

**JURY INDEPENDENCE AND
THE GENERAL VERDICT:
A GENEALOGY**

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ABSTRACT

This thesis explores the historical relationship between the ‘general verdict’ of ‘guilty’ or ‘not guilty’ and ideas of jury independence. This relationship is often presented as natural or self-evident: because the reasons a jury has for reaching its verdict are hidden from sight, it is impossible to control a jury; and therefore the jury can deliver a verdict against the wishes either of the trial judge or of the government. What is generally overlooked in these accounts is the influence of the judge: that a jury’s verdict cannot be corrected after the fact says nothing about the ways in which the verdict is reached.

This thesis, drawing upon the work of Michel Foucault, presents a history of the relationship between jury independence and the general verdict. It argues that the general verdict has only been understood as a guarantor of jury power since the second half of the seventeenth century; and that since the late eighteenth century this understanding has been consistently challenged by an alternative perspective, one which holds that judicial directions permit the trial judge to limit the otherwise free action of the jury. These competing perspectives are described in this thesis as ‘exclusionary’ and ‘inclusionary’ ideas of jury power. The former holds that the jury comes into the trial as a citizen, passes judgment upon the justice of the law, and then leaves, without being altered by his or her experiences at trial. The latter holds that ‘the juror’ is constructed within the courtroom by his or her experiences at trial.

Having argued that the ‘inclusion thesis’ reasonably accurately describes the activities of the contemporary judges of England and Wales, this thesis goes on to ask whether there is any possibility for jury independence if the juror is constructed within a space set out by the judge. Drawing on the accounts of the jurors from the 2004 ricin terror trial, it concludes by suggesting that jurors may be able to achieve meaningful independence by claiming expertise as a juror. In this way, the most significant type of jury independence might come after the delivery of the verdict, rather than before.

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TABLE OF CONTENTS

| | |
|--|-----|
| ABSTRACT..... | i |
| ACKNOWLEDGEMENTS | ii |
| TABLE OF CONTENTS..... | iii |
| CHAPTER 1: INTRODUCTION | 1 |
| 1.1: What Can a Silent Jury Do?..... | 1 |
| 1.2: Exclusionary and Inclusionary Perspectives on Jury Trial..... | 6 |
| 1.3: Methodology..... | 8 |
| 1.4: Thesis Outline..... | 25 |
| CHAPTER 2: THE PLACE OF THE MEDIEVAL JURY | 30 |
| 2.1: The Post-1215 Crisis in the Criminal Trial..... | 31 |
| 2.2: The Verdict against Conscience | 44 |
| 2.3: General and Special Verdicts in Medieval Law | 56 |
| 2.4: Conclusions..... | 64 |
| CHAPTER 3: CONSCIENTIOUS JUDGMENT AND JUROR INDEPENDENCE IN SEVENTEENTH CENTURY ENGLAND | 67 |
| 3.1: <i>Bushell's Case</i> , Conscience and Synderesis | 69 |
| 3.2: The Jury, the Judge and the Sovereign | 81 |
| 3.3: The Verdict according to the Jurymen's Conscience | 92 |
| 3.4: Conclusions..... | 103 |
| CHAPTER 4: THE RECONSTITUTION OF THE GENERAL VERDICT | 107 |
| 4.1: Mitigation and Enlightenment Penology | 111 |
| 4.2: The General Verdict and Homicide Defences | 125 |
| 4.3: Seditious Libel and the 'Monster in Law' | 135 |
| Conclusions..... | 144 |
| CHAPTER 5: THE EXCLUSION AND INCLUSION THESES IN NINETEENTH- CENTURY AMERICA | 148 |
| 5.1: The Judge and the Laws | 151 |
| 5.2: The Jury and the Facts | 163 |
| 5.3: Defining 'True' Jury Trial | 173 |
| 5.4: Conclusions..... | 183 |
| CHAPTER 6: JURY INDEPENDENCE AFTER DEVLIN | 188 |
| 6.1: Jury Trial and Jury Power In and After Devlin | 189 |
| 6.2: The Inclusion Thesis and Internet 'Evidence' | 199 |
| 6.3: The Exclusion Thesis and the Citizen-Juror | 217 |
| 6.4: Conclusions..... | 230 |

| | |
|------------------------------|-----|
| CHAPTER 7: CONCLUSIONS | 235 |
| BIBLIOGRAPHY | 247 |
| TABLE OF CASES | 262 |
| TABLE OF STATUTES | 265 |

CHAPTER 1: INTRODUCTION

Early in the summer of 2012, I found myself talking to a man who had recently been a juror. He told me that he had almost been put on a long, complex case, but that in the end he had found himself on a two-week rape trial. Early on in the trial, the judge had made it clear that jurors were not to go looking for extra information: they were to judge only according to the evidence presented to them in the trial. The problem was that each morning, as they milled about in the waiting room, the jurors were provided with a copy of the local newspaper; and, as far as the jurors were concerned, the newspaper's coverage of the trial contained plenty of prejudicial material and comment. So I asked the former juror what they did: did they ask the judge for clarification? Did they request that the newspaper no longer be provided? Did they simply try to put the extra information to the back of their minds as they reached their verdict? 'Actually,' explained the former juror, 'in the end we didn't have to do any of that: the accused pleaded guilty and nobody needed our verdict'.

1.1: What Can a Silent Jury Do?

This thesis is concerned with the relationship between 'jury nullification' – the idea of juries acting independently of the law, according to some extra-legal concept of justice – and the 'general verdict' – in which the jury finds a person 'guilty' or 'not guilty', without further explanation. My central research question is: 'what is the relationship between the general verdict and the possibility of jury independence?' In order to answer this question, I shall turn to the legal history of jury power, in order to get a sense of the different ways this problem has been conceptualised since the advent of something approaching modern

jury trial at the turn of the thirteenth century. Taking a historical approach allows me to place current perspectives on jury power within their discursive limits. But in doing this I am not trying to shut down the possibility of juror action, in order to open this action up to scientific scrutiny. Rather, my hope is that I will be able to critique the complacency of some traditional accounts, and point to the spaces which juries might (for now at least) be able to use in order to retain some degree of independence.

Jury independence is a difficult concept, both analytically and politically. Analytically speaking, it is difficult to say exactly what it means to state that a jury is or should be (conversely, that it is not or should not be) ‘independent’ of the wider processes of a criminal trial. For one notable critic, the problem with any argument which legitimises jury independence is that it prioritises the sentiments of “an anti-democratic, irrational and haphazard legislator”¹ over those of “an otherwise supposedly rational adversarial system”.² But, as Bankowski has pointed out, arguments such as these presume that the ‘supposedly rational adversarial system’ thinks in a more rational way than a lay jury. Might it not make more sense, he asks, to frame things in terms of different ways of seeing the world, rather than in terms of a fundamental opposition between reason and unreason?³

Politically speaking, both those who support the idea of jury independence and those who oppose it are in a difficult position. Those uncomfortable with what they consider the

¹ P Darbyshire, ‘The Lamp that Shows that Freedom Lives: Is it worth the candle?’ [1991] Crim LR 740, 750.

² Ibid, 751.

³ Z Bankowski, ‘The Jury and Reality’ in M Findlay and P Duff, *The Jury Under Attack* (Butterworths 1988), 18-19.

irrationality of having a strongly independent lay element in the criminal trial are liable to struggle against “sentimental attachment to the symbol of the jury ... [and] Adulation ... based on no justification or spurious justification”.⁴ Open support for the concept of jury independence, on the other hand, is something of a hostage to fortune, and is liable to be dismissed as irrational hyperbole. Matravers, however, has made the important observation that it “offers a means of resistance and ... there are all too few of those”.⁵ But my aim in this thesis is not to find a convincing justification for the idea of jury independence. Rather, it is to explore what this concept of ‘independence’ might mean, and what kind of ‘resistance’ we might reasonably expect a jury to engage in.⁶

Two terms are often used to describe the perceived ability of juries to act against the law: ‘jury equity’ and ‘jury nullification’. The difference between the two terms can usually be regarded as superficial, reflecting little more than a choice of words (traditionally, English writers usually speak of ‘equity’, while Americans generally prefer ‘nullification’). But it may be worth pausing for a moment on any possible differences in meaning, as this could help expand on the range of actions the two phrases cover. Cornish defined jury equity as “circumstances in which the jury is swayed by some sympathetic or other emotional response, which leads it to the view that, *despite* the evidence, the

⁴ Darbyshire (n 1), 741.

⁵ M Matravers, “‘More Than Just Illogical’: Truth and jury nullification” in A Duff, L Farmer, S Marshall and V Tadros eds, *The Trial on Trial*, Vol 1: Truth and due process (Hart 2004), 83.

⁶ Devlin began his celebrated lecture series on the jury system by remarking that “Trial by jury is not a subject on which it is possible to say anything very novel or very profound.” P Devlin, *Trial by Jury* (Stevens & Sons 1956), 3. Darbyshire, on the other hand, has stated that “The jury ... seems to attract the most praise and the least theoretical analysis.” Darbyshire (n 1), 740. As I read Darbyshire, the implication is that we can do better: that there is more we can do in order to adequately theorise the criminal trial jury. In this respect, I reject Devlin’s pessimism in favour of Darbyshire’s optimism. It seems to me that there is a lot more that we can be saying about jury independence than we currently do.

defendants should not be convicted”.⁷ So the ‘equity’ jury does not reject the law so much as accept it in general, while insisting that in particular, exceptional circumstances it should not apply. Butler, defining nullification as the decision of a jury to “acquit ... an otherwise guilty defendant ... [because] the law is unfair, either generally or in this particular case”,⁸ has advocated what he calls “strategic jury nullification”.⁹ Butler’s strategic nullification is systematic, requiring among other things that “[i]n cases involving the possession or sale of small amounts of drugs, every juror should consider voting not guilty, regardless of the evidence in the case”.¹⁰ Equity, then, seems to refer to a temporary refusal to apply an otherwise just law to a particular case; while nullification is the idea that whole categories of injustice can be identified in advance, with the result that a nullifying jury will be engaging in a systematic, deliberate practice of non-application. In distinguishing between an exceptional equity and a systematic nullification, I am not arguing for a rigid series of positivistic definitions. Rather, my point is that jury independence can cover a variety of possible actions.¹¹

The ‘general verdict’ is the form of words used by criminal trial juries in most instances, simply stating that the accused has been found either ‘guilty’ or ‘not guilty’ of a particular crime. The alternative to the general verdict is the ‘special verdict’, in which the jury makes a finding of fact, and then leaves it to the judge to decide, on the facts found by

⁷ WR Cornish, *The Jury* (Penguin 1971), 179 (emphasis in original). See also Anon, ‘Toward Principles of Jury Equity’ (1974) 83 Yale LJ 1023.

⁸ P Butler, *Let’s Get Free: A hip-hop theory of justice* (New Press 2009), 61.

⁹ Ibid, 72.

¹⁰ Ibid, 72. See also P Butler, ‘Racially Based Jury Nullification: Black power in the criminal justice system’ (1995) 105 Yale LJ 677.

¹¹ In an article in the Criminal Law Review, I consistently referred to ‘jury nullification’, but without meaning to take a position on whether jury power should be exceptional or systematic: K. Crosby, ‘Controlling Devlin’s Jury: What the jury thinks, and what the jury sees online’ [2012] Crim LR 15.

the jury, whether the accused is or is not guilty.¹² In 1792, in response to a crisis regarding the law of seditious libel, Parliament declared that special verdicts could not be demanded in such cases. The jury, rather, should be permitted to pass judgment on the whole question of the guilt or innocence of the accused.¹³ Special verdicts have been used after 1792, but only in cases which have generated particularly difficult questions of legal (or moral) interpretation. When, in 1884, a jury was impanelled to try two men who, while shipwrecked, had ate a third, the jurors found a special verdict rather than pronounce generally on the guilt or innocence of the ‘murderers’.¹⁴ In 1952, it was confirmed in the Court of Appeal that “[s]pecial verdicts ought to be found only in the most exceptional cases”.¹⁵ So the jury’s power to declare generally whether a prisoner is ‘guilty’ or ‘not guilty’ is very well protected; and it is this fact which is often presented as evidence of the jury’s power to act independently of the other actors involved in the administration of the criminal law. In this thesis, I shall present a history of the relationship between these two things: the general verdict and the possibility of jury independence.

¹² See generally ER Sunderland, ‘Verdicts, General and Special’ (1920) 29 Yale LJ 253.

¹³ Libel Act 1792. See also TA Green, *Verdict According to Conscience: Perspectives on the English criminal trial jury 1200-1800* (University of Chicago Press 1985), 318-355; and, more generally, RH Helmholz and TA Green, *Juries, Libel, & Justice: The role of English juries in seventeenth- and eighteenth-century trials for libel and slander* (William Andrews Clark Memorial Library 1984). See also chapter four, below.

¹⁴ *R v Dudley and Stephens* (1884) 14 QBD 273, 273-275.

¹⁵ *R v Bourne* (1952) 36 Cr App R 125, 127.

1.2: Exclusionary and Inclusionary Perspectives on Jury Trial

Discussions about the possibility of jury power most commonly present an ‘exclusionary’ account: postulating a jury which, for good or for bad, comes into the legal system from the outside and acts as it sees fit. As EP Thompson memorably put it, “[t]he jury box is where the people come into the court ... The jury attends in judgment, not only upon the accused, but also upon the justice and humanity of the law.”¹⁶ But it is not only friends of this total jury independence who see things in these terms. In his *Review of the Criminal Courts*, in which he dismissed Thompson’s view as mere romanticism,¹⁷ Auld LJ sought to establish that juries may well choose to nullify in particular cases, but that they have no right to do so. He conceded that “at present there is no procedural means of stopping them exercising their ability to return what in law may be a perverse verdict”,¹⁸ but thought that at the very least a statute should be passed declaring such conduct illegal.¹⁹

¹⁶ EP Thompson, ‘The State versus its “Enemies”’ in *Writing by Candlelight* (Merlin 1980), 108.

¹⁷ Auld LJ, *Review of the Criminal Courts of England and Wales* (HMSO 2001), 173-174.

¹⁸ Ibid, 174. S.2 Criminal Appeal Act 1995 provides that the Court of Appeal should allow an appeal against conviction “if it thinks that the conviction is unsafe”. Generally speaking, appeals against conviction relate to procedural irregularities rather than to the decision of the jury as such. The major exception to this is the ‘lurking doubt’ test, introduced in *R v Cooper* [1969] 1 QB 267, which allows the Court of Appeal to allow an appeal if there is some “lurking doubt in our minds which makes us wonder whether an injustice has been done” (271). Several studies, discussed in A Sanders, R Young and M Burton, *Criminal Justice* (4th edn, OUP 2010), 636-637, have found that this power is used on average only once a year. The actual deliberations of the jury will not generally be considered admissible evidence during an appeal; although evidence of ‘extraneous’ influences upon the jury’s deliberations can be permitted: see generally *R v Mirza*; *R v Connor and Rollock* [2004] UKHL 2 [2004] 1 AC 1118. The combination of these procedural rules makes it difficult, in most circumstances, for the apparent ‘inscrutability’ of a delivered verdict to be challenged.

¹⁹ Ibid, 176. See also the argument of a US District Judge, that Butler’s ‘strategic nullification’ is “antithetical to the rule of law, to the way we govern and judge ourselves, and ultimately to a society in which law and order are revered principles”. CP Kocoras, ‘Race-Based Jury Nullification: Rebuttal (part B)’ (1997) 30 J Marshall L Rev 929, 929. And see Butler’s response: “I think that that is what I like about it. The rule of law, it seems to me now, suggests that the way to deal with the problem of African-Americans is to punish them. ... If that is what the rule of law suggests, then I think that it needs subversion.” P Butler,

Whether they are for or against jury independence, most commentators seem at least to agree that it is a power guaranteed by the jury's exclusion from legal norms and controls: an exclusion which is, ultimately, guaranteed by the inscrutability of the general verdict.

This absolute division between the trial and the jury fails to describe the experiences, and the concerns, of the juror whose account opened this introductory chapter. He did not imagine that he was a total outsider to the trial, whose only task was to say 'yes' or 'no' to the question: 'is this a just law?' Rather, he identified for the time being as a juror, and his question was: 'how, *as a juror*, should I act? How do I act in accordance with the juror's duty?' For proponents of the exclusion thesis, the juror comes into the trial *as a citizen*, passes judgment upon the justice of the law *as a citizen*, and then returns to his or her life, untouched by the law. For this juror, an inclusionary model of jury trial is required: one which takes account of the subjective changes involved in becoming a juror. In fact, as I shall argue in this thesis, much judicial practice – and at least one major theory of jury trial²⁰ – acts on the assumption that the juror is created in the criminal trial, and cannot simply enter and leave as a citizen. There is an important difference between exclusionary and inclusionary models of jury trial, and it will be a key task of this thesis to explore their histories and implications.

Each of these perspectives – exclusionary and inclusionary – has a history; and for at least the last 250 years the history of jury trial has in large part been the history of the tension

'Race-Based Jury Nullification: Surrebuttal' (1997) 30 J Marshall L Rev 933, 934. Again, both sides are agreed that the jury can simply decide to step outside the space legitimately given it by the law. Their only disagreement concerns the question whether they ought to do so.

²⁰ Devlin (n 6). See generally Crosby (n 11), and chapter six, below.

between these two positions. This is perhaps not the kind of tension which can ever be resolved once and for all: perhaps it is no more than a choice of perspective. But perspective does matter here: our choice between the exclusion and inclusion theses has an effect upon the concept of jury power. The exclusion thesis presumes the existence of a citizenry willing and able to act independently of the wishes of the legal system: in Restoration England (1660-1688), for instance, a pamphlet literature existed which told potential jurors what their duties as citizens meant they should do if summoned.²¹ Paul Butler and various organizations promoting nullification serve a similar function in twenty-first century America. But what about today's Anglo-Welsh citizen: is he or she given equivalent cultural guidance? Might an inclusionary model of jury trial, with its presumption that the juror is constructed *inside* the courtroom, offer a more productive means of critique? These are some of the questions I hope will be raised through an exploration of the history of jury equity/nullification, and its relationship with the general verdict of 'guilty' or 'not guilty'.

1.3: Methodology

While I believe that a legal-historical approach is the most appropriate for this thesis, I have considered other methodologies. In this section, I shall briefly set out my reasons for my selection.

It would be difficult to answer my central research question, for example, using a doctrinal, or black-letter, approach. Such an approach primarily involves "examining

²¹ See K Crosby, 'Bushell's Case and the Juror's Soul' (2012) 33 J Leg Hist 279, and chapter three, below.

decisions of judges and identifying matters of concern to the author and his or her audience”;²² but this thesis is less concerned with the publicly-reasoned decisions of judges than it is with the possibility of an unreasoned jury verdict ‘escaping’ the limits set by legal doctrine. But while doctrinal analysis is not the principal method used here, in order to accurately trace the development of the jury’s relationship with the wider legal system, it is essential that this thesis should accurately discuss relevant doctrinal developments. This tension is at the heart of modern legal history.²³

Jury trial has been regularly scrutinized by empirical studies;²⁴ but I believe that such an approach is also inappropriate to this thesis, as my central research question is less about establishing how juries actually reason and more about challenging the conceptual dominance of the exclusion thesis. As a work of theory, written primarily through a historical lens, this thesis could not include an original empirical study. It does, however, make use of empirical findings, particularly in chapter six.

²² M Pendleton, ‘Non-empirical Discovery in Legal Scholarship: Choosing, researching and writing a traditional scholarly article’ in M McConville and WH Chui, *Research Methods for Law* (Edinburgh UP 2007), 161-62.

²³ See the discussion below, at 11-12.

²⁴ Classic studies in this area include: H Kalven and H Zeisel, *The American Jury* (Little Brown 1966); S McCabe and R Purves, *The Shadow Jury at Work* (Blackwell 1974); M Zander, ‘Are Too Many Criminals Escaping Conviction? A study in Britain’s two busiest courts’ (1974) 37 MLR 28; and J Baldwin and M McConville, *Jury Trials* (OUP 1979). In 2001, Penny Darbyshire published a brief overview of the findings of empirical research on the jury: P Darbyshire, ‘What Can we Learn from Published Jury Research? Findings for the Criminal Courts Review 2001’ [2001] Crim LR 970. The full version is available as P Darbyshire, A Maughan and A Stewart, ‘What Can the English Legal System Learn From Jury Research Published up to 2001?’ (Kingston University 2002) <<http://eprints.kingston.ac.uk/23/1/Darbyshire-P-23.pdf>> accessed 30 Jul 2012. Since then, Cheryl Thomas in particular has provided additional evidence regarding jurors’ decision-making processes (particularly with an eye to the impact of race) and their access to improper ‘evidence’: C Thomas, *Diversity and Fairness in the Jury System* (Ministry of Justice Research Series 2/07, 2007); C Thomas, ‘Exposing the Myths of Jury Service’ [2008] Crim LR 415; C Thomas, *Are Juries Fair?* (Ministry of Justice Research Series 1/10, 2010); C Thomas, ‘Avoiding the Perfect Storm of Juror Contempt’ [2013] Crim LR 483.

While there is a comparative element to my thesis (in chapter five), this is less about comparing the development of legal rules across jurisdictions and more about temporarily shifting focus to a jurisdiction (the US) in which, at a particular time (the century-and-a-half after the Revolution) the meaning of ‘true’ jury trial was particularly contested. The rich exploration of these ideas in nineteenth-century American juristic debates makes the study of nineteenth-century American jury trial an essential component in the attempt, pursued throughout this thesis, to write a theoretical account of the jury, seen primarily through a historical lens.

The question whether we should bother with jury trial in serious criminal cases is frequently reduced to a discussion of the institutional place of the jury, and it is this feature of the question of jury trial which I contend can be challenged through the use of legal history. Since 1670, we are frequently reminded, it has not been possible for a judge to reach beyond the inscrutability of a general verdict, as the jury acquired at this time “the right ... to return a verdict with which the judge disagreed”.²⁵ Perhaps the most popular reading of this institutional fact is that it has permitted ‘the jury’ to resist ‘the state’: acting, in Devlin’s phrase, as a “little parliament”.²⁶ And while there have been excellent

²⁵ C Hill, *The World Turned Upside Down: Radical ideas during the English revolution* (Penguin 1991), 271. See also, for example, S Enright and J Morton, *Taking Liberties: The criminal jury in the 1990s* (Weidenfeld and Nicolson 1990), 32-33; H Harman and J Griffith, *Justice Deserted: The subversion of the jury* (National Council for Civil Liberties 1979), 11; J Hostettler, *The Criminal Jury Old and New: Jury power from early times to the present day* (Waterside 2004), 69-72; and M Mansfield, ‘Foreword’ in L Archer and F Bawdon, *Ricin!: The inside story of the terror plot that never was* (Pluto 2010), x.

²⁶ Devlin (n 6), 164. See also F Cownie, A Bradney and M Burton, *English Legal System in Context* (5th edn, OUP 2010), 356-358; Enright and Morton (ibid), Ch 2: ‘The State Against the Jury’; A Sanders, R Young and M Burton, *Criminal Justice* (4th edn, OUP 2010), 536-537, 593-594. Thompson put it like this: “Time and again, when judges and law officers, mounted on high horses, have been riding at breakneck speed towards some convenient despotism, those shadowy figures – not particularly good nor especially true – have risen from the bushes beside the highway and flung a gate across their path. They are known to historians as the Gang of Twelve.” Thompson (n 16), 103.

investigations made into the history of the institution,²⁷ serious attempts to make this history speak to contemporary concerns have been far less common. The major exception to this tendency has been the work of John H Langbein, who for over forty years has been explaining the inadequacies of the Anglo-American adversarial trial by direct reference to its history.²⁸

Two common approaches to legal history are the doctrinal and the contextual. Lobban, in a recent article on ‘The Varieties of Legal History’, has emphasised that this split is largely geographical, with English writers asking about doctrinal developments, and Americans seeking to explore the social context of a specific legal problem at a specific point in time. As he puts it, “[t]he internal and institutional history which stands at the heart of [the] *Oxford History of the Laws of England* plays a very small role in the *Cambridge History of Law in America*”.²⁹ And he goes on to describe his hope that legal history might be of use both to lawyers and historians, with each clearly defined disciplinary group able to take something of value from the shared project. Musson and Stebbings meanwhile, in their recent introduction to a collection of essays on legal historical method, also view the historian and the lawyer as discrete subjects working on the shared object of ‘legal history’; but take the further step of cautioning against legal history (certainly from the lawyer’s end of things) straying too far from doctrine:

While it is fashionable to pursue the external influences on law, nevertheless ... a thorough evaluation of the legal context should not be

²⁷ Much of this work is discussed in Hostettler (n 25).

²⁸ See, in particular, JH Langbein, ‘The Criminal Trial Before the Lawyers’ (1978) 45 U Chil L Rev 263; and JH Langbein, *The Origins of Adversary Criminal Trial* (OUP 2003).

²⁹ M Lobban, ‘The Varieties of Legal History’ (2012) 5 Clio@Themis: Revue électronique d’histoire du droit 1 <http://www.cliothemis.com/IMG/pdf/TP_Lobban.pdf> accessed 13 Jun 2012.

ignored. This, indeed, is a special task for the legal historian, whose training enables him or her to understand the practical as well as the theoretical operation of the law.³⁰

There is, then, a tension between the historian's vision of legal history as contextual social history, and the lawyer's vision of it as an account of doctrinal change.

The division in legal history between doctrinal and contextual studies reflects a more general split in the study of intellectual history between textual and contextual studies. In a classic article, first published in 1969, Quentin Skinner suggested that in fact neither of these approaches were appropriate ways of understanding the meaning of classic texts, and that some sort of middle ground was required.³¹ Skinner identified his two targets as follows:

The first (which is perhaps being increasingly adopted by historians of ideas) insists that it is the *context* 'of religious, political, and economic factors' which determines the meaning of any given text, and so must provide 'the ultimate framework' for any attempt to understand it. The other orthodoxy, however, (still perhaps the most generally accepted) insists on the autonomy of the *text* itself as the sole necessary key to its own meaning, and so dismisses any attempt to reconstitute the 'total context' as 'gratuitous, and worse.'³²

Skinner then catalogued a wide range of problems which would follow from adopting either of these approaches. Too much focus upon the text itself might, he argued, lead to unfortunate mental gymnastics aimed at eliminating any contradictions in the text;³³ or it might lead to an unjustifiable search for supposedly timeless, universal concepts in the author's work.³⁴ On this point Skinner gives the example of those studies which persist

³⁰ A Musson and C Stebbings, 'Introduction' in A Musson and C Stebbings (eds), *Making Legal History: Approaches and Methodologies* (CUP 2012), 5.

³¹ Q Skinner, 'Meaning and Understanding in the History of Ideas' (1969) 8 *History and Theory* 3.

³² *Ibid.*, 3.

³³ *Ibid.*, 16-22.

³⁴ *Ibid.*, 5-16.

in asking whether *Bonham's Case*, decided by the English Court of Common Pleas in 1609, really did anticipate *Marbury v Madison*, decided by the US Supreme Court in 1803.³⁵ Skinner also asserts that seeking 'the ultimate framework' in broad questions of social context might lead the interpreter to two errors which he calls "prolepsis" – in which the historian prioritises the future significance of an action over "its meaning for the agent himself"³⁶ – and "parochialism" – in which the historian either wrongfully assumes the "influence" of one text or thinker upon another, or misunderstands the "sense" of an argument, importing contemporary concerns into a past statement.³⁷ Skinner here gives the example of a historian correctly identifying Leveller demands for an extended franchise, reading this as a statement of liberal democratic philosophy, and then finding that "their agonizings over the monarchy and their appeals to religious sentiment begin to look rather baffling".³⁸ Skinner's solution to these problems is to insist that any proper intellectual history must be contextual, but in the specific sense of insisting that "no agent can ... be said to have meant or done something which he could never be brought to accept as a correct description of what he had meant or done".³⁹ Skinner, in short, finds a middle ground between textual and contextual approaches to history by focusing on the question of authorial intent.

³⁵ Ibid, 8-9. *Bonham's Case* (1609) 8 Co Rep 113b; 77 ER 646. *Marbury v Madison* (1803) 5 US 137.

³⁶ Skinner (n 31), 22-27. Quotes are from 22.

³⁷ Ibid, 27-28. Quotes are from 27.

³⁸ Ibid, 27.

³⁹ Skinner (n 31), 28. On Skinner's historiography generally, see J Tully ed, *Meaning and Context: Quentin Skinner and his critics* (Polity 1988); and Q Skinner ed, *Visions of Politics*, vol 1: Regarding Method (CUP 2002).

Some legal historians, responding to the challenge of critical legal studies, have also rejected the strict dichotomy between a legal-doctrinal and a social-contextual perspective, and the supposed task of legal history of mediating between the two. Critical legal history “showed how jurists came to assemble a whole coherent system of doctrine in the late-nineteenth century, and how that system cracked open under the pressure of its own contradictions, as well as savage political and intellectual attacks from outside”.⁴⁰ It added to the American legal realists’ assertion, that legal rules do not in themselves settle disputes, the additional claim that laws are themselves incoherent, fractured objects.⁴¹

Building upon these insights, some legal historians have recently suggested that legal history ought to abandon its ‘law and...’ perspective (as in law and history, law and society, law and economics, etc.), in favour of a necessarily less simplistic ‘law as...’⁴² model, implicating law in society as well as society in the law. Tomlins and Comaroff explain what this might mean:

Legal historians should be bifocal, but we should also temper our respect for the claims of difference made for themselves by the twin topoi of our attention, law and history. We must of necessity keep an eye on each, but the point of having two eyes is not to suffer double vision. It is to have properly focused, more acute in/sight. Each of the essays in this collection encourages us to gaze upon the past and present with two eyes, and to understand that, as our

⁴⁰ RW Gordon, “‘Critical Legal Histories Revisited’: A response” (2012) 37 L& Soc Inquiry 200, 205 (discussing the work of Duncan Kennedy).

⁴¹ Ibid, 208. See also C Tomlins, ‘What is Left of the Law and Society Paradigm after Critique? Revisiting Gordon’s “Critical Legal Histories”’ (2012) 37 L& Soc Inquiry 155, 158: “The new problematic [of Critical Legal Studies] was that the formative discourse, law, was not only autonomous and immensely powerful, but also that it had no immanent meaning, hence no predictable causal effect. It was indeterminate to its core because at its core lay a perennially bipolar human impulse, always present in its simultaneity: to associate and to individuate, to lump and to split, to seek and to fear ... Hence ‘indeterminacy located in contradiction.’”

⁴² See in particular CL Fisk and RW Gordon, “‘Law As...’: Theory and method in legal history” (2011) 1 UC Irvine Law Review 519 and C Tomlins and J Comaroff, “‘Law As...’: Theory and practice in legal history (2011) 1 UC Irvine Law Review 1039.

perspective deepens, we will see how ineluctable differences and dichotomies dissolve into clarity – or, better yet, transpose themselves into dialectics of comprehensible proportions. The moral of the story? That our critical vision, in all its careful bifocality, ought to aspire to one resolved object of study, capaciously conceptualized. Legal history should not always be looking in two directions, forever glancing nervously from one to the other.⁴³

Although the questions being asked here are somewhat different to Skinner's, the solutions he offers seem at least to share with Tomlins and Comaroff a refusal to treat either pure text or pure context as ways of properly understanding a given historical statement. Tomlins and Comaroff's solution may amount to the construction of a privileged legal-historical subject, in which case it could be objected that such a position is little better than that of a 'law and history' approach: the only difference being that the privileged totalities 'law' and 'history' have been dissolved, in order to form a total 'legal-history'.

While he was not a *legal* historian as such, the fragmented approach to history espoused by Tomlins and Comaroff⁴⁴ owes much to the philosopher-historian Michel Foucault.⁴⁵ Foucault's project involved challenging the unity of concepts such as the sovereign, the subject, the state, and society;⁴⁶ but the purpose of this challenge was not to deny the

⁴³ Ibid (Tomlins and Comaroff), 1079.

⁴⁴ Fragmented in the sense of breaking down the disciplinary unities 'law' and 'history', in order to construct a new disciplinary space named 'legal history'.

⁴⁵ There is in fact scholarly debate as to whether Foucault saw a place for law in the modern world at all. Hunt and Wickham state that "The primary theme that emerges from Foucault's treatment of the origins of the modern state and disciplinary society is one which casts law in the role of a pre-modern harbinger of absolutism." A Hunt and G Wickham, *Foucault and Law: Towards a sociology of law as governance* (Pluto 1994), 59. More recently, Golder and Fitzpatrick have challenged this 'expulsion thesis', arguing that law is in fact present as an active participant in most of Foucault's accounts of the strategies of power: B Golder and P Fitzpatrick, *Foucault's Law* (Routledge 2009). It should be noted that even Hunt and Wickham refused to go so far as to suggest that Foucault should not be read, and used, by lawyers. This is what their 'sociology of law as governance' consists of.

⁴⁶ BE Harcourt and P Veyne, 'Supposons Que la Discipline et la Sécurité N'existent Pas: Rereading Foucault's Collège de France lectures' (2008) 4 Carceral Notebooks 1, 5 <http://www.thecarceral.org/cn4_harcourt.pdf> accessed 14 Jun 2012.

existence of these concepts so much as to understand their supremacy. As Harcourt and Veyne have recently put it:

Foucault's project – to interrogate universals, to pass them under the microscope of practices – is to understand how those universals came to be accepted as true. ... His starting point – 'supposons que la folie n'existe pas' – is not intended to throw us back onto the practices as a way to develop better tools to understand them, so much as it is intended to make us focus on how the universal itself was constructed.⁴⁷

But the Foucauldian project is not simply about unearthing the basis of this or that seemingly universal concept: his histories of systems of thought were grounded in ideas of resistance.⁴⁸ Without ever seeking to construct a new, truer, order, Foucault always praised resistance. As one commentator has put it, in Foucault's work "transgression seeks to undermine or at least weaken any given set of limits in order to attenuate their violence".⁴⁹ Ultimately, Foucault's 'archaeological' and 'genealogical' analyses of power relations (discussed below) and of systems of thought exist in order to fragment them: to suggest possible avenues for resistance. This is obviously of enormous help in a project such as this thesis, which is concerned with the possibility of a jury acting against (or at least differently to) the formal requirements of the criminal law.

For Foucault, it was important to emphasise that power is not simply a "prohibition, law, the act of saying no, and above all, the figure or expression: 'You must not'"⁵⁰, but rather that power can also be something productive. What he sought to develop was accordingly

⁴⁷ Ibid, 6.

⁴⁸ See generally AI Davidson, 'In Praise of Counter-Conduct' (2011) 24 *History of the Human Sciences* 25.

⁴⁹ BL Pickett, 'Foucault and the Politics of Resistance' (1996) 28 *Polity* 445, 450-451.

⁵⁰ M Foucault, C Chitty trans, 'The Mesh of Power' *Viewpoint Magazine* (September 2012) [1976] <<http://viewpointmag.com/the-mesh-of-power/>> accessed 25 September 2012.

“not simply a negative, juridical idea of power, but rather, the idea of a technology of power”.⁵¹ Foucault is perhaps best known for his analyses of two particular strategies of power: discipline and governmentality.

Discipline – “a whole complex of techniques of power that do not rely on force and coercion”⁵² – relies on three main techniques: “hierarchical observation, normalizing judgement and their combination in a procedure that is specific to it, the examination”.⁵³ Inasmuch as discipline “‘makes’ individuals”⁵⁴ by “‘train[ing]’ the moving, confused, useless multitudes of bodies and forces into a multiplicity of individual elements”,⁵⁵ discipline is not relevant to this thesis. Even the inclusionary models of jury trial, which do rely on a kind of ‘training’ of jurors, do not describe a disciplinary power: the jurors in an inclusionary approach are insufficiently individualised for that.⁵⁶

A more useful possibility is ‘governmentality’: a strategy of power which is concerned less with the control of individuals and more with the government of populations. As Foucault explains, in governmentality “it is not a matter of imposing a law on men, but of the disposition of things, that is to say, of employing tactics rather than laws, or, of as far as possible employing laws as tactics”.⁵⁷ This fits the inclusionary thesis reasonably

⁵¹ Ibid.

⁵² Hunt and Wickham (n 45), 20.

⁵³ M Foucault, *Discipline and Punish: The birth of the prison* (A Sheridan trans, Penguin 1991) [1975], 170.

⁵⁴ Ibid, 170.

⁵⁵ Ibid, 170.

⁵⁶ Which does not mean that discipline has nothing at all to do with the history of jury trial: Bentham’s book on the special jury system describes (and attacks) a panopticon-like system for the control of jurors who, in pursuit of the handsome fees attached to special jury service, are constantly on the look-out for indications of the verdict sought by the legal system in a particular case: J Bentham, *The Elements of the Art of Packing, as Applied to Special Juries, Particularly in Cases of Libel Law* (Effingham Wilson 1821).

⁵⁷ M Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-78* (M Senellart, F Ewald, A Fontana and AI Davidson eds, G Burchell trans, Palgrave 2007) [1978], 99.

well for, as I shall start to argue in chapter four, this model of jury trial is not interested in ‘controlling’ particular juries at all: rather, the objective is to encourage jurors, as members of the population, to act within legally-defined limits. But whereas exclusionary models of jury power focus upon the *theoretical capacity* of juries to disobey the law (and in this sense they are purely juridical),⁵⁸ the inclusionary thesis is concerned with identifying those tactics which are most likely to make a jury, *as a matter of fact*, behave.

Beyond the ‘toolbox’⁵⁹ offered by his strategies of power – primarily discipline and governmentality⁶⁰ – Foucault also developed two ways of writing history: archaeology and genealogy. The term ‘archaeology’, Foucault explains,

does not imply the search for a beginning; it does not relate analysis to geological excavation. It designates the general theme of a description that questions the already-said at the level of its existence: of the enunciative function that operates within it, of the discursive formation, and the general archive system to which it belongs.⁶¹

‘Archaeology’, as presented in Foucault’s only properly methodological book, *The Archaeology of Knowledge*, is a very strict scheme for constructing discourses. This method constructs discourses out of individual statements which are, themselves, constituted by discourse. The archaeological statement, while often drawn out of individual texts, is a different thing to a text or a group of words, and must be actively constructed by the archaeologist: the text is a complete document while the statement is a discrete assertion, claim, etc. The statement is what is ‘really’ being said, not in the

⁵⁸ For a discussion of the juridical in Foucault, see Golder and Fitzpatrick (n 44), 35-39.

⁵⁹ See discussion in C O’Farrell, *Michel Foucault* (Sage 2005), 50-60.

⁶⁰ For a discussion of the possibility that these strategies may be Foucault’s (rather than naturally-existing objects), and that we might therefore benefit from asking what work they do for us (including the possibilities they shut down), see Harcourt and Veyne (n 46).

⁶¹ M Foucault, *The Archaeology of Knowledge* (AM Sheridan-Smith trans, Routledge 2002) [1969], 148.

sense of a secret behind the text, but in the sense that the statement, unlike the text itself, tells us what it holds to be true and so allows for the construction of discourses, grounded on specifiable conditions of truth: “So contemporary criticism is abandoning the great myth of interiority... It is completely detached from the old theme of nested boxes, of the treasure chest that one is expected to go look for at the back of the work’s closet.”⁶² Archaeology fragments universals by refusing to engage in interpretation: by constructing discourses which acknowledge the tensions and incompatibilities between different sets of statements, rather than interpreting them away.

Foucault’s second historical method is called, with a nod to Nietzsche,⁶³ ‘genealogy’. Archaeology, it seems, was too rigid: as Dreyfus and Rabinow have argued, “Archaeology as the disinterested study of mute monuments can never enter the debates which rage around the monuments it studies. In fact, from the archaeological perspective the monuments were mute all along.”⁶⁴ The turn to genealogy addressed this problem by focusing, in Nietzschean vein, on knowledge and power as inherently sites of struggle, rendering problematic the archaeologist’s claim to neutrally describe the shape of this or that discourse. Knowledge, Foucault the genealogist tells us, is “like ‘a spark between two swords,’ but not made of their metal”:⁶⁵ it is fundamentally a question of power and resistance, but without really ‘belonging’ to any particular group. And just as genealogies

⁶² M Foucault, ‘On the ways of writing history’ in M Foucault, *Aesthetics, Method and Epistemology* (J Faubion and P Rabinow eds, R Hurley and others trans, Penguin 2000) [1967], 287.

⁶³ F Nietzsche, *On the Genealogy of Morals: A polemic by way of clarification and supplement to my last book Beyond Good and Evil* (D Smith trans, OUP 1996) [1887].

⁶⁴ HL Dreyfus and P Rabinow, *Michel Foucault: Beyond structuralism and hermeneutics* (Harvester Wheatsheaf 1982), 95.

⁶⁵ M Foucault, ‘Truth and Juridical Forms’ in M Foucault, *Power* (J Faubion ed, R Hurley and others trans, Penguin 2002) [1973], 8.

in the sense of family histories will usually be oriented towards the person carrying out the research, Foucauldian genealogy is less concerned with writing total histories of particular periods (Foucault was keen to point out that historical ‘periods’ do not exist in isolation, but must arise out of the ‘periods’ of a particular research problem),⁶⁶ and is more concerned with writing what Foucault called “the history of the present”.⁶⁷ This does not mean reading current prejudices into the past; rather, it means carrying out research into the development of practices which are important for the researcher, at his or her time. Genealogy is no less opposed to universals than is archaeology; but genealogy, unlike archaeology, does not limit itself to description. Genealogy is interested less in the construction of discourses, and more in the tensions at their core.

Of the three concrete historical methods I have briefly set out – Skinner’s adapted contextualism, Foucault’s archaeology and his genealogy – it is Foucault’s genealogy that I intend to use in order to answer my research questions. Skinner and Foucault are far from polar opposites, and each has cited the other’s work as making an important contribution to the history of ideas; but there are enough differences significant to this particular research project for me to need to make a choice. Skinner’s methodological writings describe a system which is not very far away from Foucault’s archaeology: both approaches seek to locate historic statements within a discourse, and both acknowledge that the rules of this discourse shift according to use: statements and discourses (although Skinner does not use this exact language) are understood as being constitutive of one

⁶⁶ M Foucault, ‘Nietzsche, Genealogy, History’ in M Foucault, *Aesthetics, Method and Epistemology* (J Faubion and P Rabinow eds, R Hurley and others trans, Penguin 2000) [1971], 380-81.

⁶⁷ Foucault (n 53), 31.

another. It is true that Skinner emphasises conflict in a way which Foucault the archaeologist does not; but nonetheless it is discourse which, in both cases, forms the principal object of study.

Foucault's turn to genealogy, however, saw him looking less to the structures of this or that way of thinking about the world, and much more to questions of the self. Both 'discipline' and 'governmentality' are concerned with power as governance in a way which Skinner's studies of classic texts are not; and in his final years Foucault took this further, turning to ethical questions of self-formation, of what he called the "exercise of the self on the self".⁶⁸ Taking the example of their respective studies of Machiavelli, for example, Skinner's analyses focus on questions of the author's biography, in order to gain a better sense of what his classic texts might in fact be attempting to convey;⁶⁹ while Foucault's explore the ways in which Machiavelli was taken as a straw man by theorists of governance in the two centuries after he wrote.⁷⁰ The difference between the two is clear: Skinner's intellectual instincts drove him to better understand texts and their place within discourses; while Foucault's drove him to understand their implications on the ways in which people understand their own existence.⁷¹ In this thesis my primary concern is with the question: 'what does it mean to be a juror?' For this reason, I draw more heavily upon Foucault.

⁶⁸ See in particular M Foucault, 'The Ethics of the Concern for Self as a Practice of Freedom' in M Foucault, *Ethics* (P Rabinow ed, R Hurley and others trans, Penguin 2000) [1984]. Quote is at 282.

⁶⁹ Q Skinner, *Machiavelli* (OUP 1981).

⁷⁰ Foucault (n 57), 241-247.

⁷¹ This does not mean that I take issue with Skinner's approach, only that I find it less helpful than Foucault's for the present project. It would be ironic indeed if someone were ever to criticise Quentin Skinner for not answering questions other than those which he had asked!

There is one final theorist who I should briefly mention: the sociologist Erving Goffman. Goffman, in his *Presentation of Self in Everyday Life*, describes through a theatrical analogy the ways in which people ‘present’ various self-images in their day-to-day interactions with other people. He suggests that in our society there are two main types of self: the self as character and the self as performer. The self as character, Goffman emphasises, “is not an organic thing that has a specific location, whose fundamental fate is to be born, to mature, and to die; it is a dramatic effect arising diffusely from a scene that is presented, and the characteristic issue, the crucial concern, is whether it will be credited or discredited.”⁷² The self as performer, on the other hand, is something much closer to the person we might usually think of when considering the nature of the ‘self’: “[the] attributes of the individual *qua* performer are not merely a depicted effect of particular performances; they are psychobiological in nature, and yet they seem to arise out of intimate interactions with the contingencies of staging performances.”⁷³

For Goffman, the questions one can ask about the nature of the ‘self’ centre upon these questions of presentation, with the performing self carefully deciding how to define a given situation so as to project an appropriate self-as-character. This vision of the self cannot be accused of ignoring historical contingencies, as the whole point seems to be that, despite the central coherence of the self-as-performer, the self-as-character cannot stray very far from what the situation appears to demand. But I am not convinced that the self-as-performer should necessarily be described as having the total, context-independent freedom which Goffman seems close to giving it. I have a similar difficulty

⁷² E Goffman, *The Presentation of Self in Everyday Life* (Allen Lane 1969), 223.

⁷³ Ibid, 224.

with Skinner's occasional discussions of self. Discussing the appropriation of religious language by early protestant capitalists, for example, Skinner explains that the capitalists could only push the agreed definitions of words like 'provident' and 'religious' so far: beyond a certain point, they had to accept that their potential activities could not be regarded as legitimate by their contemporaries.⁷⁴ The difficulty I have with both of these accounts of the self is that they appear to posit a basic distinction between the real and the presented self, in which only the latter is actually constrained by historical contingency. This is a further reason for aligning this thesis more closely to Foucault than to Skinner: Skinner, like Goffman, seems to view the self primarily as a question of *presentation*; while Foucault was more interested in, as he once named a lecture course, 'the *government* of self and others'. In this thesis, I would like to shift the discussion on jury power away from the institutional observation that the general verdict means we cannot in principle know why a jury decided as it did,⁷⁵ towards the ethical question of what it might be possible to do within the space set out by the general verdict. This shift in focus amounts to asking 'what does it mean to become a juror?', and Foucault here becomes necessary as a philosopher-historian who was extremely interested in these kinds of questions of self-*formation*.

⁷⁴ Q Skinner, 'Moral Principles and Social Change' in Q Skinner, *Visions of Politics*, vol 1: Regarding Method (CUP 2002).

⁷⁵ See, for example, the comments of Lord Slynn of Hadley in *Mirza*. (n 18). Lord Slynn, discussing the general rule excluding evidence of jury misbehaviour, thought that the observance of this 'basic rule' was of fundamental importance to the jury system: "observance of the basic rule ... is essential to the operation of the jury system as we know it. If there can be a review of what happens between jurors, whether in the jury box or in the jury room, the advantages relied on as justifying the rule will disappear or fundamentally be diminished. I do not thus find it possible that candour would not be affected." (1145)

This thesis offers a genealogy of the relationship between the general verdict and the possibility of jury independence. It has at its core this research problem, and the ways in which courts, academics and those with no prior connection to the criminal justice system experience and conceive of jury power. As a genealogy, it is a ‘history of the present’. This does not mean importing contemporary prejudices into historical debates, but it does mean selecting only those issues which might inform a discussion of the possibility of jury independence in the contemporary criminal justice system of England and Wales, a discussion articulated strictly around the problem of the general verdict. This means, for example, overlooking historical work done on special juries: those higher-status bodies which, until 1971, were available to adjudicate on particularly deserving cases (which eventually meant only fraud cases in the City of London).⁷⁶ It also means deliberately fragmenting the unified picture presented by the exclusion thesis: that, in Thompson’s language, “The jury box is where the people come into the court: the judge watches them and the jury watches back”.⁷⁷ But this fragmentation is attempted not in order to find some truer account: the attempt is made in order to understand what we gain and what we lose by prioritising this way of thinking about jury trial (and, by extension, this way of thinking about the juror), which sets the people and the law at an absolute distance, able to do nothing more than ‘look’ at each other. Specifically, I hope that by telling the adjacent story of the inclusion thesis, the task of identifying what is gained and what is lost will be made simpler. Towards the end of the thesis, I will make some suggestions

⁷⁶ Special juries were almost totally abolished by the Juries Act 1949, s18, and the job was finished by the Courts Act 1971, s40. For a good history of the nineteenth-century reforms of the special jury system in England, see J Oldham, ‘Special Juries in England: nineteenth century usage and reform’ (1987) 8 J Leg Hist 148.

⁷⁷ Thompson (n 16), 108.

about how adopting one or other of these perspectives might open (or close) particular lines of resistance and of critique. But ultimately, of course, it is for the jurors to act.

1.4: Thesis Outline

In this thesis, I shall not attempt to write an exhaustive history of trial by jury. Rather, I intend to construct a genealogy of the relationship between jury independence and the general verdict. This means focusing heavily on the last four hundred years, as the modern exclusionary and inclusionary discourses of jury power only emerged in the late seventeenth and eighteenth centuries, respectively. For this reason, my discussion of the history of jury trial before the seventeenth century is brief, and serves only as a point of reference for the later, modern, discussion. Similarly, my thesis does not contain a separate discussion of nineteenth century English attitudes to jury trial. This choice reflects the fact that, during the century or so after the 1792 Libel Act, it was in America that the most interesting tension between the exclusion and inclusion theses was present. These choices of focus are all born of the fact that what I am trying to write is not a neatly periodised history of the jury but, rather, a genealogy of the two main approaches to jury power which I have identified.

In chapter two, I shall explore the relationship between jury independence and the general verdict in English law up to around the end of the sixteenth century. Specifically, I will consider three issues. First, the origins of jury trial, and the role envisaged for the trial jury during its emergence at the turn of the thirteenth century. Second, I shall trace out the significance of special and general verdicts, from the parliamentary declaration in

1285 that juries could not be compelled to deliver general verdicts,⁷⁸ to Coke's argument in 1628 that "to find the speciall matter is the safest way where the case is doubtfull".⁷⁹ Finally, I shall argue that the medieval juror's conscience was more commonly understood as a question of positive knowledge (does the evidence support a finding of 'guilty'?) than it was of moral propriety (would God approve of the jury's convicting this person?). The purpose of this chapter is to establish in rough form the ways in which jury trial was conceptualised in the centuries before the appearance, during the late seventeenth century, of the idea that 'true' jury trial is only possible on condition that the jurors exclude themselves from judicial control. What, this chapter asks, was jury trial before the exclusion thesis?

In chapter three, I will turn to the seventeenth century transformations in the concept of the 'verdict according to conscience'. My main focus in this chapter will be *Bushell's Case* (1670), in which Vaughan CJ famously announced that jurors could no longer be fined or imprisoned for delivering the 'wrong' verdict.⁸⁰ Over the last few decades, legal historians have increasingly downplayed the significance of the case, pointing to the fact that juries were still fined after 1670 and that, in any event, there were many ways short of actual punishment in which judges could manipulate their juries. In this chapter, I shall attempt to rehabilitate the case by placing it in its wider discursive setting. *Bushell's Case*, taken together with the concurrent pamphlet literature, offers a positive model of jury trial

⁷⁸ Statute of Westminster the Second (1285) 13 Ed 1, c 30. English translation: E Coke, *The Second Part of the Institutes of the Laws of England: containing the exposition of many ancient and other statutes* (Lawbook Exchange 2002), 422.

⁷⁹ E Coke, *The First Part of the Institutes of the Lawes of England*, (Societie of Stationers 1628), 228 (EEBO image 13710:179).

⁸⁰ *Bushell's Case* (1670) 124 ER 1006; Vaughan 135.

which downplays the jury's relationship either with the judge's or the sovereign's laws in favour of a focus on the jurymen's soul. Whatever the practical limitations of the idea, this reconceptualisation of jury trial is an important moment in the history of the jury, for it is the moment at which the exclusion thesis emerged as a positive description of jury power.

In chapter four, I trace the development of an inclusionary model of jury power in late eighteenth century England. In this chapter, my main focus is on the fundamental change in the meaning of the phrase 'the general verdict' which took place at this time. First, I shall explore English practices of mitigation (what Foucault calls, in a French context, "tolerated illegality: the non-application of the rule, the non-observance of the innumerable edicts or ordinances"⁸¹), and the challenge to these 'illegalities' from enlightenment penology. Second, I shall turn to the development which saw general verdicts increasingly take the place of special verdicts in defences to homicide; and the fact this development was attended by promises that such verdicts would always be delivered 'under direction of the court'. Finally, this chapter shall turn to the seditious libel crisis, and the reconstitution of the general verdict which formed a crucial part of the solution to this crisis. The contribution of this chapter to the thesis lies in its explicitly tying together the birth of the inclusionary model of jury power with a model of the general verdict which, as the enlightenment penologies recommended, focused on the channeling of natural human desires (in this case the desire to mitigate) into appropriate outlets.

⁸¹ Foucault (n 53), 82.

In chapter five, I shall look at the tension between exclusionary and inclusionary models of jury power in post-revolutionary America. The 1792 Libel Act had, in England, come at the end of a dispute between parliament and the courts regarding not what the law *should be* with regard to the powers and functions of juries but, rather, regarding what the position of the common law actually *was*. In England, the post-1688 settlement meant the courts had to submit to parliament's constitutional claims; but obviously things were different in post-revolutionary America. There, courts had to decide whether the older exclusionary model – supported by the pre-1792 English courts – or the newer inclusionary model – as stated in the 1792 Libel Act – gave the better account of 'true' jury trial. This chapter is important to the thesis as a whole because of its focus on the tensions involved in selecting between the exclusion and inclusion theses. This chapter demonstrates that the selection is not merely a choice of perspectives, but that it has important implications for the meaning and possibility of jury independence.

Finally, in chapter six, I will consider the possibility of jury independence in the contemporary criminal justice system of England and Wales. This chapter will begin by surveying some of the more important theoretical statements on Anglo-Welsh jury trial from the last half century or so, since Lord Devlin's classic *Trial by Jury* was published in 1956. Second, I shall ask what insights we might gain regarding current practices if we adopt the inclusion thesis as a theoretical framework. Specifically, I shall look here at the growing problem of jurors accessing unauthorised 'evidence' online. Finally, I shall turn to the figure of the citizen-juror postulated by the exclusion thesis. Using the example of the jurors in the 2004 ricin terror trial, who for a number of years after the trial used their status as former jurors to frustrate the government's attempts at deporting the acquitted

‘terrorists’, I shall ask whether the image of the citizen-juror might not sometimes be inverted into the opposite image of the juror-citizen. In which case, where is the unaffected citizen in the jury box? This chapter suggests that the shift to an inclusionary model of jury trial, started some 250 years ago, need not only be about controlling the jury: to the extent that the inclusion thesis posits a juror constructed in the trial, this chapter looks for positive possibilities for resistance opened up by this construction.

CHAPTER 2: THE PLACE OF THE MEDIEVAL JURY

Writing in the early nineteenth century, an English lawyer rejected history (particularly the history of origins) as a means of understanding the powers and functions of the criminal trial jury. All such histories could amount to, he contended, are a pleasant distraction:

The question of the origin of the trial by jury may probably engage the attention of antiquaries, or excite the zeal of disputants; but the decision would not interest the inquirer into its constitution and power. At the same time it may not be an unpleasing task to trace with a rapid pen its passage in an embryo state through periods of our history, not wholly enveloped in the mist of antiquity.¹

And yet this thesis, with all its claims about writing a ‘history of the present’, begins here, in a chapter about the medieval jury.

As a genealogy, the purpose of history in this thesis is not to gain a complete view of what jury trial was about at every point in its history. Rather, the purpose of history in a genealogy is to give context to contemporary problems: to get a sense of the limits within which they are set, how these limits came about, and what possibility there is for resistance either within or against them. So this thesis, despite casting its eye as far back as the late twelfth century, does not try to account for ‘the origin of the trial by jury’.²

¹ G Worthington, *An Inquiry into the Power of Juries to Decide Incidentally on Questions of Law* (S Sweet 1825), 5-6.

² For a good introduction to attempts to account for the jury’s ultimate origins, see J Masschaele, *Jury, State, and Society in Medieval England* (Palgrave 2008), 18-20.

The origins being sought after are the origins of the exclusionary and inclusionary models of jury power, not of the whole system of jury trial. In this first substantive chapter, I shall present in outline the shape and place of criminal jury trial³ prior to the seventeenth-century transformations which I will explore in chapter three, with a particular eye to understanding: the significance of general verdicts; the purpose of ‘conscience’ in jury verdicts generally; and their relationship at this time.

2.1: The Post-1215 Crisis in the Criminal Trial

During the second half of the twelfth century, a peasant named Ailward, from Westoning in Bedfordshire, was accused of stealing from his neighbour (who had earlier refused to repay him his one-penny debt). Ailward was caught in the act by his debtor/victim, and stabbed. A local official, realising that the theft did not legally justify being stabbed, then contrived to have Ailward accused of a theft of an appropriate value. He was formally accused and, a month later, was tried by the ordeal of cold water. Fulk, the official responsible for the charges, then

grabs him saying: “Hither, you criminal, you shall come hither to me”. Whereupon [Ailward] said: “Thanks be to God and the holy martyr Thomas”. He was consequently taken to the place of torment where he was deprived of his eyes and his testicles mutilated: his left eye was at once gouged entirely, but his right eye, while being hurt and cut, was not really torn out... He had lost so much blood from his wounds that the bystanders fearing for his life had called for a priest, to whom he made his confession...⁴

³ I focus on the criminal trial because of the theoretical ambition of this thesis more generally, which relates to criminal trials in England and Wales today. This is a direct consequence of the attempt to write a focused ‘history of the present’, rather than a general historical overview of trial by jury.

⁴ RC van Caenegem ed, *English lawsuits from William I to Richard I*, vol 2: Henry I to Richard I, SS vol 107, 511-2. The whole story is told at length in two separate accounts, at 507-14.

Fortunately for Ailward, his piety did not go unnoticed: after almost two weeks of prayer, he found that one of his eyes had miraculously healed.⁵

This, in rough outline at least, is how the trial of many serious offences functioned in England at the end of the twelfth century. An older system of ‘appeals’, in which a victim would privately prosecute a person accused of what we would today regard as a serious crime, ran alongside a newer ‘presentment’ procedure, in which a body of twelve locals was periodically summoned in order to report people suspected of certain activities to the royal justices. In either situation, the strictly human part of the procedure was restricted to accusations: if there was a lack of compelling evidence one way or another, it was the ordeals (therefore God), rather than a judge or a jury, which would finally settle the matter.

In the 1166 *Assize of Clarendon* (reiterated in expanded form in the 1176 *Assize of Northampton*), Henry II had announced a system for trying offenders suspected of certain serious crimes.⁶ When the royal justices passed through a county, twelve people were to be summoned from each hundred (the administrative unit immediately below the county level), along with four people from each village; and it was the duty of these local representatives to report any criminal activity falling within the remit either of the 1166 or 1176 laws. The accused would typically undergo one of two ordeals, administered by

⁵ Ibid, 512-13.

⁶ In 1166, the relevant activities were robbery, murder, thievery; and receiving robbers, murderers or thieves (which all had to have been committed *after* the Anarchy under King Steven): ‘The Assize of Clarendon (1166)’ in DC Douglas and GW Greenaway eds, *English Historical Documents*, vol 2: 1042-1189 (Eyre & Spottiswoode 1953), 408. In 1176, the list was expanded to include forgery and arson; and harsher punishments were also specified: ‘The Assize of Northampton (1176)’ in DC Douglas and GW Greenaway eds, *English Historical Documents*, vol 2: 1042-1189 (Eyre & Spottiswoode 1953), 411.

a priest, who would ask God for help in “the just examination of doubtful issues”.⁷ If the accused failed the test, as Ailward did, they would either be executed or mutilated; if they passed, they may still be exiled if they were generally reputed to be of bad character.⁸

In his article on private prosecutions (‘appeals’) between 1166 and 1215, Groot argued that during this period there was a growing feeling that the lawful men mentioned in the 1166 and 1176 assizes were an appropriate body for finding the truth, leading to occasional forced inquests.⁹ In his article on publicly prosecuted (‘presentment’) cases during the same period, he argued that the presentment procedure, set out in the *Assizes of Clarendon* and *Northampton*, morphed into a procedure whereby community accusation was not sufficient on its own to justify putting a suspect to the ordeal: in addition, the jury had to assess the evidence and decide whether or not the accused was worthy of suspicion.¹⁰ By the end of this period, Groot argued, the procedure had taken on a rigid form: either the hundredor jury (i.e. the lawful men drawn from the hundred) suspected, and offered reasons for its suspicion, or it was joined in suspicion by four lawful men from each of four nearby villages, in which case there was no reasoning requirement and this expanded jury reported with the equivalent of the ‘guilty’ or ‘not guilty’ of today’s publicly unreasoned jury verdicts.¹¹ The major difference between these verdicts and those delivered by the later trial jury is that the presenting jury’s accusation was either

⁷ R Bartlett, *Trial by Fire and Water: The medieval judicial ordeal* (OUP 1986), 1; quoting from K Zeumer ed, *Formulae Merovingici et Karolini aevi* (1886), 700-01. As the wording of this quote suggests, ordeals would be resorted to only if there was insufficient evidence coming from different sources, e.g. witnesses.

⁸ ‘The Assize of Northampton (1176)’ (n 6), 411.

⁹ RD Groot, ‘The Jury in Private Criminal Prosecutions Before 1215’ (1983) 27 *Am J Legal Hist* 113, 130.

¹⁰ RD Groot, ‘The Jury of Presentment Before 1215’ (1982) 26 *Am J Legal Hist* 1, 2.

¹¹ *Ibid*, 13-4.

confirmed or denied by an ordeal, and therefore the ‘verdict’ at this stage lacked the finality which it would soon acquire.

In 1215, the Catholic Church issued its Canons of the Fourth Lateran Council: a document setting out Church doctrine on matters as wide-ranging as the hierarchy of the senior bishops and the requirement of regular confession.¹² The Canons are of great importance to the history of criminal law across Europe, as Canon eighteen outlawed clerical participation in the ordeals, declaring:

No cleric may pronounce a sentence of death, or execute such a sentence, or be present at its execution ... Wherefore, in the chanceries of the princes let this matter be committed to laymen and not to clerics ... Neither shall anyone in judicial tests or ordeals by hot or cold water or hot iron bestow any blessing ...¹³

While this does not directly amount to a ban on the unilateral ordeals,¹⁴ without the authorised support of the clergy the institution could not survive for long. In much of Continental Europe, the ordeals continued to be used for a little while longer,¹⁵ but in England their use was discontinued more or less immediately. In 1219, the following order went from the court of the young English king to his royal justices:

Because it was in doubt and not definitely settled before the beginning of your eyre [the judges’ periodic tour of the country] with what trial those are to be judged who are accused of robbery, murder, arson, and similar crimes since

¹² HJ Schroeder, *Disciplinary Decrees of the General Councils: Text, translation and commentary* (B Herder 1937), 236-296.

¹³ Ibid.

¹⁴ The bilateral trial by battle, while also disowned by the church, was not eventually repealed until 1819. It had, however, fallen out of regular use by the thirteenth century. See generally MJ Russell, ‘Trial by Battle and the Writ of Right’ (1980) 1 J Leg Hist 111.

¹⁵ Bartlett (n 7), 127-135.

the trial by fire and water has been prohibited by the Roman church ... at present, in this eyre of yours, it shall be done thus ...¹⁶

The order went on to specify that those who “would do evil” even if banished, or if “permitted to abjure the realm”, “shall be kept in our prison and safely guarded, yet so that they do not incur danger of life or limb on our account”.¹⁷ Those who could be trusted to abjure were to be permitted to do so.¹⁸ For those “accused of lesser crimes and of whom there would be no suspicion of evil”, the accused were to be set free provided they could give “pledges of fidelity”.¹⁹

Immediately after this limited prescription, dividing accused into various degrees of suspected dangerousness rather than into ‘guilty’ and ‘not ‘guilty’, the order went on to explain that the ultimate resolution of the crisis lay in the hands of the justices at eyre:

As our council has provided nothing more certain in this matter at present, we therefore leave to your discretion the observance of this aforesaid order in this eyre of yours, in order that you, who are better able to know the people, the nature of the offence and the truth of things, may in this way proceed to this effect in accordance with your own discretion and consciences.²⁰

The judges here are charged to act according to three criteria of truth: knowledge of the people, of the offence, and of ‘the truth of things’; so their ‘discretion and consciences’ are to be guided by their closeness to the details of each trial, as opposed to the abstract guidance reaching them from Westminster. And the justices, obeying the instruction to use their discretion, quickly adopted mode of trial in which the local population made a

¹⁶ TFT Plucknett trans, ‘Temporary Instructions to Justices in Eyre because of Prohibition of Ordeal, 1219’ in DC Douglas ed, *English Historical Documents*, vol 3: 1189-1327 (Eyre & Spottiswoode 1975), 340.

¹⁷ Ibid, 340.

¹⁸ Ibid, 340-341.

¹⁹ Ibid, 341.

²⁰ Ibid, 341.

second decision, stating not only that a certain person is *suspected* of committing a certain offence, but also concluding that they are or are not *actually guilty*. With incredible speed, possibly drawing on the similarly conclusive role of juries in land disputes,²¹ something akin to the modern trial jury came into existence.

In his article on the years following the 1215 order, Groot traced through the following rough history. At York in 1218-19, the justices at eyre insisted on virtually every appellee (those who were privately accused) receiving a jury inquest, with guilty verdicts leading either to incarceration or ‘amercement’ (i.e. a judicial fine, to be quantified at the local level).²² At the central court in Westminster, 1219-21, the final jury verdict – complete with death sentence for the guilty – was offered as a pragmatic solution to appellees unable to engage their accusers in a duel, because the accuser was either dead or a woman.²³ In 1221-22, the royal justices went back on the road and the developments in the central Westminster court were tentatively applied to local settings. In Worcester, the idea of a conclusive jury trial was extended, from its initial application only to the appeals of ‘approvers’ (convicted criminals spared severe punishment in exchange for a promise to name their accomplices and appeal against them) to those prosecuted by a presenting jury, and to those privately appealed against in the usual (i.e. non-approver) way. Groot suggests that this was done, in varying circumstances, either because the defendant expected acquittal or because they feared the indefinite imprisonment offered as an alternative by Henry III’s 1219 order detailing the future direction of English criminal

²¹ See M Macnair, ‘Vicinage and the Antecedents of the Jury’ (1999) 17 Law & Hist Rev 537, 584-586.

²² RD Groot, ‘The Early-thirteenth-century Criminal Jury’ in JS Cockburn and TA Green eds, *Twelve Good Men and True: The criminal jury in England, 1200-1800* (Princeton UP 1988), 12-3.

²³ Ibid, 17-8.

justice.²⁴ In Gloucester, defendants – possibly preferring imprisonment to the risk of death – began to refuse jury trial;²⁵ and no records exist for the hearings in Hereford and Leicester, where the justices visited immediately after Gloucester.²⁶ The next stop was Warwick, where the royal Justices offered defendants a choice: either a voluntary inquest by the hundred jury and the local villages, or a forced inquest by the hundred jury and twenty-four knights drawn from the county as a whole. Defendants quickly accepted hundred-village jury trial, and the knightly jury was withdrawn.²⁷ On Groot’s model, the final, silent jury verdict was born by the end of the 1218-22 eyre.²⁸

The value for this thesis of tracing the emergence of jury trial as the final arbiter of criminal complaints (which is different to the question of its origins as such) is that it might help us to interrogate the self-evidence, postulated in the exclusion thesis, of a fundamental antagonism between judge and jury. A good example of this perspective in legal history is Green’s interpretation of the medieval law of homicide. Responding to Hurnard’s claim that evidence of perverse verdicts is difficult to find prior to the fourteenth century,²⁹ Green has argued that in fact the post-Conquest homicide law was immediately resisted by juries, who operated on the basis of “their own extra-legal theory of culpable homicide”:³⁰

²⁴ Ibid, 24-5.

²⁵ Ibid, 29-30.

²⁶ Ibid, 30.

²⁷ Ibid, 30-3.

²⁸ Groot’s three articles remain the standard account of this chronology. They are drawn upon in, for example, T Olson, ‘Of Enchantment: The Passing of the Ordeals and the Rise of the Jury Trial’ (2000) 50 *Syracuse L Rev* 109; and Macnair (n 21).

²⁹ ND Hurnard, *The King’s Pardon for Homicide Before AD 1307* (OUP 1969), 251-272.

³⁰ TA Green, ‘Societal Concepts of Criminal Liability for Homicide in Mediaeval England’ (1972) 47 *Speculum* 669, 674.

During the Anglo-Saxon period only those who committed homicide through secrecy or stealth – murder – had to pay for their act with their life. The new, twelfth-century practice subjected to the death penalty not only ‘murderers’ but the large class of open slayers formerly allowed to compensate for their act by payment of the *wergeld*. The community resisted this harsh extension of capital punishment and subsequently found means – acquittals and verdicts of self-defence – to impose upon the courts their long-held notions of justice, a process which becomes visible to us only as of the fourteenth century.³¹

It may be that Green’s argument, locating in the medieval law of homicide a tension between the laws which judges attempted to enforce and the customs which juries insisted on upholding, reads into his sources the ‘separability thesis’ of modern legal positivism, presuming a necessary tension between the morality of a law and its formal validity. As Shapiro has argued in a different context, perceptions of law and of the trial can be shaped by changes in the ontological presumptions of the people meditating on them.³² If this is so, might the law-and-culture split of Green’s argument be open to challenge?

Foucault, in a lecture series delivered in 1973, suggested that the legal changes of the late twelfth and early thirteenth centuries constituted a shift in the relationship between “truth and juridical forms”.³³ Prior to the thirteenth century, he argues, the various legal tests (passing a unilateral ordeal, winning a bilateral trial by combat, finding sufficient people to attest to your innocence, etc.)³⁴ assumed a “binary form”,³⁵ which identified a victor without a third party formally inquiring into the truth of the matter. What, Foucault

³¹ Ibid, 670-71.

³² BJ Shapiro, *Probability and Certainty in Seventeenth-Century England: A study of the relationship between natural science, religion, history, law, and literature* (Princeton UP 1983). See also T Kirchengast, *The Criminal Trial in Law and Discourse* (Palgrave 2010), 39-64.

³³ M Foucault, ‘Truth and Juridical Forms’ in M Foucault, *Power* (J Faubion ed, R Hurley and others trans, Penguin 2002) [1973].

³⁴ On these older modes of proof, see F Pollock and FW Maitland, *The History of English Law Before the Time of Edward I*, vol 2 (2nd edn, Liberty Fund 2010) [1898], 627-671

³⁵ Foucault (n 33), 38.

contends, was new around the end of the twelfth century was the use of an ‘inquest’ procedure:

The inquiry was to be the substitute for the flagrant offense procedure: if one managed to assemble persons who could affirm under oath that they had seen, that they knew, that that they were well informed – if it was possible to establish through them that something had actually taken place – then one would have, by means of the inquiry via these persons who knew, the indirect equivalent of the flagrant offense. And one could treat gestures, actions, offenses, crimes that were no longer in the field of actuality, as if they were discovered in flagrante delicto.³⁶

The legal forms which emerged at around the end of the twelfth century, Foucault contends, are notable mainly for this change, in which past events are subjected to a type of knowledge-formation which enables them to be analysed as if they were events happening contemporaneously with the analysis itself. These changes prioritise the collection of factual information in a way which was not necessary for as long as difficult questions of fact could be left to the unilateral ordeals.

Green’s contention is that juries refused to bow to the Norman law, and continued to act on the basis of their own Saxon morality; but the ordeals must initially have made this difficult: “Before 1215, persons presented for homicide were forced to undergo the ordeal, so that if the community desired to absolve a slayer it had to fail to present him in the first place.”³⁷ But the community was *required* to act when it was aware of a crime, as is graphically demonstrated by three cases reported from the 1201 Cornish eyre. The village of St Just in Roseland lost a suspect in their custody and concealed this fact: “Therefore

³⁶ Ibid, 47.

³⁷ Green (n 30), 688.

the village is in mercy [i.e. fined]”.³⁸ When the justices reached Kerrior hundred, they were told that Jordan, an official of the Bishop of Exeter, had been killed in the hamlet of Gwedna. But the report did not come from the inhabitants of Gwedna, who had all fled before the arrival of the justices, leaving their village deserted. The justices fined the villagers for their behaviour, and Jordan’s friends had the inhabitants of the village - “in fact, the whole township” - outlawed.³⁹ A third jury was over-eager to present: “The jurors are in mercy for foolish presentment, because they presented a man outlawed for 15 years past.”⁴⁰ In Worcestershire, twenty years later, the jurors of Oswaldslow hundred attempted to escape responsibility for their failure to present a suspected homicide by insisting that the death had occurred outside their jurisdiction:

Speak about the jurors who concealed the death of Andrew, Robert de Bracy’s man whom Robert the cook killed, and the jurors say that this belongs to the manor of Hanley which answers for itself. The village has not come and therefore it is in mercy [i.e. fined]. Afterwards the village comes and says that this was not done within the liberty of their manor, nay rather within the hundred of Oswaldslow in the field of Holdfast, and this they can prove as the court shall adjudge [i.e. they are willing to submit to a judicial proof regarding traditional land boundaries], and they say that he died at Holdfast. And the jurors of the hundred say that he was not killed in the hundred, nay rather within the liberty of the manor etc. But all say that Robert is guilty, and therefore let him be exacted and outlawed. He had not chattels.⁴¹

Failing to present was no guarantee that the justices would not discover the communal suspicion against a person, or at least discover that the death had occurred. The best a community could hope for if this happened was to shift responsibility to some other

³⁸ DM Stenton ed, *Pleas Before the King or His Justices 1198-1202*, vol 2: Rolls or fragments of rolls from the years 1198, 1201 and 1202, SS vol 68, 50.

³⁹ FW Maitland ed, *Select Pleas of the Crown*, vol 1: AD 1200-1225, SS vol 1, 2. See also Stenton (n 38), 55.

⁴⁰ Stenton (n 38), 52.

⁴¹ DM Stenton ed, *Rolls of the Justices in Eyre Being the Rolls of Pleas and Assizes for Lincolnshire 1218-9 and Worcestershire 1221*, SS vol 53, 594.

community; but clearly this is not the same as resisting the law under which a killer is tried as a murderer.

Under the jury system as it developed around the turn of the thirteenth century, juries acquired the additional burden of determining guilt or innocence, rather than merely reporting local suspicion. And this is what Green focuses on: the ways in which trial juries contrived to tell a mitigating story, usually of self-defence.⁴² So it was the law itself which gave the jurors the possibility of resisting it: the prodigious power of the English crown required the jurors' knowledge, and so their relationship cannot have been simply a question of domination and resistance.⁴³ As Masschaele has recently argued, writing specifically in the context of the thirteenth and fourteenth centuries, "[a]cquisition of information became one of the central concerns of English government in the period and served to link the history of sworn inquests and trial juries".⁴⁴ The medieval criminal trial depended in large part on the knowledge of the jurors and so the spheres of action of judge and jury were, to this extent at least, implicated in one another; and the jury, therefore, was only able to resist the laws inasmuch as the jury was itself an internal participant within their administration.

We have already seen that the prescriptive element of the 1219 order to the justices was immediately followed by a concession to their capacity to 'better know the people', and

⁴² Green (n 30).

⁴³ Green himself acknowledges this complex relationship between the crown and the community when discussing the end of widespread jury discretion in eighteenth-century England: TA Green, *Verdict According to Conscience: Perspectives on the English criminal trial jury 1200-1800* (University of Chicago Press 1985), 349-355.

⁴⁴ Masschaele (n 2), 18.

that they were therefore asked to resolve the post-1215 crisis by reference to their ‘discretion and consciences’. As I shall argue in section two, below, ‘conscience’ is a term which must be treated with caution, but it will be enough for now to note that medieval conscience concerned morality, knowledge and their application to one another, and that it was therefore a much broader concept than its modern successor. As the thirteenth-century theologian Thomas Aquinas explained:

The term conscience signifies the application of knowledge to something, hence to know with [*conscire*] means, as it were, to know at the same time...

...

Knowledge can be applied to an act in two ways: in one way, insofar as we consider whether the act is or was; or, in another way, insofar as we ask whether the act is right or not.⁴⁵

So the exhortation to ‘conscience’ need not overrule the generalised prescription regarding imprisonment, banishment and ‘pledges of fidelity’. Rather, it recognises that the proper application of these broad commands will always depend upon the justices’ knowledge of ‘the people, the nature of the offence and the truth of things’. And just as the crown in this way left it to the judges to apply the royal order in the context of their specific knowledge, so too early criminal trial juries were conceded their knowledge, both of the case and of the standards to be applied. As Whitman has recently observed, “historians have devoted a good bit of energy to debating (misguidedly, I think) whether early jurors were *really* witnesses or *really* judges. The answer, critically important from

⁴⁵ T Aquinas, ‘*On Conscience*. Disputed question on truth, 17 (1256-9)’ in T Aquinas, *Selected Writings* (R McInerney ed, Penguin 1998), 221-22.

the point of view of moral theology, is that they were both.”⁴⁶ The early criminal trial jury could not simply resist the law from the outside: the requisite distinction between laws and facts, or judges and juries, had not yet developed.

The printed records of English criminal trials at the turn of the thirteenth century suggest an understanding of legality concerned more with the resolution of cases, and with the enforcement of royal jurisdiction, than with the description of a monolithic law. When, in 1218-19, the royal justices demanded an explanation for the hanging of a man on the suspicion of a local jury in Claro Wapentake, Yorkshire, their concern seems to have been less with the rules of law which may or may not have been applied and more with the idea that a jury might resolve a case in the absence of a royal judge.⁴⁷ The criminal law itself was, in Baker’s words, a body of rules which, “for many centuries, rested more on practice than on authoritative principles laid down by the courts or parliament”.⁴⁸ As Green’s argument attests to, custom was an important element in the medieval criminal trial. But it is not entirely clear that this custom had always to be regarded as an element antagonistic to ‘the law’. In Warwickshire in 1221, for example, the royal justices ordered that fines should stay at their customary level.⁴⁹ The relevant cost was attested to by the jurors, and it was a purely local knowledge of custom which they provided:

Touching new customs, they [the jurors] say that Richard Labanc in his time amerced [fined] the men of the shire at half a mark or more when they used

⁴⁶ JQ Whitman, *The Origins of Reasonable Doubt: theological roots of the criminal trial* (Yale UP 2008), 151-152.

⁴⁷ DM Stenton, ed, *Rolls of Justices in Eyre: Being the rolls of pleas and assizes for Yorkshire in 3 Henry III (1218-19)*, SS vol 56, 277.

⁴⁸ JH Baker, *An Introduction to English Legal History* (4th edn, Butterworths 2002), 521.

⁴⁹ DM Stenton ed, *Rolls of the Justices in Eyre Being the Rolls of Pleas and Assizes for Gloucestershire, Warwickshire, and Staffordshire, 1221, 1222*, SS vol 59, 402-03.

to give only 6 pence before judgment and 12 pence after judgment. Therefore precept to the sheriff that he do therein as (the sheriff) used and ought.⁵⁰

It was not the case, at the turn of thirteenth century, that the criminal trial always consisted of a judicial statement, defining the law, followed by a jury verdict, applying it. The line between the law and the community's expectations of the law was not yet clear enough that we might pit a positivistic sovereign command against a natural lawyer's verdict according to conscience. Even if, as Green asserts, by the late-fourteenth century there was a tension between 'law' and 'culture', at the time of the post-1215 crisis the distinction was not so clear.

2.2: The Verdict against Conscience

Writing in his 2001 *Review of the Criminal Courts of England and Wales*, Auld LJ cast the problem of errant jury verdicts in terms of a distinction between conscience and evidence. He asked: "Should we provide juries with an express power of dispensation or nullification, instead of just letting them get away with it, and should jurors undertake to give a verdict according to the evidence or their conscience?"⁵¹ Similarly, in his celebrated defence of jury power, Devlin stated that juries could resist the directions of the judge "in matters of conscience".⁵² In this section, I shall start to place this idea of the 'verdict according to conscience' into its historical context, arguing that the role of

⁵⁰ Ibid, 402-03. Masschaele notes in this connection that tradition was not always conclusive, but emphasises the role of inquest juries in assessing the likely impact of any deviation from custom: Masschaele (n 2), 29-30.

⁵¹ Auld LJ, *Review of the Criminal Courts of England and Wales* (HMSO 2001), 176.

⁵² P Devlin, *Trial by Jury* (Stevens & Sons 1956), 163.

conscience in the medieval jury verdict did not involve distinguishing between fact-based and moral-based verdicts in the way that they are distinguished by modern commentators.

When we say that juries do or ought to deliver a verdict according to ‘conscience’, we are not employing a timeless word with a single static meaning.⁵³ What exactly ‘conscience’ means in a given context is always a proper subject of clarification. Writing a little over half a century ago, Lewis explained that the roughly equivalent words *suneidos* and *conscientia*

can [sometimes] mean ‘I know together with, I share (with someone) the knowledge that’. But sometimes they had a vaguely intensive force, so that the compound verbs would mean merely ‘I know well’, and perhaps finally little more than ‘I know’.⁵⁴

In Modern English, ‘consciousness’ has taken on the sense of *conscientia* as something well or truly known, leaving “*conscience* free to develop almost exclusively the ‘together’ senses; a notable example of desynonymisation.”⁵⁵ The shared knowledge aspect of conscience, Lewis explains, most commonly took the form of ‘consciring’, by which he means a (commonly negative) secret knowledge, shared only by a few people; and this Lewis splits into concepts of the ‘external’ and the ‘internal’ witness, the internal witness referring to knowledge shared only between the individual and God.⁵⁶ In Christian theology, he explains, the internal witness was gradually transformed into an internal lawgiver. This lawgiver is known as ‘synderesis’; and synderesis

⁵³ The text in this section is drawn upon in my publication, K Crosby, ‘*Bushell’s Case* and the Juror’s Soul’ (2012) 33 J Leg Hist 279.

⁵⁴ CS Lewis, ‘Conscience and Consciousness’ in CS Lewis, *Studies in Words* (CUP 1960), 181.

⁵⁵ Ibid, 183.

⁵⁶ Ibid, 184-190.

is something quite different [from the internal witness]; something which will be named, according to the system we employ, practical reason, moral sense, reflection, the Categorical Imperative, or the super-ego. *Conscientia* in this ... sense can be said to 'bind' and 'impel' (*instigare*), and can of course be obeyed or disobeyed.⁵⁷

'Conscience', then, can refer either to shared knowledge or to the moral worth of a particular course of action; and the absolute split between conscientious decisions and those which simply apply laws to facts is a relatively recent phenomenon.

It is important to note that my interest in the word 'conscience' is not exactly etymological; rather, I am interested in the way that some core concept of shared knowledge (*conscientia*) has shifted and developed its meaning. My hope is that, by treating conscience in this way, I will be able to demonstrate that the 'verdict according to conscience' is a phrase which carries a less certain meaning than it might appear at first sight to hold. This is an important prelude to my discussion, in chapter three, of the emergence of something like the modern concept of the verdict according to conscience. Just as Foucault interrogated the concept of free-spokenness by tracing the history of the word '*parrhesia*' in the ancient world,⁵⁸ and just as Skinner has explored the use by early-modern capitalists of language which had previously had an exclusively religious meaning,⁵⁹ I hope by temporarily pausing on the history of the word 'conscience' in English juristic debates to be able to, in Skinner's phrase, "illuminate ideological disputes through the study of

⁵⁷ Ibid, 194.

⁵⁸ This and related issues are explored at length in M Foucault, *The Hermeneutics of the Subject: Lectures at the Collège de France, 1981-82* (F Gros, F Ewald, A Fontana and AI Davidson eds, G Burchell trans, Palgrave 2005) [1982], M Foucault, *The Government of Self and Others: Lectures at the Collège de France, 1982-83* (F Gros, F Ewald, A Fontana and AI Davidson eds, G Burchell trans, Palgrave 2010) [1983], and M Foucault, *The Courage of Truth: Lectures at the Collège de France, 1982-83* (F Gros, F Ewald, A Fontana and AI Davidson eds, G Burchell trans, Palgrave 2011) [1984].

⁵⁹ Q Skinner, 'Moral Principles and Social Change' in Q Skinner, *Visions of Politics*, vol 1: Regarding Method (CUP 2002).

linguistic disagreements”.⁶⁰ It is for this reason, rather than for the more properly etymological purpose of discovering the ‘true’ meaning of the word, that I am pausing here on ‘conscience’.

Writing in his book on late medieval English law, Doe has noted that medieval lawyers were at times concerned with the possibility of a jury delivering a verdict according to conscience:

In short ... the judges do not command the jurors to give a verdict according to their conscience. They merely point out, and in a sense advise, that when there is no evidence to the contrary the jurors can find for P with no offence to their consciences. To return a false verdict would imperil the soul. Rather than command obedience to conscience, the judges merely describe the consequence of an untrue verdict in terms of an offence to conscience.⁶¹

It is well known that the task both of civil and of criminal juries was initially more closely related to the collection of evidence than it is today,⁶² and it is important to bear this in mind when considering Doe’s account of the medieval juror’s conscience. As I have hoped to show, there is a basic tension in the word ‘conscience’ between concepts of true knowledge and of moral judgment. The medieval juror, on Doe’s account, seems to have been criticised for giving a verdict against his conscience in the first of these two senses, choosing (for whatever reason) a verdict other than that which would be suggested by the jurors’ knowledge of the case. This is very different from the idea of conscience as a moral force, expressed today in the phrase ‘verdict according to conscience’.

⁶⁰ Q Skinner, ‘The Idea of a Cultural Lexicon’ in Q Skinner, *Visions of Politics*, vol 1: Regarding Method (CUP 2002), 160.

⁶¹ N Doe, *Fundamental Authority in Late Medieval English Law* (CUP 1990), 147-148.

⁶² See J Oldham, *The Varied Life of the Self-Informing Jury* (Selden Society 2005); and JM Mitnick, ‘From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror’ (1988) 32 *Am J Legal Hist* 201.

In the thirteenth-century account of English law known as *Bracton*,⁶³ the conditions for punishing jurors responsible for delivering a false verdict were set out quite precisely:

If in the manner of an assise, let it be enquired by the jury whether the twelve have made a true oath or a false one. If true, their verdict will hold; if false, they are to be convicted because of perjury. An oath may be false or foolish. And so may a judgment, whether by the justice or by the jurors. For a juror commits perjury because of a false oath if he wittingly swears otherwise than the matter in truth is. But if the oath is foolish, though it is false, he does not commit perjury, though in truth the matter is otherwise than he has sworn, because he swears according to conscience since he does not go against his understanding.⁶⁴

While it is not clear that the procedure *Bracton* describes (the attain) ever applied to criminal juries,⁶⁵ this extract may still be taken as a guide to the way in which ‘conscience’ was considered a relevant element in the evaluation of a doubtful jury verdict. A verdict might be incorrect, but it could only be considered a verdict against conscience if the jurors acted against their ‘understanding’. As Aquinas pointed out in his roughly contemporaneous reflections on conscience: “conscience is nothing else than the application of science to some special act, in which application error can arise in two ways: in one way, because that which is applied contains an error in itself, in another way in this that it is not correctly applied”.⁶⁶ If conscience is basically a syllogistic action, applying general norms to particular acts, then a verdict might be said to be ‘against conscience’ either because it goes against the general norm or because it fails to correctly classify the factual situation. What the extract from *Bracton* specifies is that English law

⁶³ The authorship and precise date of *Bracton* are still disputed: see JL Barton, ‘The Authorship of *Bracton*: Again’ (2009) 30 J Leg Hist 117; and P Brand, ‘The Date and Authorship of *Bracton*: A response’ (2010) 31 J Leg Hist 217.

⁶⁴ GE Woodbine ed and SE Thorne trans, *Bracton on the Laws and Customs of England*, vol 3 (Harvard UP 1977), 336-337.

⁶⁵ Green (n 43), 19-20.

⁶⁶ Aquinas (n 45), 226.

had an even narrower understanding of errors against conscience: in order to deliver a verdict against conscience, the verdict must be wilfully delivered in the face of the evidence. Again, the ‘conscience’ of the jurors is squarely focused on the conformity of the verdict to the facts. And a verdict against the facts is not suspected of being delivered *according to* some extra-legal conscience: rather, the wilful incompatibility between the facts and the verdict is the very thing which qualifies the errant verdict as a verdict *against* conscience.

By the mid-sixteenth century, however, the moral aspect of conscientious judgment seems to have been elevated, challenging the supremacy of facts as the most important element in the categorisation of a decision as either according to or against conscience. Doubtless an important reason for this shift was the attempt on the part of a succession of English regimes to alter the relationship between the state’s power to regulate bodies and the Catholic Church’s traditional power to regulate souls.⁶⁷ This shift can be seen both in a key theoretical exposition of the relationship between conscience and the English legal system and in a prisoner’s insistence that his jury decide according to conscience. Both these examples are drawn from the same period, and both presume that the most important part of conscience is ‘synderesis’, the moral dictate which forms the major premise of the syllogism of conscientious judgment. In the former, a controversial jurist sought “to justify common law and to explore equity’s functions and boundaries [not] as an exercise in jurisprudence *per se*, but ... to do so as the essential precondition to attacking the

⁶⁷ See generally S Tutino, *Law and Conscience: Catholicism in Early Modern England, 1570-1625* (Ashgate 2007).

independent jurisdiction of church courts and clergy in England”.⁶⁸ In the latter, an English politician stood accused of plotting against the Catholic Queen’s marriage to the king of Spain. In situations like these it will be unsurprising to find contestation around a concept like ‘conscience’; and it might also be expected that the concept would not be entirely settled in such circumstances.

The classic English text on the use of synderesis, particularly as regards legal questions, is Christopher St German’s *Doctor and Student*,⁶⁹ first published in 1528 and republished twenty-eight times during the following century.⁷⁰ Synderesis, for St German, is not conscience itself; rather, it provides the major premise in the syllogism which produces conscientious judgment. “Sinderesis”, he explains, “is a naturall power or motive force of the rational soule sette always in the hyghest parte therof/ mouynge and sterryng it to good/ & abhorryng euyll. And therefore synderesis neuer synneth nor erryth nor does it err in respect to the fundamentals of speculation.”⁷¹ But to get from a proposition established through synderesis to a conscientious judgment, reason must be deployed. St German emphasises here that:

[r]eason and intellect are not distinct as two separate powers, but as two activities of the same power; for ‘intelligere’, ‘to understand’, is simply to

⁶⁸ J Guy, ‘Law, Equity and Conscience in Henrician Juristic Thought’ in A Fox and J Guy, *Reassessing the Henrician Age: Humanism, politics and reform 1500-1550* (Basil Blackwell 1986), 198. For St German’s debate with Thomas More regarding the true nature of English law, see J Guy, ‘Thomas More and Christopher St German: The battle of the books’ in A Fox and J Guy, *Reassessing the Henrician Age: Humanism, politics and reform 1500-1550* (Basil Blackwell 1986).

⁶⁹ TFT Plucknett and J.L. Barton eds., *St German’s Doctor and Student*, SS vol 91 [1528]. The Selden Society edition of St German only translates Latin passages into modern English, and leaves anything originally written in English as St German wrote it. For this reason, the quoted passages alternate between sixteenth- and twentieth-century English. The following discussion of *Doctor and Student* is drawn upon in my publication, Crosby (n 53).

⁷⁰ RA Greene, ‘Synderesis, the Spark of Conscience, in the English Renaissance’ (1991) 52 *Journal of the History of Ideas* 195, 207.

⁷¹ Plucknett and Barton (n 69), 81.

apprehend an intelligible truth; but ‘to reason’ is to proceed from one thing that is understood to another, so as to reach the knowledge of intelligible truth.⁷²

When reason moves in this way from a major premise revealed by synderesis, through a minor premise, which St German describes as a ‘particular act’, a conscientious judgment is reached:

This worde conscyence/ whiche in laten is called conscientia is compowned of this preposicion: cum/ that is to say in englysshe: with/ and with this nowne scientia/ that is to saye in englysshe knowlege/ and so conscyence is as moche to say as a knowlege of one thyng with another thyng/ and so the word says two things, knowledge by itself, and knowledge with another thing ... In the second place, indeed, conscience says and imports more appropriately knowledge with something else, that is to say, with some particular act. In that case it imports a certain acception or acceptation on the part of reason, whereby it accepts or reproves some particular thing. And conscyence so taken is no thyng els/ (strictly speaking) but an applyenge or an ordering of any scyence or knowlege to some partyculer acte of man... And so conscyence taken in this sense is not always in itself right but may somtyme erre/ and somtyme not erre. This is because it has to deal with particular things by means of knowledge or research in which there is often chance of error.⁷³

St German builds upon this notion of error in an act of conscience, suggesting that judgment can err for one of seven reasons: ignorance of what a person ought or ought not to do; negligence regarding the searching of one’s own conscience; pride, which stops a person believing the advice of someone better placed to know what ought to be done; singularity, or an idiosyncratic will; an insistence on making conscience bend to the judge’s will; pusillanimity; or perplexity, where a person falsely believes their conscience to be set between Scylla and Charybdis.⁷⁴ An important theme in *Doctor and Student* is the role of law in clarifying a nation’s vision, turning its sight away from customs which

⁷² Ibid, 85.

⁷³ Ibid, 87-89.

⁷⁴ Ibid, 91-93.

might otherwise interfere with the spark of divine reason manifested in synderesis. When the doctor first explains the law of reason, the student asks why positive laws are necessary if “the lawe of reason is wryten in the herte of euery man”.⁷⁵ One answer is that without law the divine spark may tend towards (although it will never quite reach) extinction:

though the lawe of reason maye not be chaunged nor hollye put away: neuertheles byfore the lawe wryten it was greatly let and blinded by euyl customes & by many synnes of the people besyde the orygynall synne/ in so moche that the inner book of the heart having been obscured and as it were mutilated by diuers passions it myght hardly be descernyd or read by men what was ryghtwyse and what was unjust. It was therefore necessary that an external book should be given, containing laws and precepts delivered by God and by wise men whose hearts still remained more lucid, whether it be by heavenly illumination, or by human study, aided by moral lives which also contribute a wonderful light. One cause for giving written law, therefore, is said by holy men to have been the darkening of the law of reason and not its changing.⁷⁶

Human law, then, serves the important purpose of clearing people’s minds, allowing them to grasp that fundamental law of reason which humans, as rational creatures, can in principle all access through synderesis. Human law also fills in the gaps, addressing what is elsewhere called *adiaphora*, meaning those matters regarding which the laws of reason or of God are neutral, but which, for the sake of good governance, princes are permitted to legislate on.⁷⁷ “So when St. Augustine says that the sin is not remitted unless the thing taken is restored, English law tells us which taking is just and which unjust; so law is the

⁷⁵ Ibid, 15.

⁷⁶ Ibid, 15.

⁷⁷ See the discussion in DR Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate 2010), 56-57.

best guide whether restitution is due or not.”⁷⁸ And so conscience and law, for the most part,⁷⁹ flow into (or at least support) one another.

In St German’s account of conscientious judgment, conscience sets out clearly what a person must do if they are to act properly; and human laws primarily serve the function of bringing the conduct of the legal subject into closer conformity with these objective, correct standards. His account, which focuses on *synderesis*, largely ignores the role of fact-finding in conscientious decision-making, and may therefore be contrasted to the criticism in *Bracton* of the judge and the juror who ‘wittingly swears otherwise than the matter in truth is’. In the former, conscience relates primarily to questions of moral standards, while in the latter it primarily relates to disputed questions of fact. This difference has important implications for this thesis, demonstrating that it is not enough to simply speak of later developments, such as the abolition of the practice of fining jurors, or the legal protection of the jury’s right to deliver a general verdict, as guaranteeing the jury its right to deliver a ‘verdict according to conscience’.

In a case from the middle of the sixteenth century, only a few decades after St German’s *Doctor and Student* was first published, we can see these two visions of conscience – roughly, of true knowledge and of accountability to God – sitting side by side, albeit awkwardly. The case was the treason trial of Sir Nicholas Throckmorton, who had been accused of participating in the planning of Wyatt’s rebellion against Queen Mary’s proposed marriage to Phillip II of Spain. This case is notable for the jury’s refusal to

⁷⁸ Plucknett and Barton (n 69), 5.

⁷⁹ St German does include a statement along the lines of ‘unjust law is not law’ (Ibid, 10-11), but the majority of the text is about demonstrating how unusual such a conflict will be.

convict, and for their reliance on conscience as a justification for their verdict; but the specific type of conscience they invoke is not that of the syllogism of St German's synderesis. Rather, their verdict comes from a conscience of true knowledge. Throckmorton, on the other hand, pleaded with the jury to consider the spiritual requirements of a just god. He sought to remind them of their duties as Christians, and of the spiritual danger inherent in any act of judgment:

And albeit many this day have greatly inveighed against me, the final determination thereof is transferred only to you: how grievous and horrible the shedding of innocent blood is in the sight of Almighty God, I trust you do remember. Therefore take heed, I say, for Christ's sake, do not defile your consciences with such heinous and notable crimes; they be grievously and terribly punished, as in this world and vale of misery upon the children's children to the third and fourth generation, and in the world to come with everlasting fire and damnation.⁸⁰

The jury here are called upon to turn first to God's rules, and therefore to decide primarily on the basis of something like St German's syllogism of conscientious judgment. Strategies like this one were used by John Lilburne a century later, and they would then be redeployed by the pamphleteers of the following generation in order to develop some positive sense of the 'verdict according to conscience'.⁸¹

It is the tension between these two understandings of 'conscience' which makes the actions of Throckmorton's jurors so interesting. They had been encouraged to give a verdict according to what we might call a 'moral' conscience, and they did in the end find against the wishes of the bench. Furthermore, they justified their actions in terms of conscience. But the conscience to which they appealed was still very much of a medieval

⁸⁰ *Trial of Sir Nicholas Throckmorton* (1554) 1 Cobbett's State Trials 869, 898.

⁸¹ See generally chapter three.

variety: conscience in the sense of knowledge which they shared with one another. The jurors were imprisoned for their verdict and, when they were eventually called back to court to give an account of themselves, their foreman, Whetston,

affirmed that they had done all things in that matter [i.e. in Throckmorton's trial] according to their knowledge, and with good conscience, even as they should answer before God at the day of judgment; and Lucar [another juror] said openly before all the lords, that they had done in the matter like honest men, and true and faithful subjects; and therefore they humbly besought the lord chancellor and the other lords to be means to the king's and queen's majesties, that they might be discharged and set at liberty, and said, that they were all contented to submit themselves to their majesties, saving and reserving their truth, consciences and honesties.⁸²

Whereas Throckmorton's address to the jury had been about the moral dangers of judging, and the need to listen to the rules of synderesis when reaching a verdict, the jurors were concerned to establish that they were judging according to conscience in the sense of judging *according to the evidence*. Indeed, while they were willing to submit to Phillip and Mary as their rulers, they were not able to give up what conscience demanded that they keep; and this was not an abstract moral rule, but simply 'their truth, consciences and honesties'. It is possible that jurors believed that, by describing their 'conscience' according to the word's facts-based meaning, they might escape the wrath of the judges. This seems unlikely, however: the judges were enraged by the jurors' response and imprisoned them until they would pay a fine of £1,000 each (£2,000 for the three 'ringleaders').⁸³ It therefore seems unlikely that the jurors were being dishonest in their description of their own consciences: they stood to gain nothing by doing so. Conscience,

⁸² *Trial of Sir Nicholas Throckmorton* (n 80), 901.

⁸³ This fine was eventually lowered to the still significant sum of £220 for those who had the money and £60 for those who did not. The jurors lost their liberty on April 17th 1554, and the last of their number was not released until December 21st. *Trial of Sir Nicholas Throckmorton* (n 80), 901-902.

for the jurors in this trial if not for the defendant, was about true knowledge: ‘consciring’ with one another. It was not a question of abstract moral rules pitted against an unjust domestic legality.

In this section, I have not been attempting to argue that there was a decisive move, carried out in England during the sixteenth century, towards a conscience of morality, away from a conscience of facts. Rather, my intention has simply been to demonstrate the changing, conflicting nature of the word ‘conscience’ in the centuries before the appearance of the modern ‘verdict according to conscience’, tied to the jury’s general verdict, during the seventeenth and eighteenth centuries. Throckmorton’s trial in the mid-sixteenth century exemplifies these shifting concepts of conscientious behaviour, and is therefore of direct relevance to my argument. But my purpose in all this, as with this chapter generally, is not to exhaustively survey the possible meanings of the phrase ‘verdict according to (or, indeed, ‘against’) conscience’; rather, it is to create a problematized preamble to my argument in the later chapters of this thesis. My aim, in this section, has been to suggest that one reason why we should not be happy with simply asserting that the general verdict guarantees a defendant the possibility (for good or for bad) of a verdict according to conscience is that ‘conscience’ is not a single, unchanging thing. What this means in practice will have to wait until the later chapters, specifically chapter three, where this theme will be taken up again in a different historical setting.

2.3: General and Special Verdicts in Medieval Law

One of the most significant claims often made regarding the basis of jury power is that, as Lord Devlin once put it, “The freedom of thought given by the general verdict is of the

essence of the jury system.”⁸⁴ Or, in Cornish’s slightly different words, considering the desirability of compelling juries to explain their decisions:

While it might be possible to require special verdicts from criminal juries to ensure that they do consider each legal aspect of the case, it would be impracticable to require a reasoned judgment from them. In any case, to take either step would reduce the special value of the inscrutable verdict: that the jury may avoid the consequence of a strict application of the law, if it wishes to do so. This is surely a characteristic which is bound to last as long as the jury system itself – once the inscrutability principle has gone, the time has come to set up another kind of tribunal.⁸⁵

So the general verdict is presented as an inherent part of trial by jury, and the ‘freedom of thought’ which it guarantees is also fundamental. But what is the historical basis of this meshing together of ideas?

Lord Devlin’s statement, which describes jury independence through jury secrecy as ‘the essence of the jury system’, was made at the end of a discussion about *The Dean of St. Asaph’s Case*.⁸⁶ a late-eighteenth century case which dealt among other things with the question of whether the jury’s capacity to act against the law should be understood as a power or as a right. Ultimately the dispute before the courts became moot, however, as parliament declared in 1792 that the common law had always provided juries with a right to decide both law and fact.⁸⁷ While the precise nature of the dispute was not simply that of parliamentarians favouring the free general verdict, with judges preferring more tightly controlled special verdicts, there were by the end of the eighteenth century many people

⁸⁴ P Devlin, ‘The Power without the Right’ in P Devlin, *The Judge* (OUP 1979), 148.

⁸⁵ WR Cornish, *The Jury* (Penguin 1971), 281.

⁸⁶ *R v Shipley* [A.K.A. *The Dean of St Asaph’s Case*] (1784) 4 Dougl 73; 99 ER 774.

⁸⁷ Libel Act 1792.

who held this exclusionary perspective on the general verdict.⁸⁸ Over a century earlier, pamphleteers writing during the English Restoration (1660-1688) had pointed to the uncontrollable nature of the general verdict-giving jury, and cited this as proof that it was the juryman's duty to reach his verdict independently of the judge's opinion on the proper outcome of a case.⁸⁹ But the purpose of a genealogy is not to memorialise: it is to hypothetically denounce self-evident foundations in order to understand how they came to seem so natural. So how did the exclusionary thesis of jury power, which links together as 'natural' the freedom of the jury and the general verdict, first come about? In chapter three I shall argue that it arose during the second half of the seventeenth century; but my contention is that the exclusionary models of jury power were a *reinterpretation* of earlier medieval practices, not a bald invention.

As we have already seen, jury trial emerged as the means of determining ultimate questions of guilt or innocence (as opposed to simply 'presenting' suspected criminals) at the turn of the thirteenth century, and by the early 1220s it seems to have been reasonably well established.⁹⁰ Which raises the question: why? Why were the judges so keen on the jury, rather than developing, as continental jurists did, an embryonic 'inquisitorial' mode of trial, with the judge at its centre? Whitman, analysing this question, has argued that the difference between continental systems and the common law should not be understood as centring around the question: who judges? Rather, he suggests, we

⁸⁸ See generally chapter four.

⁸⁹ See generally chapter five.

⁹⁰ In the following discussion of the medieval special and general verdict, I rely heavily upon the secondary literature. I am forced to do this by the fact that my Latin is not good enough for me to turn to the primary sources, most of which (at least with respect to the relevant case law) have never been translated into English.

should focus on how small the judge's role is in each system. For Langbein, the common law has never properly developed its concept of the judge, and it is the presence of the jury which has largely caused this difficulty. Trial by judge and jury, he contends, creates a "bifurcation of the trial court".⁹¹ He argues that:

By isolating the judge from the work of fact-finding, the English common law emerged with a stunted or impoverished concept of the judicial function. A judge who is kept away from fact-finding is so remote from the core function of adjudication that he is only peripherally responsible for the court's decision.⁹²

In fact, Whitman argues, the continental judges' reliance on witnesses, forced confessions, etc. were just as much about keeping the judge 'only peripherally responsible for the court's decision' as was the development of trial by jury. The judges after 1215, in England as on the continent, wanted to avoid the extra responsibility placed on them by the end of the ordeals. The witness-focused continental trial and the jury-focused English trial were, Whitman contends, simply different means to the common end of limiting judicial responsibility.⁹³

After a thousand-year development, Whitman explains, by the turn of the thirteenth century the Christian theology of judgment had two distinct, but related forms. On the one hand, there was the theology of pollution, in which a judge becomes tainted when they order any blood punishment: not only execution, but also judicially-sanctioned

⁹¹ JH Langbein, 'Bifurcation and the Bench: The influence of the jury on English conceptions of the judiciary' in P Brand and J Getzler, *Judges and Judging in the History of the Common Law and Civil Law: From antiquity to modern times* (CUP 2012), 68. I appreciate that this is an unexceptional statement for an evidence scholar to make. My interest lies in the fact that Langbein claims this bifurcation accounts for what he considers the impoverished concept of the judge in the common law world.

⁹² Ibid, 78.

⁹³ Whitman (n 46), 91-157.

maimings. On the other hand, there was an Augustinian “distinction between ‘murderers,’ ... and soldiers and judges ... The great difference was that judges, like soldiers, followed ‘the law’ and acted without ‘passion.’”⁹⁴ The 1215 ban on clerical participation in the ordeals, Whitman maintains, was clearly couched in the language of pollution;⁹⁵ and while judges could not completely wash their hands of the messy business of judging, the problem still remained of ensuring that they acted only as the law demanded, without passion or prejudice.⁹⁶ It was, therefore, essential to find some method of distancing the judge from the problematic task of judging: of doing anything more than applying the law. The ordeals obviously helped to resolve this difficulty; but their abolition caused a crisis in the legitimacy of judgment. “Where [under the ordeal] at least some of the burden of judgment had been shifted to God, it now fell to two classes of human actors: witnesses and judges.”⁹⁷ On the continent, witness testimony became the favoured means of protecting the judge’s soul;⁹⁸ while in England the jury was promoted to this role.⁹⁹

Seen in this light, it is possible to reassess the seemingly self-evident link between jury power and the general verdict. Exclusionary models of jury power presume that juries will *want* to take on the responsibility of judging, wresting it away from the judge, who will want above all to retain control of the outcome of the trial. The 1792 Libel Act, for

⁹⁴ Ibid, 46.

⁹⁵ Ibid, 48-49.

⁹⁶ See the discussion of imagery connected to the difficulties involved in judging in J Resnik and DE Curtis, ‘Representing Justice: From Renaissance Iconography to Twenty-First-Century Courthouses’ (2007) 151(2) *Proceedings of the American Philosophical Society* 139, 153-164.

⁹⁷ Ibid, 90.

⁹⁸ Ibid, 91-124.

⁹⁹ Ibid, 125-57.

example, shows how the jury's right to answer the whole question of guilt or innocence was historically regarded as an important political freedom; and this could hardly be so if juries had no intention of using the freedom. Whitman's work on the Christian theology of judgment, however, suggests that this quest for jurisdictional power may not be absolute: for whoever has the power of ultimately deciding a case, particularly a criminal case, also has the spiritually difficult responsibility of judging. As one legal historian noted almost a century ago (albeit with a focus less on moral doubts and more on the threat of the harsh punishments which could be meted out to judges or jurors found to have delivered a false judgment or a false verdict):

Under these circumstances, there was little temptation on the part of the justices to encroach upon the province of the jurors. On the contrary, the evidence is clear that the contest between the justices and the jurors was not one for the enlargement of jurisdiction but for the evasion of responsibility.¹⁰⁰

If the task of judging was an onerous responsibility, to be avoided wherever possible, then the usual image of the general verdict must be modified. Even if, for us, the general verdict signifies and guarantees the independence of the jury from the draconian meddlings of biased (or simply case-hardened) judges, the picture must change inasmuch as we can understand this freedom's historical significance.

Before 1215, priests presided over ordeals of fire and water, and the only things a judge had to do in the trial were to generally oversee proceedings and to specify the punishment

¹⁰⁰ EM Morgan, 'A Brief History of Special Verdicts and Special Interrogatories' (1923) 32 Yale LJ 575, 586.

decreed in the abstract by a law and in the particular case by a divine sign.¹⁰¹ In 1215, as we have already seen, the Church banned clerical participation in the ordeals and the system quickly crumbled, replaced in England by the newly-promoted jury. But juries, unlike divine signs, were also people, and so shared with the judges a desire not to take on the whole responsibility for the case. The general verdict appealed to the judges, because it required juries to take on all of the moral (spiritual) responsibility for the verdict. What seems to have appealed more to juries is the ‘special’ verdict, in which the jury explains what happened in the case and leaves it to the judge to say ‘well, in that case the prisoner is guilty (or not guilty)’.¹⁰² So theological concerns led judges to prefer the general verdict, and led juries to prefer the special verdict; and in 1285 Parliament legislated to the effect that judges could not compel juries to give general verdicts. The statute said that a jury might safely deliver a general verdict when they do not “require aid of the justices”, and warned that such a verdict “shall be admitted at their own peril”.¹⁰³

In fact, the special verdict provisions of the 1285 statute only applied to a very small class of cases; but during the following centuries the jury won the right to deliver a general verdict in virtually all cases.¹⁰⁴ In 1642, Sir Edward Coke described the limited nature of the 1285 statute as giving only “an example” of what “the jurors might doe at the common

¹⁰¹ The major task of the judge at this time seems to have been in determining the proof to be employed in a particular case, rather than actively participating in the ‘trial’ itself: see the discussion of the common modes of proof in Bartlett (n 7), 24-33.

¹⁰² Morgan (n 100). See also Whitman (n 46), 154-156.

¹⁰³ Reprinted in Latin in E Coke, *The Second Part of the Institutes of the Lawes of England* (M Flesher and R Young, London 1642, 421-422. (EEBO images 60936:218, 60936:219).

¹⁰⁴ Morgan (n 100). See also Whitman (n 46), 154-156.

law”, explaining that the general verdict is also possible “in pleas of the crown at the king’s suit”.¹⁰⁵ Although two decades later Justice Kelyng, presiding over a case of copper-stealing, insisted that “it would be dishonourable for the Court in so plain a case as this, to suffer the jury to find a special verdict”.¹⁰⁶ Special verdicts, while usually permitted in theory, never seem to have become the most common form of verdict.

The struggles of the medieval juries turn the usual story of the general verdict on its head. The unfolding freedom of a jury system gradually conceded the right to act ‘according to conscience’ – through the protection of its right to deliver a general verdict – is largely a modern story, and cannot be read back into the medieval law. For medieval jurors, the problem seems to have been precisely the opposite of that told by exclusionary accounts of jury power: the problem was not how to ensure that they *could* give a general verdict, but rather how to ensure that they *didn’t have to*. But while the story of jury power is either absent or inverted during this period, even here the general verdict does seem to have been understood in an exclusionary sense. The reason why the choice between general and special verdicts was so important to medieval judges and juries was that the general verdict was seen as separating the two ‘judicial’ bodies. Judges wanted as much responsibility as possible to fall at the jurors’ feet, and the general verdict was seen as a useful device with which to achieve this aim. Similarly, jurors wanted to give special verdicts because this would relieve them of some of the responsibility, bringing the judge’s soul into the picture. So from the very beginning it seems that the special verdict was seen to guarantee that the outcome of the trial was a cooperative endeavour; and that

¹⁰⁵ Coke, *Second Part of the Institutes*, 425-426 (EEBO images 60936:220, 60936:221).

¹⁰⁶ *R v Joyner* (1664) *Kelyng* 29; 84 ER 1067, 29-30; 1067.

the general verdict was seen as a means of absolutely splitting judge and jury. This description of general verdicts is clearly ‘exclusionary’. The difference is that, unlike in the later model of the ‘verdict according to conscience’, this exclusion is not emancipatory: rather, it is a terrifying bind.

2.4: Conclusions

This chapter has not been about the origins of jury trial but, rather, it has looked in outline at the relationship between jury independence and the general verdict in the pre-modern English criminal trial. Its focus has been ‘pre-modern’ in the sense that it serves mainly as a prelude to the discussion, in chapters three to six, of the various ways in which jury independence has been conceived of since the start of the seventeenth century. In this sense, the present chapter has served as a pre-history of the modern accounts detailed in the rest of this thesis.

At the time of the jury’s emergence as the ultimate arbiter of guilt and innocence in criminal trials, the relationship between judge and jury was not entirely the antagonistic one described by exclusionary accounts of jury power; and this conclusion has been reached from two sides. On the one hand the distinction between law and custom, while not entirely absent, lacked the tight boundaries which would have been required in order to place judge and jury in opposition to one another on grounds of the legitimacy of the criminal law. Rather, judges seem to have accepted as legitimate the role of local custom in determining the ‘legal’ rules involved in a particular dispute. On the other hand, it also appears that the particular struggle which did exist between judge and jury did not typically take the form of a struggle *for* jurisdiction. Rather, each side was concerned to

shift as much responsibility for the verdict as they could. And jurors, far from resisting the judge's presence (insisting on delivering an 'independent' verdict), seem instead to have been keen to involve the judge in the task of verdict-formation, struggling for the right to deliver a special verdict. But none of this should be taken to imply that the judges were not also a source of fear: the abandonment of Gwedna, for example, shows that the king's law could be a source of terror. What it does mean is that the justices were not entirely in control, and nor did they want to be: a mutual fear of responsibility prevented the total separation of the tasks of judge and jury, making an exclusionary model of jury power difficult to find in the pre-modern trial.

But it is not only the form of the law which means that an exclusionary model of jury power cannot be found in pre-modern accounts of jury trial. In addition, there is the question of conscience. The idea of the 'verdict according to conscience' is a common way of describing an opposition between the legal requirements of the judge and the moral sense of the jury; but this moral refusal to act has not always been the exclusive meaning of the word 'conscience'. As well as this, there is also the sense of conscience as true knowledge, covered today by the English word 'consciousness' (which incidentally translates into modern French as *conscience*). So while it was possible at the turn of the twenty-first century for an English judge to complain that juries were finding according to their consciences rather than the evidence, for the medieval jurists who complained about jurors' consciences this distinction was not what they meant to suggest. Rather, they felt, juries too often found *against* their consciences by deciding against the evidence. And as late as the mid-sixteenth century a jury could insist that their unexpected

acquittal had been a verdict of conscience in the sense of a verdict *according to the evidence*.

By arguing that pre-modern juries often wanted to include the judge in their task of verdict-formation, and that the ‘verdict according to conscience’ did not imply for the medieval jurists a refusal to follow unjust laws, I do not mean to suggest that the exclusionary vision of jury power which was first described during the second half of the seventeenth century was a bald invention. The judges’ desire to limit juries to general verdicts was predicated on the idea that, by answering ‘guilty’ or ‘not guilty’, the jury could take on the whole responsibility for the case; and as late as the English Restoration a judge could state that it was beneath the dignity of the court to permit the jury to deliver a special verdict in a relatively straightforward case. Whether for reasons of limiting spiritual danger or of preserving the court’s dignity, the idea that the general verdict puts a firm barrier between the judge and the jury’s verdict is a very old claim. In this sense, jury independence and the general verdict seem to have been associated for almost as long as juries have been giving conclusive verdicts. But this is very different to the claim that this separation is either desirable or an important base of political freedom. Prior to the middle of the seventeenth century, these ideas of the proper function of jury trial did not exist in any systematic way.

CHAPTER 3: CONSCIENTIOUS JUDGMENT AND JUROR INDEPENDENCE IN SEVENTEENTH CENTURY ENGLAND¹

Ever since November 1670, when Chief Justice John Vaughan delivered his famous opinion in *Bushell's Case*, the bravery of William Bushel and his fellow jurors has occupied a central place in the mythology of jury trial. *Bushell's Case* itself concerned the capacity of the courts to fine and imprison jurors for returning the 'wrong' verdict. Vaughan refused to accept that it would be possible, in any but the most extreme of cases, to understand why a jury had reached the verdict it had, and so he effectively outlawed the practice of punishing conscientiously disobedient jurors. The jury, so the legend goes, was from this point unimpeded in its task of preventing unjust prosecutions from succeeding.

In recent decades, however, legal historians have started to downplay the significance of the case. Langbein, for example, has explained that Vaughan's opinion had little practical significance at the time, for the common law judges still dominated their juries: "there was for so many decades afterwards so little trace of jury autonomy... *Bushell's Case* did indeed become a landmark in expanding the province of the jury, but not for about a

¹ The following publication is based on this chapter: K. Crosby, '*Bushell's Case* and the Juror's Soul' (2012) 33 J Leg Hist 279.

century after it was decided.”² Green, writing in his classic history of jury trial, has asserted that “Vaughan’s opinion is remarkable for how little it addressed the most volatile issues of the day”,³ by which he means the questions of whether juries may find the law independently from the findings of the judge, and of whether the judge may coerce the jury into reaching a particular verdict.

In this chapter, I shall argue that *Bushell’s Case* should not be understood as being irrelevant to later seventeenth-century debates about jury trial. The volatile issues to which Green refers are at the heart of Vaughan’s judgment; and so to write the case off as immediately irrelevant, as Langbein does, misses the significance of *Bushell’s Case* as part of a wider event in which juries begin to be thought of in a new way. Indeed, as Stern has recently shown, even the American revolutionary use of Vaughan’s decision (alluded to by Langbein) has a history which stretches back at least to the first publication of the decision in 1674.⁴ In fact, the significance of the case seems to have been more immediately appreciated by some observers than even Stern’s account would suggest: a newsletter account written a week after *Bushell’s Case* was decided describes Vaughan CJ’s judgment as “business of great concernment and much talked of”.⁵ My concern here is to rehabilitate *Bushell’s Case* within its broader context, in which the freedom of a jury

² JH Langbein, ‘The Criminal Trial Before the Lawyers’, (1978) 45 U Chi L Rev 263, 297-98. See also JH Langbein, *The Origins of Adversary Criminal Trial* (OUP 2003), 324 n 346.

³ TA Green, *Verdict According to Conscience: Perspectives on the English criminal trial jury 1200-1800* (University of Chicago Press 1985), 239.

⁴ S Stern, ‘Between Local Knowledge and National Politics: Debating rationales for jury nullification after *Bushell’s Case*’ (2001-2002) 111Yale LJ 1815.

⁵ Anon, ‘Newsletter account of the case of Edward Bushell, 1670-1671’ in A Browning ed, *English Historical Documents*, vol 8: 1660-1714 (Eyre and Spottiswoode 1953), 86. The printed version of the newsletter in *English Historical Documents* is dated November 1671. I assume that this is a mistake, and that the newsletter (which refers to *Bushell’s Case* as a decision handed down a week earlier) is actually from November 1670.

to return a ‘verdict according to conscience’, untouched by pressures coming either from the bench or from the sovereign, is treated as a necessary condition of jury trial. In short, my contention is that situating *Bushell’s Case* within its wider discursive setting means reading it as part of a broader event in which people started to conceive of jury trial in the way described by what I am calling the exclusionary thesis of jury power.

In its legendary guise, Vaughan’s famous opinion in the Court of Common Pleas is generally reduced to a statement of resistance. But it is more than that: it is also a statement of who it is that is doing the resisting. Even if, following *Bushell’s Case*, the courts still bullied their juries, something had changed nonetheless. For where previously the jury had been postulated as an element external to the law – and therefore an element of little consequence in an account of legal judgment – by the end of the seventeenth century this exteriority was being put forward both as a cause and as a justification of the jury’s ideal independence. This is the start of the exclusionary accounts of jury power.

3.1: *Bushell’s Case*, Conscience and Synderesis

On the morning of 14 August 1670, William Penn led a crowd of between three and five hundred Quakers in worship outside their usual meeting place (which the authorities had shut down) in Grace-Church (or Gracious) Street, London. Penn and his associate William Mead were charged with ‘unlawfully and tumultuously’ assembling ‘to preach and speak’:

[B]y reason whereof a great concourse and tumult of people in the street aforesaid, then and there, along time did remain and continue, in contempt of the said lord the king, and of his law; to the great disturbance of his peace; to the great terror and disturbance of many of his liege people and subjects, to

the ill example of all others in the like case offenders, and against the peace of the said lord the king, his crown and dignity.⁶

Their trial at the Old Bailey began on 1 September that year, and by the end of 3 September the jury was ready to return their verdict. They attempted to acquit the two men; but this was vigorously resisted by the bench, who kept the jurors in court to reconsider until, on 5th September, the jury's 'not guilty' verdicts for both defendants were finally accepted. The jurors were immediately imprisoned for contempt of court, having allegedly found against both plain evidence and the direction of the court. One of the jurors, Edward Bushel,⁷ refused to pay the fine required for his release; and finally, on 9th November, a writ of habeas corpus was issued from the Court of Common Pleas. What followed was the decision in *Bushell's Case*.⁸

Chief Justice Vaughan was not impressed by the argument that a judge could punish a jury for finding against the evidence, for the jury, he held, might have private knowledge unknown to the court.⁹ Stern has called this idea "completely implausible";¹⁰ and Langbein has described it as "dishonest nonsense";¹¹ but, as Whitman has emphasised, "the immense impact [*Bushell's Case*] had on its contemporaries" must suggest that this argument was not as ridiculous as some legal historians have recently supposed it to be.¹²

⁶ 'The Trial of William Penn and William Mead, at the Old Bailey, for a Tumultuous Assembly' (1660) 6 *Cobbett's State Trials*, col. 955

⁷ While the Case is recorded with two 'l's in the juror's surname, throughout the report of the case he is referred to as 'Bushel'.

⁸ *Bushell's Case* (1670) 124 ER 1006; Vaughan 135. For a more detailed reading of the text of *Bushell's Case* than what follows, see Crosby (n 1).

⁹ *Bushell's Case* (n 8), 147.

¹⁰ Stern (n 4), 1816.

¹¹ Langbein (n 2: 1978), 298. This point is reiterated in Langbein (n 2: 2003), at 323-324, n.346..

¹² JQ Whitman, *The Origins of Reasonable Doubt: theological roots of the criminal trial* (Yale UP 2008), 177-78.

But this was not all Vaughan had to say about the factual side of the case: as well as being interested in judicial access to the evidence available to the jury, he was also concerned to explore what the jurors do with this information in coming to a factual conclusion.

Vaughan explicitly made this distinction:

And by the way I must here note, that the verdict of a jury, and evidence of a witness are very different things, in the truth and falsehood of them: a witness swears but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses. But a jury-man swears to what he can infer and conclude from the testimony of such witnesses, by the act and force of his understanding, to be the fact inquired after, which differs nothing in the reason, though much in the punishment, from what a Judge, out of various cases consider'd by him, infers to be the law in the question before him.¹³

So when Vaughan spoke about the jury's fact-finding role, he was not only talking about the collection of evidence. Judicial punishment was only possible after *Bushell's Case* provided it could be demonstrated that a juror had acted *dishonestly*, and this focus on honesty opens up the possibility that conscience might be conceived of as a positive, constructive element in the jury's task: essentially, a true verdict would be one which is delivered honestly, according to the reason of the jurors. As Vaughan put it:

I would know whether any thing 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: Is any thing more known than that the same author, and place in that author, is forcibly urg'd to maintain contrary conclusions, and the decision hard, which is in the right? Is any thing more frequent in the controversies of religion, than to press the same text for opposite tenents? How then comes it to pass that two persons may not apprehend with reason and honesty, what a witness, or many, say, to prove in the understanding of one plainly one thing, but in the apprehension of the other, clearly the contrary thing: must therefore one of these merit fine and

¹³ *Bushell's Case* (n 8), 142.

imprisonment, because he doth that which he cannot otherwise do, preserving his oath and integrity? And this often is the case of the Judge and jury.¹⁴

Related to this is one of the most famous passages in the case: “A man cannot see by anothers eye, nor hear by anothers ear, no more can a man conclude or infer the thing to be resolv’d by anothers understanding or reasoning”.¹⁵ For Vaughan, the jury’s continuing existence as a bona fide participant in the criminal trial was dependent upon a severing of the coercive contact between judge and jury, but it also depended upon the jury reaching its decisions honestly. Even if the jurors only listen to the officially-sanctioned evidence presented at trial, they must hear by their own ears, and each must be individually satisfied, for their own reasons, by the general verdict they all give together: “...if they all agree to give their issue for the plaintiff or defendant, they may differ in the motives wherefore, as well as Judges, in giving judgment for the plaintiff or defendant, may differ in the reasons wherefore they give that judgment, which is very ordinary”.¹⁶ It is of no consequence whether a judge disagrees with a jury, or a juror disagrees with a juror: all that matters is that a verdict is reached, and that it is reached honestly; and if a judge cannot prove bad faith, he cannot expose a juror to punishment.

Turning to the question of a jury verdict delivered against the law, Vaughan stated that it would only be possible for the jury to find against the law if the judge had already supplied the jury with an authoritative statement of the law as it applied to the facts of the case; and that this in turn was only possible if the factual question had already been resolved. On this model, there are two circumstances in which the jury might be said to have found

¹⁴ Ibid, 141-142.

¹⁵ Ibid, 148.

¹⁶ Ibid, 150.

against the law: either the judge has already resolved the factual question, or the jury has done so. In the first case, there is no point in continuing with the practice of jury trial, as the judge has effective control over all aspects of the case:

For if the judge, from the evidence, shall by his own judgment first resolve upon any tryal what the fact is, and so knowing the fact, shall then resolve what the law is, and order the jury to find penally accordingly, what either necessary or convenient use can be fancied of juries, or to continue tryals by them at all?¹⁷

This argument places Vaughan's decision firmly within the new image of the jury explored in section three, below: one which, in a perfectly circular way, regards jury independence as a necessary condition of 'true' (and therefore independent) jury trial. Alternatively, the jury may – as in a 'special' verdict¹⁸ – have already supplied the judge with a finding on the facts, in which case it would be possible for the judge to authoritatively resolve the legal question. But as we shall see, Vaughan did not consider the special verdict to be the paradigmatic form of jury decision; and, as I shall argue in section two, the choice of which type of verdict should be considered 'normal' had important consequences for the meaning of the phrase 'trial by jury'.

Vaughan suggested that it was 'ordinary', if the jury finds unexpectedly, for the judge (presumably before accepting the verdict) to ask them for the basis of their decision. If their factual conclusions suggest a different outcome to the one recorded in their verdict, the judge may direct them so, "and thereupon they rectifie their verdict".¹⁹ This passage was seized upon a little over a century later by Crown counsel in *The Dean of St. Asaph's*

¹⁷ Ibid, 143.

¹⁸ On general and special verdicts generally, see chapter 1, n 12, and associated text.

¹⁹ *Bushell's Case* (n 8), 144.

Case,²⁰ who emphasised the apparent lack of dissonance between *Bushell's Case* and judicial requests for clarifications from the jury regarding the reasons for their decision. What Crown counsel overlooked was the following, somewhat later passage, partially cited above in connection with the assessment of evidence:

The legal verdict of the jury to be recorded, is finding for the plaintiff or defendant, what they answer, if asked to questions concerning some particular fact, is not of their verdict essentially, nor are they bound to agree in such particulars; if they all agree to find their issue for the plaintiff or defendant, they may differ in the motives wherefore, as well as Judges, in giving judgment for the plaintiff or defendant, may differ in the reasons wherefore they give that judgment, which is very ordinary.²¹

While Vaughan was in principle happy for judges to ask juries for additional information regarding the reasons for their decision, he made a point of distinguishing between these 'reasons', which may legitimately differ from juror to juror, and the final verdict of 'guilty' or 'not guilty'. In *Bushell's Case* he emphasised that the verdict, while 'unanimous', may in fact conceal several mutually exclusive reasons for the finding among the twelve jurors. So the general verdict is treated as the ideal, typical form of jury speech, largely for reasons of cognitive relativity.²²

Vaughan specified that if the jury is to continue as an institution, and if the jury is expected to return a general verdict of 'guilty' or 'not guilty', the judge may not give any more than hypothetical legal advice to the jury:

²⁰ *R v Shipley* [A.K.A. *The Dean of St Asaph's Case*] (1784) 4 Dougl 73; 99 ER 774, 787.

²¹ *Bushell's Case* (n 8), 150.

²² In Crosby (n 1), 289-290, I briefly explored the possibility that Vaughan also preferred general verdicts because of the difficulty a judge might face when attempting to draw legal conclusions from special verdicts which, in giving a purely factual answer to the case, did not necessarily find legally-relevant facts. See *Rowe v Huntington* (1669) 124 ER 973; Vaughan 66.

Therefore alwaies in discreet and lawful assistance of the jury, the Judge his direction is hypothetical, and upon supposition, and not positive, and upon coercion, viz. if you find the fact thus (leaving it to them what to find) then you are to find for the plaintiff; but if you find the fact thus, then it is for the defendant.²³

Vaughan informed the gaoler that his implied claim – that Penn and Mead’s jury could possibly have found against a legal declaration made in isolation from any judgment on the facts – was just a “vail and colour of words, which make a shew of being something, and in truth are nothing”.²⁴ The relevant law, Vaughan argued, can never be authoritatively stated before the facts of the case are definitively known, and in a general verdict the resolution of the factual question happens at the final (i.e. the verdict-forming) stage.

So in *Bushell’s Case* the general verdict is prioritised, largely for reasons of cognitive relativity; and judicial punishment will therefore only be possible if it can be demonstrated not simply that the jury was wrong, but crucially that the jurors were individually dishonest. The inverse of this judicial limitation is the positive claim that a true verdict must be delivered with honesty, and this raises further questions of the juryman’s conscience. Whitman’s recent work on the theology of the criminal trial treats conscience as a bar to judgment, a thing which must be overcome before a judge or a jury can reach a decision.²⁵ But to understand what an honest verdict in Vaughan’s sense might

²³ *Bushell’s Case* (n 8), 144.

²⁴ *Ibid*, 143.

²⁵ See in particular Whitman (n 12), 186-200, where Whitman argues that the ‘reasonable doubt’ rule was engineered as a way of getting around the difficult problem of jurors’ consciences.

entail, we need an understanding of how conscience might be used in a positive, constructive sense.

Klinck, in his recent book on the Court of Chancery, presents conscience as a constructive element in acts of judgment. He argues that throughout the seventeenth century the basic syllogistic logic of conscience derived from synderesis (and given its classic exposition by Christopher St German during the previous century) was maintained;²⁶ but that the operation of each of its three parts underwent significant change. While the moral truths revealed through synderesis were still in principle objective, a growing focus on probability brought into question man's ability to grasp these truths.²⁷ The law of reason, to borrow from St German, was darkened but not necessarily changed, and for some this made the turn to authority all the more important: "conscience might be informed by resort to 'any faculty or science...because whatever can guide the actions or discourses...does belong to conscience and its measures'".²⁸ But in light of the Reformation these authorities are increasingly difficult to find: "Not only is there diversity of readers of the text, but the meaning of the text is to be measured in terms of some kind of implicit rationality... There may be one rule of conscience, but that rule may potentially be as protean as are readers of the text."²⁹ The individuality of conscientious judgment was also emphasised by writers who noted that the facts which reason applies to those truths revealed by synderesis may only be accessible to God and the individual

²⁶ On synderesis, see chapter 2.2.

²⁷ DR Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate 2010), 184-88.

²⁸ Ibid, 187. Quoting J Taylor, *Ductor Dubitantium*, in A Taylor ed, *The Whole Works of the Right Rev Jeremy Taylor DD*, vol 9 (London 1883), xv.

²⁹ Klinck (n 27), 193.

whose actions are in question (we are not very far here from Lewis' *consciring* of the internal witness).³⁰ A further development relevant to the present discussion is the growing split between the public and the private conscience:³¹

The observation that the conscience has to do with inward things and that civil magistrature is concerned only with the "outward man" can cut both ways. On the one hand, it suggests that the civil authority should not meddle with inward matters and therefore should not encroach on conscience. On the other hand, because it postulates an incapacity of the civil power to reach conscience, it can lead to the argument that a person may be made to conform outwardly, even in matters of religious observance, but nevertheless maintain an inward integrity. Again, the tendency would be deeply to internalize conscience.³²

And so while each of the elements of classical synderesis-led conscience were still present, by the end of the century every component of the syllogism of conscientious judgment had been radically reconstituted as a subjective matter. This raises questions of the continuing justiciability of questions of conscience, questions which Klinck largely answers in the context of Chancery jurisdiction by emphasising the almost unique (if tentative and perhaps temporary) survival of the objectivist notion of conscience among lawyers.³³ But the main thrust of Klinck's argument is that, for non-lawyers, the previous objectivity of acts of conscience was being replaced at this time by a more individualistic understanding of the term.

In *Doctor and Student*, St German was very clear that the conscientious juror must in most instances defer to the judge regarding what it is that the abstract laws of reason

³⁰ Ibid, 199-201. On *consciring*, see chapter 2.2.

³¹ Ibid, 207-216.

³² Ibid, 212.

³³ Ibid, 219-273.

require. And this makes sense, for on his account the laws of England and the laws of reason are closely bound together, and the common law judge holds authoritative knowledge about both these sets of laws. Explaining the basis of the common law in custom recognised at the national level, the student explains that “it shall alway be determyned by the Iustyces whether there be any suche law or generall custome as alleged, or not/ and not by .xii. men”.³⁴ Similarly, that “which is a maxyme/ & whiche not shall alway be determyned by the Juges...and not by .xii. men.”³⁵ Slightly different is the case of purely local customs, such as the unusual inheritance procedures followed in Kent, Nottingham and London:

yf it ryse in questyon between parties in the kynges courtes whether there be any such partyculer custome or not/ it shal be tryed by .xii. men whether there is such a custom or not/ & not by the Iugis ... except a few occasions when the same partyculer custome be of recorde knowne and approved in the same courte.³⁶

The difference in St German’s account, between those cases in which the major premise in the syllogism of conscientious judgment must be left to the judge and those in which it must be left to the jury, is explicable by reference to the means of committing an error discussed in chapter two.³⁷ What unites these seven ways of judging against conscience is that the person committing the error is not the kind of person who can be expected to have access to the major premise. Pride, for instance, stops a person seeking help from one who is well placed to know what natural reason, human law, etc. says about a particular matter; while a person with an idiosyncratic will places their own private

³⁴ TFT Plucknett and JL Barton eds, *St German’s Doctor and Student*, SS vol 91, 47.

³⁵ Ibid, 59.

³⁶ Ibid, 71.

³⁷ See text at n 74, in chapter 2.

inclinations before the wisdom of an objective moral law. In *Bushell's Case*, Vaughan at no point suggests that the jurors are the proper judges of the law. In this sense Vaughan, as a judge, holds on to traditional notions of objectively knowable rules of conduct.

There is little discussion in *Doctor and Student* about the collection of facts: facts are simply postulated as already established, inertly waiting for an act of conscientious judgment to bring them into action. Even when St German speaks of judicial errors – for example “defaute in knowynge of the trouthe of suche a lawe/ or in the applyenge of the same to any particular acte then therupon followeth an errour”³⁸ – he seems to be referring either to knowledge of the laws (either of reason or of man), or to the act of reason which applies these laws to the already-known facts.³⁹ In Vaughan’s famous decision, on the other hand, knowledge of the facts was a live issue. Crucially for the present discussion, Vaughan emphasised that full consciousness of the knowledge held by the jurors could be had only by these jurors themselves: they were, in Lewis’ sense, *consciring* with one another (rather than with the deity). This is still a question of conscience, but not entirely in the sense discussed below in section three. It is, perhaps, more a question of what we would now call consciousness than what we would consider a ‘conscientious’ action. Indeed, in Bushel et al’s own petition to the House of Commons it is this aspect of conscientious judgment which was emphasised.⁴⁰ Clearly, even in the late seventeenth

³⁸ Plucknett and Barton (n 34), 91.

³⁹ See Klinck (n 27), at 55.

⁴⁰ Anon, ‘The Case of Edward Bushel, John Hammond, Charles Milson and John Bailly, Citizens and Free-Men of London, stated, and Humbly Presented to the Honourable House of Commons Assembled in Parliament’ (1670) (EEBO image 104287). However the participants in the wider debate on the true nature of jury trial saw things, the jurors themselves appear, like Throckmorton’s jurors a century earlier, to have understood conscience in a fact-based way.

century, the idea that conscience is about acting according to the available evidence had not entirely disappeared.

The aspect of the synderesis-syllogism which really allows *Bushell's Case* to be seen in the context of the later seventeenth-century experience of conscience explored by Klinck is reason, the active part of conscience which moves from an abstract principle of right, through a specific set of facts, and then on to the final conscientious judgment. It is in Vaughan's treatment of the reason of the jury that we see the kind of subjective individualism which seems to have typified the movement of conscience from a workable juristic idea to a vague sense that one is doing the right thing. Just as lawyers, despite their authoritative texts, can legitimately disagree regarding the application of the law in a particular case, and just as theologians, despite their authoritative texts, can legitimately disagree about what it is that God wants us to do, so too the jurors, despite the authoritative legal advice given by the judge, may quite legitimately disagree about – to borrow a phrase from contemporary English criminal justice – their routes to verdict.⁴¹ *Bushell's Case* places the decisions of the juror within the realm of public conscience (and therefore into the cognisance of a potentially antagonistic legal system) only on condition that unusually conclusive proofs are available regarding his dishonesty. The other side of this judicial limitation is the positive argument that in order to escape punishment each individual juror must act conscientiously. This positive point is made in many pamphlets published at around the same time that *Bushell's Case* was decided, and this precise mirroring of arguments suggests that when the pamphleteers appropriated

⁴¹ See chapter 6.2.

Vaughan's arguments they were not, in fact, misrepresenting them. *Bushell's Case* is just one part of the general redefining of 'true' jury trial which took place during the English Restoration, a redefining which for the first time defined jury trial (and, crucially, jury independence) in the terms of the exclusion thesis. But to properly understand the nature of this re-reading, we must first understand how jury trial was understood before the Restoration.

3.2: The Jury, the Judge and the Sovereign

In *Bushell's Case* the juror is positively constituted as the bearer of a soul, as someone who cannot be punished for their verdict so long as they act with honesty. The juror is a separate unit, with lines drawn between himself and the formal system of law which might seek to bully him; but why was this necessary? If this was, as I claim, a new way of thinking about the criminal trial jury, then how were criminal trial juries thought of previously? In this section, I shall look at the explanations of jury trial which are given in the writings of Sir Edward Coke and of Thomas Hobbes. Their models of law are conceptual rivals, and in two great arguments – Coke's imagined dressing-down of James I of England, and Hobbes' imagined argument with Coke⁴² – the divisions between the two are drawn. But there are also links, one of which is the idea that the jury has no positive characteristics of its own, and exists only in relation either to the sovereign or to

⁴² Usher emphasises that Coke's brave speech in his own report of *Prohibitions del Roy* (see below) is greatly at odds with the other eyewitness accounts, and probably represented not what Coke actually said in response to a single statement of the king, but rather what he would have liked to have said in response to several statements made over a number of weeks: RG Usher, 'James I and Sir Edward Coke', (1903) 72 Eng Hist Rev 664. And Hobbes' argument with Coke is even less real, Coke having died decades earlier: see J Cropsey, 'Introduction' in T Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England* (J Cropsey ed, University of Chicago Press 1971), 11-15.

the judge. Indeed, even when freed from these restraints by John Lilburne the jury was still not much more than the occupier of a position; although Lilburne did in places hint at what the jury would become later on in the century.

For Coke, legal knowledge was something distinct, something which is not acquired simply by reading legal materials, but which requires instead the development of a specific rationality on the part of the law student. Because legal knowledge is simply a particular type of artificial knowledge, it only seeks independence, and has no designs upon the territories of other knowledges: “Therefore the Judges of the law in matters of difficulty, doe use to conferre with the learned in that Art or Science, whose resolution is requisite to the true understanding of the case in question.”⁴³ And this is the sense in which Coke famously explained that, in a legal judgment, questions of fact are for the jury while questions of law are for the judge:⁴⁴ the jury may be deferred to on factual questions because jurors are the best-qualified people to advise the judge regarding the facts of the case. Coke’s vision of the jury, then, was ‘relational’: it posited a jury which can only be described in terms of its relationship with the Cokean legal expert.

The jury, in Coke, only exists *in relation to* the judge. In *Mackalley’s Case*, decided by all the judges of England in 1611, the jury had returned a verdict that Mackalley was guilty of murder if certain facts constituted the crime. The judges, rejecting objections to

⁴³ E Coke, ‘Part Three of the Reports: Preface’ [1600] in S Sheppard ed, *The Selected Writings of Sir Edward Coke*, Vol.1: Reports (Liberty Fund 2003), 76.

⁴⁴ “[E]t sicut ad quaestionem juris, non respondent juratores, sed judices: sic ad quaestionem facti non respondent judices sed juratores”. E Coke, ‘The First Part of the *Institutes*’ in E Coke, *The Selected Writings and Speeches of Sir Edward Coke*, vol 2 (S Sheppard ed, Liberty Fund 2003) [1628], 725. The editor translates this as “And just as for questions of law the jurors do not answer but the judges; thus as for questions of fact the judges do not answer but the jurors do.” Ibid, 725 (n 4).

this form of the verdict, held that the stated facts did amount to murder, and proceeded to sentence Mackalley.⁴⁵ But the assembled judges did not so much as set eyes upon the jurors: all they had was their factual determination. As Coke's summary put it:

Where the jury doubt, whether the facts proved amount in law to murder, they may find a special verdict, stating the facts as proved, as leaving the inference to the Judges, who may give judgment of death, if they think the offence is murder, though the killing is not found to be felonious.⁴⁶

Once the jury had spoken on the facts, and the judge had spoken on the law, the result followed without further cooperation. Once the jury had performed its task of assisting the judge, the jury melted away into the ether. The jury only existed, in Coke's model, for as long as it was capable of assisting the expert judge.

While Coke's model of law focused on the possibility of an exclusive legal rationality, Hobbes' was concerned more with the enforcement of the sovereign's commands; and this led him to describe jury trial at length both in *Leviathan*⁴⁷ and in his *Dialogue between a philosopher and a student of the common laws of England*.⁴⁸ Hobbes' problem was to account for the fact of legal judgment without conceding any ground to the common lawyers: those, like Coke, who would attempt to draw a complete body of law out of a series of individual judgments. His strategy was to construct a model in which the final judgment is split from the expertise of the lawyer, a model which makes the

⁴⁵ *Mackalley's Case* (1611) 77 ER 828, 9 Co Rep 65b.

⁴⁶ *Ibid.*, 65b.

⁴⁷ T Hobbes, *Leviathan* (CB Macpherson ed, Penguin 1985) [1651].

⁴⁸ T Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England* (J Cropsey ed, University of Chicago Press 1971).

judgment inscrutable and which is therefore no possible part of an exclusive, expert-controlled system.

This was specifically achieved by reconstructing the idea of the ‘judge’, holding that the office is not synonymous with the professional at the bench but is, rather, a status or role which can in principle be occupied by anyone, and which requires no prior knowledge.

As Hobbes explained in *Leviathan*:

The abilities required in a good Interpreter of the Law, that is to say, in a good Judge, are not the same with those of an Advocate; namely the study of the Lawes. For a Judge, as he ought not to take notice of the Fact, from none but the Witnesses; so also he ought to take notice of the Law, from nothing but the Statutes, and Constitutions of the Sovereign, alleged in the pleading, or declared to him by some that have authority from the Sovereign Power to declare them...⁴⁹

This judge is an empty space, more a capacity than a person. The judge in Hobbes, be they a jury, a lawyer, a parliamentarian or anyone else,⁵⁰ has no other function than the bringing together of facts and laws, both drawn from other heads. It is in this sense that Hobbes describes the jury as “the Judges ... not onely of the Fact, but also of the Right”.⁵¹ For Hobbes, jury trial offers an opportunity for legal judgments to be confined to the individual justice of the specific case, without the possibility of (inevitable) judicial errors being built up into an expert system which excludes the true legal knowledge of the sovereign.⁵² The jury, on this account, is the perfect judge: an empty vessel which can do no more than apply fact to law. In Hobbes, the jury only exists either as a tool for the

⁴⁹ Hobbes (n 47), 327.

⁵⁰ Ibid, 328; Hobbes (n 48), 90-91.

⁵¹ Hobbes (n 47), 328.

⁵² Ibid, 316-17, 325-27; and, a little more trenchantly, Hobbes (n 48), 83-84.

enforcement or as a defence of the exclusivity of the sovereign's laws. And again, it only exists through its relationships with other institutional actors: here, even more than in Coke, the jury is defined in relational terms.

It may be objected that in comparing Coke's position on special verdicts and Hobbes' position on general verdicts, I am not really comparing views about the same situation. I have already argued that Vaughan's decision in *Bushell's Case* to treat the general verdict as the typical, ideal type of verdict was intimately connected with his understanding of what the jury is, and of how it might legitimately act. Similarly, in Coke and Hobbes, the decision to treat either special or general verdicts as the ideal type was intimately connected to their respective understandings of the formation of legal knowledge: the special verdict allows Coke to place both knowledge of the law and the power to reason (applying law to fact) in the hands of the judge, leaving the factual question alone to the jury; for Hobbes, the general verdict allows him to hand over the task of reasoning to the jury, thus both denying the judges their 'artificial reason' and (the jury's verdict being inscrutable) preventing them from building up a body of precedents which, Hobbes feared, could serve only to obscure the commands of the sovereign.

John Lilburne, leader of the radical 'Leveller' movement and sometime opponent both of Charles I and of Cromwell, was always a critic more than an architect; and this is reflected in his somewhat obscure accounts of the jury. In 1649, Lilburne was tried before a bench of forty-one assorted dignitaries, and a jury of twelve, at London's Guildhall, for a series

of seditious publications.⁵³ In 1653, he was tried as a felon in the Old Bailey; his crime this time was being present in England despite a Parliamentary order banishing him from the Commonwealth.⁵⁴ In each case, the novelty of his description of juries lay mainly in his turning upside down of one of the two structural accounts of the jury given above, rather than in any attempt to offer a detailed account of his own.

On 24th October 1649, the first of John Lilburne's jury trials began. He accepted the Cokeian claim that lawyers were constituted as something different from ordinary men; but where Coke had seen a noble profession, Lilburne saw a living symbol of the Conquest. For the common lawyers, the claims of monarchic prerogative were revealed as bogus by a careful study of constitutional history. William had not conquered England at all, they said, but was in fact its rightful heir and had always ruled by the common law: Stuart power was therefore descended from the rights of a king created by the common law, not of a conqueror.⁵⁵ For Lilburne, it was important to emphasise that 1066 *had* been a point of rupture, for this demonstrated the illegitimacy of the whole professional legal system.⁵⁶ The legal system trying Lilburne was, therefore, a foreign imposition which

⁵³ 'The Trial of Lieutenant-Colonel John Lilburne, at the Guildhall of London, for High Treason' (1649) 4 Cobbett's State Trials (1640-49) col 1269.

⁵⁴ *Cobbett's Parliamentary History of England: From the Norman Conquest, in 1066, to the year 1803*, vol 3: 1642-60, (TC Hansard 1808), col 1377; P Gregg, *Free-born John: A biography of John Lilburne* (George G Harrap 1961), 305-11.

⁵⁵ JGA Pocock, *The Ancient Constitution and the Feudal Law: English historical thought in the seventeenth century* (WW Norton 1967), 30-55.

⁵⁶ 'Trial of John Lilburne' (n 53), col 1287 n G. See also RB Seaberg, 'The Norman Conquest and the Common Law: the Levellers and the argument from continuity' (1981) 24 *The Historical Journal* 791; M Foucault, *Society Must be Defended: lectures at the Collège de France 1975-76* (D Macey trans, M Bertani and A Fontana eds, Penguin 2004) [1976], 99-111; and Q Skinner, 'History and Ideology in the English Revolution' (1965) 8 *The Historical Journal* 151.

must be resisted. But for Lilburne, the continued existence of the jury allowed for an escape from the unjust excesses of the Norman-derived law.⁵⁷

Parkin-Speer, discussing the concept of fundamental law in Lilburne's thought, particularly in the context of his 1649 trial, has emphasised both the ontological and epistemological aspects of the concept. "Rights established by royal charter, parliamentary petitions and acts are defined as reasonable; any acts violating such rights are unreasonable, and therefore, are void."⁵⁸ So fundamental laws are, in essence, those laws which protect legal rights. The idea that English law is grounded not in an artificial legal rationality but, rather, in 'primitive reason' – an idea which Lilburne appears to have shared with at least one of his judges (judge Jermin)⁵⁹ – initially seems to suggest a reasoning faculty shared by all; but it should be noted that Judge Jermin, like St German before him, primarily saw reason not as an interpretive tool but rather as a way of justifying pre-existing human law. For Lilburne, on the other hand, this 'primitive reason' allowed everyone (including jurors) to judge the validity of laws, as well as to interpret and apply legal provisions (provided they are available in English).

In other words, he wishes to exercise an individual type of judicial review or statutory review according to his definition of fundamental laws. The audacity of the request in a court situation should not overshadow its serious implication for legal theory. The same kind of private judgment claimed in radical Protestant thought in the reading of the Bible is being claimed here in the reading of the law.⁶⁰

⁵⁷ Lilburne, of course, was not writing in the light of modern legal historical research into the origins of jury trial.

⁵⁸ D Parkin-Speer, 'John Lilburne: a revolutionary interprets statutes and common law due process', (1983) 1 LHR 276, 289.

⁵⁹ 'Trial of John Lilburne' (n 53), 1290.

⁶⁰ Parkin-Speer (n 58), 291.

So the fundamental laws of England are those which protect legal rights, and everyone is in principle capable of determining the relationship in a given case between fundamental and non-fundamental law. In an interesting reversal of St German's position, it is national custom which is both just and freely accessible to all, while the body of Norman laws darkens the vision of the conscientious juror.

This left Lilburne the task of alerting his jury to their power, a task which for the judges constituted a "damnable blasphemous heresy".⁶¹ The jury must be alerted to its duty, but it is not a duty operating in a vacuum: Lilburne explained to his jurors that if they failed to use their power then the professional judges, "the cruel and bloody men",⁶² would have his life. The jury's choice, then, was simply whether to take charge of Lilburne's life or whether to leave it with the lawyers. But this was a choice for the jury to make. The jury's power was to choose, on a case-by-case basis, what role the lawyers were to have in the trial: whether they were to be the jury's "cyphers to pronounce the sentence, or their clerks to say Amen to them".⁶³ Here, the key question is still the relationship between the judge and the jury. What is new here is the jury's power to settle the matter.

In 1653, in his second jury trial, Lilburne (and the other pamphleteers who wrote about the case) once again turned to the nature of jury trial,⁶⁴ and this time the focus lay not upon the Cokeian legal system but, rather, on the legality of the sovereign's laws. Where

⁶¹ 'Trial of John Lilburne' (n 53), col.1380. But, as the editor notes (col 1284 n E), the Attorney-General was able to argue that the jury had knowledge both of fact and of law without being at all interrupted by the judges.

⁶² Ibid, col.1395.

⁶³ Ibid, col.1395.

⁶⁴ See Green (n 3), 194-99, and the sources cited therein.

four years earlier, the jury's principal task had been to define in each case its own relationship with the lawyers on the bench, here its role was more about weighing statute law against the fundamental laws of England. As before, the jury was granted an undeniable access to the fundamental laws, but here they were given less choice: in 1649, they could decide whether or not to follow the judge's directions; in 1653, they were "bound in conscience"⁶⁵ to enforce the fundamental laws.

For St German, law was in many cases able to determine the dictates of conscience, establishing for example whether property has been taken from another either justly or unjustly. This is the concept of *adiaphora*, literally meaning 'indifferent things': things which, theologically speaking, are "'permitted' or 'free,' because [they have] been 'neither commanded nor prohibited' by the ... divine law as revealed in the New Testament".⁶⁶ In St German's account, human law could subject these otherwise 'indifferent things' to specific rules, which would then bind the consciences of those subject to the law. In 1649, Lilburne had been able to argue that, while conscience and the law are indeed bound up in one another, the legal interpretations of the Conqueror, his descendants, and their servants could be challenged: that the sovereign power of binding consciences described by St German could, in effect, be sidestepped by a sufficiently conscientious jury acting on the basis of its own interpretations. Faced in 1653 with an indictment for felony on account simply of his being in England contrary to a parliamentary command, Lilburne was unable to argue, as he had done four years earlier,

⁶⁵ Anon, 'More Light to Mr John Lilburne's Jury' (London 1653), 6 (EEBO image 41783:4).

⁶⁶ BJ Verkamp, 'The Limits Upon Adiaphoristic Freedom: Luther and Melancthon' (1975) 36 *Theological Studies* 52, 56.

that the consonance of (fundamental) English law and the laws of reason should be used as a tool for interpretation: the parliamentary order is either valid or it is not, and its validity is a question for the jurors' consciences. The focus here, then, is less on the judges' claims to know the law, and more on the claims of a sovereign power to pass potentially unjust laws.

This question of 'conscience' is not only about a local morality opposing the tyrannical desires of a distant central government:⁶⁷ the 1653 jurors, when they decide whether to convict the prisoner, must keep in mind their own time of judgment before the divine tribunal. As Lilburne put it in his speech to the jury:

take heed that you have not the bloud of John Lilburn to answer for when you shall appear (and crave for mercy your selves) before the great Tribunal, lest then it shal be said, you shewed no mercy to John Lilburn, and what mercy do you think to find for your selves, &c.⁶⁸

The question for the 1653 juror was not whether he approves of this or that statute law, but whether he thinks God will approve of the death of John Lilburne happening as a result of this particular sovereign command. No longer was the jury's role basically an extension of its relationship with the judge. No longer, in fact, was the bench of any real significance: "Oh let us take heed of being guided by the opinions of Judges, Lawyers, pleaders, or other Officers, it is not they that must answer for our guilty or not guilty before the righteous Judge of heaven and earth".⁶⁹ Now it was the juryman's soul which

⁶⁷ This was an important Leveller demand: HN Brailsford, *The Levellers and the English Revolution* (C Hill ed, Cresset 1961), 531-532.

⁶⁸ Anon, 'The Tryall, of L. Col. Iohn Lilburn at the Sessions House in the Old-Baily' (G Horton 1653), 6 (EEBO image 166673:5).

⁶⁹ Anon, 'A Jury-mans Judgment Upon the Case of Lieut. Col. John Lilburne' (London 1653), 13 (EEBO image 115760:7).

was of the greatest importance, and this emphasis excluded the possibility of a jury system understood primarily in terms of its relationship with the judge. Because of the decreased importance of *adiaphora* when faced with a law that must either apply or not (i.e. one which cannot be read as an ambivalent command), the 1653 jurors' task was much less about the application of the law than it had been for the 1649 juror: where an interpretive accommodation of fundamental and non-fundamental law is not possible, the whole legal question is displaced by the more serious question of the juryman's own salvation.

This focus on, as John Jones had put it three years earlier,⁷⁰ the discipline of the soul, allowed Lilburne to reach out towards a jury which was no longer simply a product of its relationships with the institutionally powerful; or rather we can see this movement with hindsight, because for Lilburne the jury was still a creature of comparison. Even when the lawyer is cast as a mere distraction, the jury still primarily exists through its external relationships: here, as with Hobbes, through its relationship with the sovereign's laws.⁷¹ For the pamphlets surrounding the 1653 trial do not give the juryman a general duty to act according to conscience, on the peril of his soul. Rather, this duty only arises in relation to the sovereign's attempts to break away from "the old and good Lawes of the land".⁷² The jury here is a defence of the good old laws of England in the face of unjust Cromwellian legislation.

⁷⁰ J Jones, 'Jurors Judges of Law and Fact' (TB & GM 1650), 80 (EEBO image 169931:52).

⁷¹ The differences between how Hobbes and Lilburne understand the jury's combination of law and fact to work are more closely related to the interpretive function of the 1649 jury. The 1653 jury, unable to interpret the parliamentary order exiling Lilburne in a way which is favourable to the prisoner, is told they must, on the peril of their souls, step outside the law.

⁷² 'Jury-mans Judgment' (n 69), 12 (EEBO image 115760:7).

For the first half of the seventeenth century, the jury had only existed inasmuch as it was possible to describe its relationship either with the sovereign or with the judge. In *Mackalley's Case*, the jury was no longer needed once it had spoken on the facts. In Hobbes, the jury was one of several interchangeable occupiers of the position 'the judge'. In Lilburne's 1649 trial, the positions of judge and jury were inverted, inasmuch as the jury was given power to determine the extent of the judge's role; but this was still a jury more fully defined by its position than by its characteristics. In 1653, however, the juryman's salvation was directly tied to the outcome of the trial, and Lilburne made it clear that a juror could not escape the basic connection between Lilburne's fate and his own. During the Restoration years (1660-1688) this theme would be developed into a general claim that jury trial in a true sense was dependent upon the jurors attending to their own souls, deliberately ignoring the wishes of both the sovereign and the judge; but we are not quite there yet. In Lilburne's 1653 trial, legal judgment was more about doing the right thing in the eyes of God than it was about strictly adhering to the letter of the law; but even here, the jury was still set up in explicit opposition to the sovereign, and so an important part of the jury's identity still consisted of its external relationships.

3.3: The Verdict according to the Juryman's Conscience

In the early years of the Restoration, Lilburne's concept of the jury as essentially a creature of the soul was taken further: Coke and Hobbes' jury defined by its institutional position first became a jury of essential conflict with the judge, and then a jury of introspection, for whom conflict was logically (but not physically) impossible. By the 1660s, the judge-jury relationship had become a judge-jury antagonism, and as pamphleteers started to see, this conflict could have one of two outcomes: either the

antagonism would disappear, or jury trial would. This is the period in which a relationship between judge and jury became basically impossible, for any such relationship would necessitate the non-existence of juries. And this is the event of which *Bushell's Case* is a part, an event which worries much less about *where* the jury is, and turns instead to the question of *who* the juror is. This focus on the juror's identity meant postulating (and advocating) a citizenry which would bring its own sense of justice into the trial, putting aside the expertise of the trial judge in favour of a verdict according to conscience. And this, of course, is the perspective described by exclusionary accounts of jury power. My contention is that this perspective, still with us today, was initially a product of the English Restoration.

In his *Postscript to all honest, sober and impartial jurors*, the Quaker William Smith wrote that the jury should not take the bench's word either for the legality of an indictment or for the consonance of the facts asserted and the law relied upon. Smith was aware that "many of you are of grave and solid disposition, and desire to perform your places of Trust in honesty and sobriety as becometh men",⁷³ and he advised these honest, sober jurors to consider the following before reaching a verdict: first, whether the purported law charged against the prisoner is "properly and truly Law"; second, whether the law and the facts in the case combine so as to suggest guilt; and third, whether the interpretation the judges have given to the law is correct.⁷⁴ Like Lilburne's 1653 jury, Smith's jurors were

⁷³ W S[mith], 'Some Clear Truths Particularly Demonstrated Unto The King And Both Houses Of Parliament, With All Judges, Justices, Merchants, And Shipmasters, Why The Innocent And Peaceable People, Called Quakers, Ought Not To Be Banished Out Of Their Native Land, Or Any Other Way Exposed To Sufferings' (London 1664), 11 (EEBO image 193458:6).

⁷⁴ Ibid, 11.

urged in 1664 to judge not according to the lawyers' interpretations, but according to their own sober reflections. And while the relationship between judge and jury was perhaps less tangible than before, this was still a jury which existed primarily in relation to the judge. But here, the jury was urged to find a way past the domination of the judge. The necessary judge-jury conflict was considered a problem, but there was not yet a solution beyond Smith's vague call for sobriety.

For former Lord Mayor of London Samuel Starling, writing on the Penn and Mead trial (which he had recently presided over), the judge-jury conflict was necessary in quite a different way. Here, the antagonism was not self-evident, and had to be urged upon the judges for the sake of their profession, and for the continued existence of their specialised mode of thought:

Now Gentlemen of the long Robe look to your selves, and your *Westminster-Hall*: If these learned Reformers of Religion shall likewise Reform your Laws and Methods of Proceedings (as doubtless they design it) and make twelve Jury-men, eleven of which it's possible can neither write nor read, to be the sole Judges both of Law and Fact; farewell then to your great Acquisitions, your Year books will then be out of date, and an *Ouster* will be put to your books of *Entries*.⁷⁵

The danger of a loss of judicial authority was both real and imminent, as far as Starling was concerned, and we should fear this possibility no less than we fear a loss of clerical authority. "[I]f the *Papists* be so politick and prudent, by their *Inquisition*, to preserve and maintain their false Religion; surely it will be the *Protestants* prudence, to find ways for the preservation of their true Religion."⁷⁶ Starling's argument appears to have been the

⁷⁵ S S[tarling], 'An Answer to the Seditious and Scandalous Pamphlet Entitled The Tryal of W Penn and W Mead' (WG 1670), 2 (EEBO image 192028:4).

⁷⁶ *Ibid*, 9.

following: religious reformers, because of the laxity of the established church, have been permitted to undermine ‘the true religion’; similarly, these same reformers are currently engaged in undermining judicial authority, setting up an ignorant group of jurors in the judges’ place; to prevent the end of proper judicial authority, jurors must not be allowed to think that they have the true power in the case; therefore, regrettable as it is that this should be necessary, the continuing existence of judicial authority requires the judges to resist the efforts of the jurors and the reformers. Ideally none of this would be necessary, but for now a judge-jury conflict is necessary if the laws of England are to survive. Starling gave the following example of a pre-emptive strike in his report of the Penn and Mead case:

Sir Tho. Bloodworth. I knew *Bushel* would never yield.

Bushel. Sir *Thomas*. I have done according to my Conscience.

Mayor. That Conscience of yours would cut my Throat.

Bushel. No my Lord, it never shall.

Mayor. But rather than you shall cut my Throat, I will in defence of my self cut yours first.⁷⁷

In Starling’s opinion, political realities meant that, without a pre-emptive confrontation between judges and jurors, the judicial understanding of law would be lost; for this reason a confrontation between the two was essential, and had to be encouraged.

For Smith, a judge-jury conflict was essential in the sense that for the time being it could not quite be avoided: the judge must be defied *if justice was to be had*. For Starling, such

⁷⁷ Ibid, 27.

a conflict was essential *if the judicial law was to exist*. There was another way of thinking about the jury which appeared at around this time, however, one which was the precise opposite of Starling's solution, and which answered Smith's problem exactly. For this jury, a conflict with the judge was impossible *if the jury was to exist*: if judge confronts jury, the jury is inevitably destroyed. This jury could not confront the judge without ceasing to exist, and so could not be described except in such a way as denies even the possibility of a conflict with the bench.

In one of the many Quaker trials of 1664,⁷⁸ a jurymen attempted to inform his judge that he had overheard a witness tell the prisoner that the evidence they were about to give was false, and the juror asked the Court if the witness' evidence should still be relied upon. The presiding judge made it clear that the jurors' task was simply to enforce parliamentary commands, and that to do anything else was to question the law.⁷⁹ The editor of the report was not impressed by these arguments, however, and asserted that "whilst Juries are thus dealt by...they have only the name, and supply not the place of Juries". For this anonymous editor at least, judicial domination of the jury was physically possible, in the sense that it was possible for a judge to punish a group of people nominally referred to as 'a jury' for delivering a verdict other than the one the judge would like to have heard; but it was not logically possible, for a body so treated would immediately cease to be a true

⁷⁸ See WC Braithwaite, *The Second Period of Quakerism* (Macmillan 1919), 41-49. See also Anon, 'For the King and Both Houses of Parliament: being a declaration of the present suffering' (London 1664). At 28, it is claimed that since the Restoration four years earlier 6,000 Quakers had been imprisoned, of which 78 had died in prison and 600 remained incarcerated (EEBO image 103496:15).

⁷⁹ Anon, 'The Cry of the Innocent and Oppressed for Justice' (London 1664), 19-20 (EEBO images 204888:10, 204888:11).

jury. The existence of the jury and the existence of judicial domination, then, are mutually exclusive.

For William Penn, writing in response to Samuel Starling's pamphlet cited above, the jurors had to be recognised as judges both of law and of fact, for a judgment on the merits of the entire case is implied by the general verdict of 'guilty' or 'not guilty'.⁸⁰ Penn allowed that judges may educate a jury in a point of law, but he insisted that this advice could only become part of a true verdict "*as understood, digested, and judiciously made the Iuries, by their own free-will and acceptance, upon their conviction of the Truth of things reported by the Bench*".⁸¹ Judicial violence certainly happens, but it is always "destructive, of the Fundamental Laws",⁸² and

Notwithstanding Juries of late are grown so out of fashion, and of power with some, that to shew any, is to incur the Threats and Menaces of the Court, to have their *Noses Slit, their Throats Cut, their Bodies Imprisoned, and drag'd at a Carts Tayle through the City, &c.* Yet that they are by the *ancient Laws of England, and force of Reason, the only right and proper Judges, as well of Law as Fact.*⁸³

The bench's attempts to wrest power from the jury, then, cannot be confronted: the judges are too strong. The bench cannot, however, produce a servile jury: despite their best attempts, jurors remain the sole judges both of law and of fact. And so judicial violence is impotent, pointless against the 'force of reason'.

⁸⁰ W Penn, 'Truth Rescued from Imposture, or a Brief Reply to a Mere Rapsodie of Lies, Folly, and Slander' (1670), 33-34 (EEBO images 104641:17, 104641:18).

⁸¹ Ibid, 35.

⁸² Ibid, 8-9.

⁸³ Ibid, 36.

In *Bushell's Case*, Vaughan made little attempt to prevent judicial control of juries (in the sense explored by Langbein in his 1978 article):⁸⁴ rather, his focus was upon its logical impossibility. On the one hand, he thought, the knowledge which judges claim regarding the dishonesty of jurors was necessarily groundless: the legal answer to a case can only be given either hypothetically or after the facts have been definitively ascertained, and in the case of a general verdict the factual question cannot be resolved in the absence of legal implications. On the other hand, a judge might compel the jury into reaching certain factual conclusions, in which case the jury would be denied its whole purpose.⁸⁵ Once again, judicial control of the jury was not, as a description of events happening in the world, impossible: far from it, it was common enough to generate the pamphlet literature in the first place. What *was* considered impossible was that the jury might truly exist in the face of the bench's antagonisms. Either an angry judge existed, or a jury existed, but not both.

And so the problem was solved, or at least an answer had been proposed; but what now was the jury? If at least since Coke's day the jury had been a creature of comparisons, of institutional positions defined in relation either to the judge or to the sovereign, what was the jury when specifically cut off from these relationships? Clearly it had to still exist, for the whole point of the argument just sketched out was that the only way the jury *could* exist was if it was left alone. This problem is the point at which I part ways with Whitman. For Whitman, conscience is something which prevents a judge or a jury from reaching the right decision, and one of the key problems of a criminal justice system is how to

⁸⁴ Langbein (n 2: 1978), 284-306.

⁸⁵ *Bushell's Case* (n 8), 143.

devise ‘moral comfort rules’ which might coax a judge or a juror into convicting despite their moral scruples. In this sense, conscience is seen as something entirely negative. In the pamphlet literature to which I now turn, ideas of conscience were used to positively help a juror come to a decision (which is not necessarily the same thing as coming to a decision to convict); and so in answering the problem of what the phrase ‘the jury’ means when radically disassociated with the judge and the sovereign, conscience adopted a constructive role.

In the early 1680s,⁸⁶ the author of *English Liberties* described jury trial as one of “two Grand Pillars of English Liberty”.⁸⁷ Through parliament “the Subject has a share in his chosen Representatives in the *Legislative* (or Law-making) Power”, and through juries “he has a share in the *Executive* part of the Law”.⁸⁸ Here, jury trial was not understood as part of a wider juristic process, as it had been previously: rather, its primary concern was with its own duties.⁸⁹ What was needed above all else was the correct kind of juror. And so we can see here that the true juror was one who would maintain the necessary distance between the jury and the external agents who would chop down one of the two ‘pillars of English liberty’.

In 1680, a ‘person of quality’ published *A Guide to English Juries*, a text which both describes the object ‘English juries’ and tells the subject ‘English juries’ what it must do

⁸⁶ The document does not claim a date for itself; Green (n 3), 252 n 207 dates it to 1680; Stern (n 4), 1829, n 62 dates it to 1682.

⁸⁷ [H Care], ‘English Liberties: or, the free-born subject’s inheritance’ (G Larkin 1680 or 1682), 5 (EEBO image 50184:6).

⁸⁸ Ibid.

⁸⁹ Ibid, 147-149 (EEBO images 50184:78, 50184:79).

if it is to survive.⁹⁰ Juries, we are told, are fundamental to English liberty, and once again the idea of a judge controlling a jury is both a danger and a flat contradiction.⁹¹ The point is not that judicial control is impossible, but rather that *either* it *or* jury trial exists: a free jury is a precondition of the jury's existence. But another precondition is that the jury must not be unduly *guided* by the professional judge, a judge whose "*Juris dictum*, the telling only of what is the Law" has virtually nothing to do with the jury's "*Veridictum*, the declaring of what is the Truth of the matter".⁹² And the jury's task, of discovering the truth, means being careful not just to avoid all fear of the outside, for it also means making sure not to trust it too easily. "One can't see by another's Eyes",⁹³ etc. In short, the ideal jurymen ought not to have *any* contact with external institutions when reaching its final decision on the guilt or innocence of the accused.⁹⁴ The jury is liable to be deceived, and so must not take evidence, even at the grand jury stage, on trust: at all times, the juror must remember his oath.

In his or her preface, our "person of quality" cited John Cowell's definition of juries: that they are a body of "associates and Assistants to the Iudges of the court".⁹⁵ Cowell looked back longingly at a time when jurors were the judges' assistants, "in a kind of equality",⁹⁶ but in *A Guide to English Juries* the relationship was inverted, for here the judge could not be understood as contributing to the jury's verdict, *other than as an assistant*: "Judges

⁹⁰ Person of Quality, 'A Guide to English Juries: Setting forth their antiquity, power, and duty, from the common-law, and statutes' (Thomas Cockerill 1682).

⁹¹ Ibid, 26-27 (EEBO image 96216:20).

⁹² Ibid, 16 (EEBO image 96216:15).

⁹³ Ibid, 32 (EEBO image 96216:23).

⁹⁴ Ibid, 81 (EEBO image 96216:48).

⁹⁵ J Cowell, 'The Interpreter: or, book containing the signification of words' (Iohn Legate 1607), unnumbered page (the quoted text is from the entry for 'Iurie (Iurata)') (EEBO image 56626:75).

⁹⁶ Ibid.

are unessential and needless in a Tryal by Jury further than to assist it by answering and informing what the Law is where difficulties arise”.⁹⁷ What links these arguments is the claim that the separation between judge and jury which is understood here as an ontological precondition of jury trial is grounded upon a belief in the jurors’ ability to think about the case independently of (and therefore differently to) the judge. An important part of the juror’s duty, then, is a willingness to value his own reason above that of the judge.

Another pamphlet, *The English-mans Right*, imagines a dialogue between a barrister and his old client, who has contacted him in the hope of being excused from jury service. The juror is quickly convinced to serve, however,⁹⁸ and the rest of the piece is concerned not with the desirability of jury trials, but with the powers and duties membership on a jury entails. There is, of course, a discussion of the qualified impossibility of judicial violence against a disobedient jury.⁹⁹ And beyond this, there is a general demand that a juror must take his duty seriously, for he must at no point forget that it is not only the life or estate of the prisoner at risk: beyond this, there is also the question of the juryman’s soul:

You that are Jury-men should first of all seriously regard the weight and importance of the Office; your own Souls other mens Lives, Liberties, Estates, all that in this World are dear to them, are at Stake, and in your hands; therefore consider things well before-hand, and come substantially furnished and provided with sound and well-grounded Consciences, with clear minds, free from malice, fear, hope, or favour; lest instead of *Judging* others, thou shouldest work thy own Condemnation, and stand in the sight of God our

⁹⁷ Person of Quality (n 90), 22-23 (EEBO image 96216:18).

⁹⁸ [J Hawles], ‘The English-mans Right: A dialogue between a barrister at law, and a jury-man’ (Richard Janeway 1680), 3 (EEBO image 99141:3).

⁹⁹ Ibid, 24 (EEBO image 99141:13).

Creator and Judge of all men, no better than a *Murtherer*, or *Perjured* Malefactor.¹⁰⁰

This piece also warns against the false juror, who would “seek for the office, use means to be constantly *continued* in it, will not give a *disobliging* Verdict ... there are others that have particular *Piques* and a humor of Revenge against such or such *Parties*”.¹⁰¹ The juryman must be aware of his duty to reach his own understanding of the case, not because the judge is a tyrant but because this is what the juror’s oath demands. This jury is a creature of its duty, and only the juryman has the power to subvert jury trial. And here, as in *Bushell’s Case*, we can see clearly the importance of each juror being satisfied that the verdict is correct. With the judge and the sovereign effectively neutralised, it is only the bad juror who can compel a jury to act against conscience, and he can do this only by allowing external influences to enter the jury’s deliberations:

Jurym. You have answered all my *Scruples*, and since I see the Law has made so good *Provision* for Jury-mens priviledges and safety, God forbid any Jury-man should be of so *base* a temper, as to betray that (otherwise) impregnable *Fortress* wherein the Law hath plac’d him, to preserve and defend the just Rights and Liberties of his Country, by treacherously surrendering the same into the hands of *Violence* or *Oppression*, though maskt under never so fair Stratagems and Pretences ...¹⁰²

And so we have here a new understanding of jury trial, one which is simultaneously concerned both with the impossibility of being subjected to external power and the constant threat of exactly that power. These texts over and over again spend page after page explaining precisely why the juryman need not worry about the threats of the judge’s cell, or, occasionally, the temptations of the government’s favour; and for that reason they

¹⁰⁰ Ibid, 37 (EEBO image 99141:19).

¹⁰¹ Ibid.

¹⁰² Ibid, 35 (EEBO image 99141:18).

can seem, to borrow from one of Lilburne's critics, "strangely ridiculous".¹⁰³ But the fact that these texts reject the notion of a jury known only through its external relationships should not be taken to mean that they considered these relationships entirely unimportant. The essential lack of a relationship is not manifested in a failure to *look at* the former relationship between judge and jury. Far from it, the fact that there is no relationship is fundamental, something which allows this jury to exist, and which the jurymen are duty-bound to remember: he is required not only to judge according to conscience, but to judge according to a conscience which is constantly on its guard against the threat of unseen influences coming in from the outside. It is in this positive sense that these texts unite, both in their rejection of a judge-jury relationship and in their celebration of each juror's ability to reason his way to a verdict.

3.4: Conclusions

This chapter has been concerned with the appearance of an exclusionary model of jury power in the late seventeenth century, and the connection between this idea and the general verdict of 'guilty' or 'not guilty'. In chapter two, we saw that the general verdict was connected with the idea of a judge-jury separation much earlier than the period of Stuart rule in England. Judges, seeking to escape responsibility for blood punishments, favoured general verdicts because of this concept of exclusion; while juries preferred the more inclusive special verdict, which forced judges to at least share in the jury's otherwise exclusive responsibility for the fate of the accused. This exclusionary understanding of

¹⁰³ H P[arker], 'A Letter of Due Censure, and Redargvition to Lieut. Coll: John Lilburne: Touching his triall at Guild-Hall London in Octob: last. 1649' (Fr Neile 1650), 24 (EEBO image 117320:14).

the general verdict seems to have survived at least until the end of the seventeenth century, and to this extent the conceptual changes of the Restoration cannot be considered innovations. What was new was not so much the idea that the general verdict kept judge and jury separated and more the claim that, *for this reason*, trial by jury requires an independent-minded body of citizens who, when called upon to serve as jurors, will attend to their consciences rather than the law as expounded by the sitting judge. But for as long as the juryman's 'conscience' was for practical purposes indistinguishable from our 'consciousness', this shift to conscience could not have this effect. What characterised the shift to an exclusionary model of jury *power* was, above all else, this shift in the meaning of the word 'conscience', such that the verdict according to conscience, like the medieval verdict against conscience, was necessarily a verdict against the wishes of the bench. It was only after this change had occurred that a judge could complain about juries reaching verdicts according to their consciences, *rather than* the evidence.

A related change also happened regarding the meaning of the separation guaranteed by the general verdict. For theorists such as Coke and Hobbes, and to a certain extent also for John Lilburne, the distinction between judge and jury was one which did not take the jury beyond the limits of legal space. The jury was undertheorised because the primary actor in legal judgment was generally considered to be the judge: the jury acted as a mere institutional support, and therefore did not need to have its actions explained in the same detail. Hobbes' mischievous adaptation of the idea of judgment reminded his readers that a jury is just as much a 'judge' as is the lawyer on the bench; but again, his purpose here was not to emancipate juries. Rather, he sought to explain the role of the homogenous subject-position of 'the judge' as an institutional support to the primary actor which, for

Hobbes, was the sovereign. Towards the end of the century, the jury's autonomy was emphasised; and it was not a relative separation which was described, but a total autonomy. The jurors, who were on their consciences to deliver a just verdict, had to separate themselves from the wider juristic machinery and, following *Bushell's Case*, the only way jury trial could be subverted (so the argument went) was for a juror to voluntarily insert himself into this machinery. A jury might well take *advice* from a judge or a sovereign, but if they took *direction* the jury would cease to be the independent primary actor and would, therefore, cease to have any more than an illusory existence. The separation of judge and jury, on this account, is more than a precondition of jury *power*: without it, jury trial itself will cease to exist.

So the exclusionary model of jury power which emerged during the second half of the seventeenth century can be distinguished from an earlier 'relational' model, in which the jury had a relative autonomy within a broader juristic system. And this idea, of the 'verdict according to conscience' as an absolute break between the wishes of the judge and the conscientious scruples of the jury, still has purchase today. But this is not the only account of jury power which has been proposed (and employed) in the jury trials of the past 350 years. What I shall explore in the next chapter is the emergence of what might be called an 'inclusionary' model of jury power, which sought to re-insert jury trial into the criminal justice system but without entirely abandoning the modern concept of the verdict according to conscience. This inclusionary approach to jury power has received considerably less scholarly attention than has the exclusion thesis; but it is a central part of my contention that the meaning and possibility of jury independence today cannot be considered without taking into account this alternative perspective. The tension between

inclusionary and exclusionary accounts of jury power has animated debates on jury trial since the invention of the inclusionary model during the second half of the eighteenth century; and it is to this invention that I shall turn in the next chapter.

CHAPTER 4: THE RECONSTITUTION OF THE GENERAL VERDICT

In 1792, in Fox's Libel Act, parliament declared that juries could not be compelled to return general verdicts in cases of seditious libel; and that it is "in their discretion, as in other criminal cases",¹ to find a special verdict. After Fox's Libel Act, special verdicts cannot be compelled in criminal trials, and it is for this reason that the Act is often taken as the second half of the legal guarantee of jury independence.² In 1670, Vaughan CJ ensured that jurors could no longer be punished for delivering the 'wrong' verdict; in 1792, parliament ensured that juries retained that functional independence which it is claimed that only the general verdict can guarantee. As Devlin concluded in a discussion of *The Dean of St. Asaph's Case* – the seditious libel trial and appeal which ultimately led to the 1792 Act – "The freedom of thought given by the general verdict is of the essence of the jury system."³

In his various accounts of the impact of *Bushell's Case*, Langbein consistently emphasises what he sees as the insignificance of the case. Despite the loss of the power to fine, judges frequently refused to accept errant verdicts;⁴ or sometimes they accepted a verdict only to later request that the king pardon the convict;⁵ alternatively, they might terminate trials

¹ Libel Act 1792, s.3.

² See in particular the discussion of Green at nn 10-11, below.

³ P Devlin, 'The Power without the Right' in P Devlin, *The Judge* (OUP 1979), 148.

⁴ J Langbein, 'Bifurcation and the Bench: The influence of the jury on English conceptions of the judiciary' in P Brand and J Getzler eds, *Judges and Judging in the History of the Common Law and Civil Law: From antiquity to modern times* (CUP 2012), 81; J Langbein, *The origins of Adversary Criminal Trial* (OUP, Oxford 2003) 326-329.

⁵ Langbein (n 4: 2003), 324-325.

before a verdict was even required.⁶ A judge might also “direc[t] a jury to formulate a special verdict after he rejected the jury’s proffered general verdict”,⁷ although this practice came to an end after 1792. But “[a]s the judges lost their ability to *detect and correct* what they perceived to be jury error, they developed a new system of jury control, whose emphasis was on *preventing* jury error”.⁸ So despite the political movements lying behind *Bushell’s Case* and Fox’s Libel Act, judges for the time being managed to exert control upon their juries.⁹ This control was achieved by abandoning attempts at correcting the result after the verdict, and instead turning to the judge’s role in forming the verdict. Judicial control of the verdict had somehow to operate in spite of both *Bushell’s Case* and Fox’s Libel Act; although the actual potential for judges to prevent jury lawlessness was more effectively curtailed by the latter than by the former.

Green has argued that the Act, by guaranteeing the possibility of a general verdict, effectively prevented jury trial being brought into conformity with enlightenment calls for swift and certain punishment. “The constitutionalization of the general verdict perhaps raised the stakes for the penal reformers”:¹⁰ the jury was identified as a key democratic institution, and so its power to act as it wished was legitimised. This meant that the jury’s historic role in mitigating capital sanctions could not be changed from above: “Changes

⁶ Ibid, 325.

⁷ Ibid, 329.

⁸ Ibid, 330 (emphases added).

⁹ I say “for the time being” because Langbein’s central thesis – that ‘lawyerization’ was directly responsible for the whole range of mechanisms which characterise the adversary trial – means that even this judicial control had to recede after a certain point: “By broadening the jurors’ sources, the adversary system inevitably undermined the authority of the judge and increased the potential for the jury to form a view of the case different from the judge’s. In this way, lawyerization of the trial contributed to the break-up of the ancient working relationship of judge and jury.” Ibid, 331.

¹⁰ TA Green, *Verdict According to Conscience: Perspectives on the English criminal trial jury, 1200-1800* (University of Chicago Press 1985), 355.

in jury trial would follow, rather than precede, changes in English attitudes toward the entire problem of the administration of the criminal law.”¹¹ The mitigating function of the jury was not simply protected by the ‘constitutionalization of the general verdict’, then. More than this, ‘constitutionalization’ gave legitimacy to the practice, placing the argumentative burden with those who sought to put the workings of the English criminal trial on a more logical footing.

Both Langbein and Green’s accounts of the significance of the 1792 Act presume that the general verdict carries with it an inevitable support for the exclusion of the jury from judicial processes (or an exclusion of these processes from the jury’s final decision). For Langbein, the general verdict’s legal protection necessitated a newly-formed judicial focus on pre-verdict control of the jury. Green takes the point further: the 1792 Act amounted to a ‘constitutionalization’, in the dual senses of a political and a legal guarantee of the jury’s power to act independently. In this chapter, I shall argue that the ‘constitutionalization’ metaphor can be extended in a different direction, one which speaks to the enlightenment concerns Green identifies and also to the turn to pre-verdict techniques elaborated on by Langbein. I shall argue that the 1792 Act can in fact be understood as part of a *reconstitution* of the general verdict. The nature of the general verdict was reconceptualised as a decision made with legal knowledge, and therefore as something which does not – cannot – exist independently of broader trial processes. The late-eighteenth-century reconstitution of the general verdict, I shall argue, is the event in

¹¹ Ibid, 355.

which the courts moved from an exclusionary to an inclusionary model of the general verdict.

In making out this argument, I shall turn first to the role of mitigation in eighteenth-century criminal trials in England; and the incompatibility of this system with Beccarian ideas regarding the proper function of a criminal justice system. Having briefly surveyed the ways in which this thought was applied to the English context of jury mitigation, I shall next explore the changing nature of homicide defences in eighteenth-century criminal law. At the start of the century, such defences required special verdicts; but by the 1770s this practice had changed, and this change was justified by reference to the need to guide the jury's natural mitigating desires in a way which could do no damage to the law's integrity. Finally, I shall turn to the unusual form of verdict used in seditious libel trials before the 1792 Act, and the challenge to this system in favour of a return to a clear distinction between special and general verdicts. This return, I shall argue, was in fact a reconstitution: an assertion which is supported by an analysis of the debates leading up to the passage of the Libel Act.

During the second half of the eighteenth century, English courts reconceptualised the general verdict as an institutional form which unavoidably combined the input of judge and jury, thus undermining historic claims that the general verdict necessarily entails separation or exclusion. But the older discourse was not instantly displaced by the newer; and neither did the new inclusionary model of the general verdict imagine that practices of mitigation could be instantly eradicated. Rather, a tension emerged between two discourses on the institutional space occupied by the jury, each of which claimed to offer the only legitimate account of jury mitigation. The older discourse, typified by the

Restoration recreation of the juryman's soul, posited an exclusionary basis for the jury's power to soften legal excess; the newer approach responded by asserting that any tension with the law must be rooted in legal knowledge on the part of the jurors, and that mercy, while natural, could usually be channelled into appropriate forms of quiet mitigation. By the end of the century, then, a tension had emerged which has not entirely disappeared today: a tension between exclusionary and inclusionary definitions of 'true' jury trial and jury power.

4.1: Mitigation and Enlightenment Penology

During the eighteenth century the criminal laws of England became a 'bloody code', steadily increasing their recourse to the death penalty. Radzinowicz states that "[e]ven as late as 1688, despite the exceptionally rigorous laws which had been enacted during the reigns of the Tudors and Stuarts, no more than about fifty offences carried the death penalty".¹² By 1769, however, Blackstone could claim that there were 160 such crimes;¹³ and by 1823, the MP James Mackintosh put the figure at 200.¹⁴ But Mackintosh's complaint was not that the laws were bloody so much as that their bloodiness made them uncertain: "instead of being the country of the world where the laws were most literally carried into effect, and least dependent upon the will of judges, we had become the country of all the world in which they were least literally executed, and in which the life

¹² L Radzinowicz, *A History of Criminal Law and its Administration from 1750*, vol 1 (Stevens & Sons 1948), 4. Radzinowicz emphasises the difficulty in calculating precisely how many capital crimes there were before the reforms of the mid-nineteenth century: Ibid, 5-8.

¹³ W Blackstone, *Commentaries on the Laws of England*, vol 4 (Clarendon 1769), 18.

¹⁴ TC Hansard ed, *The Parliamentary Debates; New Series*, vol 9 (TC Hansard 1824), 405.

and death of man was the most frequently intrusted to the feeling of an individual.”¹⁵

Three years earlier, a House of Commons select committee on capital punishment had reported that victims of crime were refusing to prosecute, and juries were refusing to convict, on account of not wishing to see people die for relatively minor offences. One merchant reported that, while he was regularly a victim of theft at the hands of his employees, all he could do was fire them. He recounted one instance in which he had prosecuted a former employee:

‘The pain and anxiety ... occasioned by that event, until we obtained for him the Royal Mercy, none can describe but ourselves; which made us resolve never to prosecute again for a similar offence.’ ... He declared, that if he received a forged bank note, he should be prevented from prosecution by the punishment of death, and that if the punishment were less than death, he should undoubtedly consider it as his absolute duty to bring the offender to justice.¹⁶

Blackstone had earlier criticised English criminal law for a lack of principle, arguing that the death penalty could not possibly have remained attached to the crimes of associating with gypsies or breaking the head of a fish pond if only the criminal law was occasionally subjected to critical scrutiny.¹⁷ So the ‘bloody code’ posed two main problems. First, that it was an unprincipled accumulation of emergency responses to centuries of temporary social problems; second, that this made mitigation – whether it took the form of a failure to prosecute, a refusal to convict, or an undervaluing of thefts (taking them below the

¹⁵ Ibid, 405. On the widespread nature of mitigation, see JM Beattie, ‘Crime and the Courts in Surrey 1736-1753’ in J.S. Cockburn (ed.), *Crime in England 1550-1800* (Princeton University Press 1977).

¹⁶ ‘Report of the Select Committee of the House of Commons, Appointed to Consider so much of the Criminal Laws as Relates to Capital Punishment in Felonies’, in *The Pamphleteer: Respectfully dedicated to both Houses of Parliament*, vol 15 (AJ Valpy 1820), 362.

¹⁷ Blackstone (n 13), 2-4. For a discussion of gypsies in early modern England, see C Hill, *Liberty Against the Law: Some seventeenth-century controversies* (Allen Lane 1996), 131-141. On the fish pond offence and other such game laws, see EP Thompson, *Whigs and Hunters: The origin of the Black Act* (Allen Lane 1975).

capital level) – inevitable. During the second half of the eighteenth century, both of these problems were tackled by Enlightenment penology;¹⁸ and the solution to the problem of jury mitigation was to bring the jurors inside the legal system by reconceptualising the general verdict.

When Langbein speaks of expanding judicial practices of jury control, it is easy to imagine a fundamental antagonism between judge and jury; but, as Green emphasises, judges were often willing participants in supposedly jury-led mitigation of the capital sanction. While judges had previously acquiesced in juries undervaluing thefts so as to avoid capital punishment, for example,

it was the statutory provision for transportation in many property offenses that made it standard form after 1718. The novelty, of course, lay in the creation of a largely jury-administered scheme of mitigation that was legitimated both by the complicity of the bench and by the reality of some substantial punishment for those who were its beneficiaries.¹⁹

More recently, legal historians have again turned to transportation as a key factor in the development of English criminal justice during the eighteenth century. Whitman has suggested that the uncertainty of criminal punishments created by the War of Independence (transportation across the Atlantic was no longer possible)²⁰ may have been

¹⁸ Handler emphasises that the actual legislative reforms of the second quarter of the nineteenth century were not entirely motivated by the Enlightenment concerns of the late eighteenth century: “By the late 1820s it was not the rational critique that threatened the continued presence of the capital laws on England’s statute book but the whig appeal for the law to be reconciled with public opinion.” P Handler, ‘Forgery and the End of the “Bloody Code” in Early Nineteenth-Century England’ (2005) 48 *Historical Journal* 683, 697. My contention relates to the earlier reforms of the jury system; reforms which were largely motivated by appeals to legal certainty.

¹⁹ Green (n 10), 280.

²⁰ See TP Gallanis, ‘The Mystery of Old Bailey Counsel’ (2006) 65 *CLJ* 159. Although Gallanis has expressed unease regarding Whitman’s use of his work: TP Gallanis, ‘Review: Reasonable doubt and the history of the criminal trial’ (2009) 76 *U Chi L Rev* 941, 961-963.

a factor in the development of the ‘beyond reasonable doubt’ rule, as the penal uncertainty this caused meant that “jurors needed more coaxing to convict than had been the case in previous decades”.²¹ Essentially, this all fits Langbein’s contention that the eighteenth century saw the development of various strategies for ‘coaxing’ jurors to act in a legally acceptable way. What might be added to this claim is the observation that ‘coaxing’ strategies were not solely about obtaining convictions: as Green has shown, they also included practices whereby “[j]udges counseled partial verdicts”.²² When continental ideas of Enlightenment penology reached England, it was against this background of routine mitigation that they were interpreted.

Drawing inspiration from the enlightenment traditions of France, England and Scotland,²³ in 1764 the Italian jurist Cesare Beccaria advocated a philosophy of criminal justice which valued certainty over spectacle. Beccaria described a system of antagonistic forces and resistances made inevitable by unenlightened (and therefore tyrannical) rule. Laws made against “the indelible sentiments of the heart of man”,²⁴ Beccaria explained, will always generate “resistance, which will destroy it in the end”,²⁵ and this resistance will increase the cruelty of the tyrant, for “the cruelty of a tyrant is not in proportion to his strength, but to the obstacles that oppose him”.²⁶ Enlightened (as opposed to tyrannical) governance is just, because it operates according to the only true basis of human

²¹ JQ Whitman, *The Origins of Reasonable Doubt: Theological roots of the criminal trial* (Yale University Press 2008), 200.

²² Green (n 10), 281.

²³ P Beirne, ‘Inventing Criminology: The “science of man” in Cesare Beccaria’s *Dei Delitti e Delle Pene* (1764)’ (1999) 29 *Criminology* 777.

²⁴ C Becaria, *An Essay on Crimes and Punishments* (J Almon 1767), 8.

²⁵ *Ibid*, 8.

²⁶ *Ibid*, 17.

government: government according to principles drawn from true knowledge of the heart of man. Just punishment goes no further than that which is necessary to guarantee the liberties of all.²⁷ This makes legal certainty a paramount feature of enlightened governance for, together with adequate legal publicity,²⁸ it ensures that “each person may calculate exactly the inconveniences attending every crime. By these means, subjects will acquire a spirit of independence and liberty”.²⁹

Beccaria repeatedly described the proper action of an enlightened sovereign in terms of flowing water, emphasising the need to *channel*, rather than *oppose* these forces. We are told, for example, that:

all laws are useless, and, in consequence, destructive, which contradict the natural feelings of mankind. Such laws are like a dike, opposed directly to the course of a torrent; it is either immediately overwhelmed, or, by a whirlpool formed by itself, it is gradually undermined and destroyed.³⁰

The task of the wise, enlightened sovereign is therefore not to destroy unpleasant human desires but, rather, to channel them; and in this sense the good governor is very similar to the good architect, working with what already exists in nature rather than eliminating this nature from the outside.³¹ Returning to the figure of the tyrannical sovereign towards the end of his book, Beccaria listed the following among the habits of bad sovereigns: “who had rather command the sentiments of mankind, than excite them, and dares say to reason, ‘Be thou a slave;’ ... and who knows of no means of preventing evil but destroying it”.³²

²⁷ Ibid, 9.

²⁸ Ibid, 18-21.

²⁹ Ibid, 17.

³⁰ Ibid, 74.

³¹ Ibid, 21.

³² Ibid, 161.

So the task of the good sovereign is to *excite* the sentiments rather than *command* them; to prevent evil in something other than a purely negative way. As Beirne has put it, “The potential criminals in Beccaria’s schema ‘act’ like automata; in effect, they are recalcitrant objects who must be angled, steered, and forced into appropriate and law-abiding behavior.”³³ The enlightened ruler, in short, must actively govern rather than passively prohibit.

In a thesis such as this one, which explicitly attempts to work in the spirit of Foucault’s ‘genealogical’ research, it might seem obvious that questions of criminal reform during the eighteenth century would be linked to the concept of ‘discipline’, as famously set out in Foucault’s *Discipline and Punish*. I would argue, however, that Beccarian penology more closely fits Foucault’s concept of governmentality, specifically the governmental technology of ‘security’, than his earlier concept of discipline.

By ‘discipline’, Foucault meant certain techniques of power – such as examinations and institutional routines – which focus on the individual, and attempt to ‘normalize’ him or her.³⁴ ‘Governmentality’, on the other hand, is concerned with the governance of populations, manipulating people in their presumed freedom rather than presuming to reconstitute an individual as ‘normal’.³⁵ Discipline tries as far as possible to start from scratch, while techniques of governmentality attempt merely to coax pre-existing

³³ Beirne (n 23), 812.

³⁴ M Foucault, *Discipline and Punish: The birth of the prison* (A Sheridan trans, Penguin 1991) [1975].

³⁵ For a particularly graphic explanation of the difference between discipline and governmentality, see Foucault’s discussion of disciplinary and governmental town-planning strategies in M Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-78* (M Senellart, F Ewald, A Fontana and AI Davidson eds, G Burchell trans, Palgrave 2007) [1978], 15-21.

elements into desirable patterns of action.³⁶ Beccaria's book, focusing as it does on the channelling of natural desires into appropriate outlets, more closely describes a governmental than a disciplinary strategy of power.

While 'governmentality' is often presented as a strategy which comes much later in history than the earlier techniques of 'discipline',³⁷ Foucault was careful to specify that this was not necessarily so:

the idea of a government as a government of population makes the problems of the foundation of sovereignty even more acute ... and it makes the need to develop the disciplines even more acute ... So we should not see things as the replacement of a society of sovereignty by a society of discipline, and then of a society of discipline by a society, say, of government. In fact we have a triangle: sovereignty, discipline, and governmental management, which has population as its main target and apparatuses of security as its essential mechanism.³⁸

Governmentality does not replace discipline at a certain point in time: rather, these techniques of power coexist and, to a certain extent, cooperate with one another. So the fact that the eighteenth-century reforms of criminal punishments are perhaps the most famous of Foucault's examples of disciplinary power does not mean that Beccaria was necessarily writing during a disciplinary 'period'. His own proposals for reform of the criminal laws were centred around governmental questions of the coaxing of populations towards certain average actions, not disciplinary questions of the construction of normal, law-abiding individuals.³⁹

³⁶ Ibid, 21-23.

³⁷ See B Hudson, 'Punishment and Control' in M Maguire, R Morgan and R Reiner eds, *The Oxford Handbook of Criminology* (3rd edn, OUP 2002), 238-250.

³⁸ Foucault (n 35), 107-108.

³⁹ See P Pasquino, C Gordon trans, 'Criminology: The birth of a special knowledge' in G Burchell, C Gordon and P Miller eds, *The Foucault Effect* (University of Chicago Press 1991), discussing the difference

The Beccarian concern with justice as something essentially tasked with channelling the flow of natural human motives is a close match for the Foucauldian concept of security as the circular governance of a “milieu”;⁴⁰ but the English context of systematic mitigation of widespread capital sanctions was fundamentally at odds with Beccaria’s contention that the swiftness and certainty of punishment is more important than its severity. Beccarian security could not, then, be transplanted into the English criminal justice system without undergoing some alterations. Beccaria argued for a limited judicial role, with functions clearly separated from the sovereign; and this separation of powers seems closely linked to current practices regarding the judge-jury relationship. But the movement from Beccaria’s description of the sovereign-judge relationship towards the modern judge-jury relationship could not be undertaken without significantly reinterpreting some central tenets of the Beccarian image of the judge.

For Beccaria, just governance required the judicial task to be restricted to “syllogistically”⁴¹ applying law to fact, and concluding “liberty, or punishment”.⁴² “If the judge be obliged by the imperfection of the laws, or chuses, to make any other, or more syllogisms than this, it will be an introduction to uncertainty.”⁴³ Only the sovereign may “interpret”⁴⁴ the laws (by means of legislation), for laws are not the judiciary’s historical inheritance but, rather, the judges “receive them from a society actually existing, or from

between the classical penology of Beccaria and others like him (the criminal as a rational man) and the criminology of the late nineteenth century (the criminal as something non-human).

⁴⁰ See Foucault (n 35), 20-21.

⁴¹ Beccaria (n 24), 14.

⁴² Ibid, 14.

⁴³ Ibid, 14.

⁴⁴ Ibid, 13.

the sovereign, its representative”.⁴⁵ Beccaria was opposed to “the fatal liberty of explaining” possessed by judges, and sought to replace it with a certain, prospective, sovereign ‘interpretation’.

The task of the modern jury is often seen as one of ‘syllogistically’ applying law to fact, leaving legal interpretation to the judge; and this image of the jury’s role is sufficiently well established that occasional observations that law and fact cannot be so easily divided appear as important criticisms.⁴⁶ Furthermore, only judges are permitted any ‘liberty of explaining’: the 1792 Act (as well as later judicial decisions)⁴⁷ has made it very unusual for a jury to say anything other than ‘guilty’ or ‘not guilty’. But while it is possible to find echoes of Beccaria’s mechanistic jurisprudence in modern trial practices, his model of adjudication could not be read into the English criminal justice system as easily as this would suggest. The primary problem was Beccaria’s stance on mercy, which was greatly at odds with English practices of mitigation.⁴⁸

On the Beccarian model, mercy undermines the predictability of the law and is an evil always to be avoided. Discussing clemency and pardons, Beccaria states: “Happy the nation in which they will be considered as dangerous!”⁴⁹ “To shew mankind, that crimes are sometimes pardoned, and that punishment is not the necessary consequence, is to

⁴⁵ Ibid, 13.

⁴⁶ See KL Scheppele, ‘Facing Facts in Legal Interpretation’ (1990) 3 Representations 42.

⁴⁷ *R v Bourne* (1952) 36 Cr App R 125.

⁴⁸ I do not mean to suggest that England was unique in tolerating systematic subversions of the technical requirements of its criminal laws. Foucault for example, describing France in the early eighteenth century, speaks of a “necessary illegality, of which every social stratum bore within itself specific forms”. Foucault (n 34), 83. My argument is simply that in England – perhaps as in other places – the Beccarian disdain for ‘merciful’ non-application of the law presented an important obstacle to the application of his ideas to trial by jury.

⁴⁹ Beccaria (n 24), 175.

nourish the flattering hope of impunity, and is the cause of their considering every punishment inflicted as an act of injustice and oppression.”⁵⁰ The freedom of all, for Beccaria, is best guaranteed by swift, certain laws, applied mechanistically by judges whose only task is to determine guilt or innocence.⁵¹ But while Beccaria was very concerned with the ability of the criminal law to channel the natural desires of potential criminals away from socially damaging activities, he seems to have been happy to baldly prohibit his judges from engaging in clemency. In England, however, practices of mitigation were widespread;⁵² and so a command not to mitigate would be unrealistic if carried over to this context.

Discussing Beccaria’s anti-judicial stance, Hostettler has recently dismissed the argument against interpretation as “being too legalistic as the spirit of the law is indeed important. In England at least, jury nullification over the centuries has frequently softened harsh laws in a manner Beccaria surely would have applauded.”⁵³ But it is difficult to say what Beccaria ‘would have’ thought of jury nullification, as he did not directly address himself to this problem. He did, however, praise legal systems which gave a professional judge the help of lay assistants:

I think it an excellent law which establishes assistants to the principal judge, and those chosen by lot; for that ignorance, which judges by its feelings, is less subject to error, than the knowledge of the laws, which judges by opinion. Where the laws are clear and precise, the office of the judge is merely to ascertain the fact. If, in examining the proofs of a crime, acuteness and dexterity be required; if clearness and precision be necessary in summing up

⁵⁰ Ibid, 176.

⁵¹ Ibid, 11-12.

⁵² See JM Beattie, ‘Crime and the Courts in Surrey 1736-1753’ in JS Cockburn ed, *Crime in England 1550-1800* (Princeton UP 1977).

⁵³ J Hostettler, *Cesare Beccaria: The genius of ‘On Crimes and Punishments’* (Waterside 2010), 75.

the result; to judge of the result, nothing is wanting but plain and ordinary good sense, a less fallacious guide than the knowledge of a judge, accustomed to finding guilty, and to reduce all things to an artificial system, borrowed from his studies. Happy the nation, where the knowledge of the law is not a science!⁵⁴

Hostettler reads into Beccaria's thought an implicit acceptance of practices of jury mitigation, and indeed we can see in this passage praise for a system which denies the judge his legal artifice. But what Beccaria appears to be praising is not the capacity of lay members to insert an extra-legal justice into their verdict but, rather, their capacity to frustrate the judge's attempts at complicating questions of law.

Skinner has argued that attempts such as Hostettler's to say what a prominent thinker 'would have' said about a particular issue should not be regarded as "merely quaint", describing them instead as "a means to fix one's prejudices on to the most charismatic names under the guise of innocuous historical speculation. History then indeed becomes a pack of tricks we play on the dead."⁵⁵ The problem here is not a moral one, however. It is simply that by assuming, as Hostettler does, that Beccaria 'would have applauded' jury nullification, we necessarily overlook the real problems faced by those attempting to bring English criminal justice in line with his Enlightened model of crimes and punishments.

This difficult tension, between Beccaria's prohibition on mercy, and English practices of mitigation, was largely resolved by the simple trick of categorising judges and juries as members of the population, no less subject to desire than actual or potential criminals. By

⁵⁴ Beccaria (n 24), 50-51.

⁵⁵ Q Skinner, 'Meaning and Understanding in the History of Ideas' (1969) 8 *History and Theory* 3, 13-14.

extending Beccaria's natural population to include judges and juries, Blackstone for example was able to extend the possibility of a *criminal law* based upon principles of governance, suggesting the possibility of a governance-centred *trial*.

Near the start of Book Four of the *Institutes* – the volume dedicated to criminal law – Blackstone recited the problem of impunity through severity:

crimes are more effectually prevented by the *certainty*, than by the *severity*, of punishment. For the excessive severity of law (says Montesquieu) hinders their execution: when the punishment surpasses all measure, the public will frequently out of humanity prefer impunity to it.⁵⁶

Turning specifically to the English problem of mitigation, Blackstone emphasised the effect all this has on the population as a whole, focusing not just upon actual or potential criminals but also upon victims, juries, and judges:

So dreadful a list [of capital crimes], instead of diminishing, increases the number of offenders. The injured, through compassion, will often forbear to prosecute: juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence: and judges, through compassion, will respite one half of the convicts, and recommend them to the royal mercy. Among so many chances of escaping, the needy or hardened offender overlooks the multitude that suffer; he boldly engages in some desperate attempt, to relieve his wants or supply his vices; and, if unexpectedly the hand of justice overtakes him, he deems himself peculiarly unfortunate, in falling at last a sacrifice to those laws, which long impunity has taught him to contemn.⁵⁷

Beccaria had simply prohibited his ideal judges from acting mercifully, and saved his sociological remarks for the extra-legal population. Writing in an English context, however, Blackstone included *everybody* in the calculation of the ways in which people

⁵⁶ Blackstone (n 13), 17.

⁵⁷ Ibid, 18-19.

will be affected by unenlightened, excessive punishments. The victim, the juror and the judge are just as much people as the actual or potential criminal, and they cannot simply be *prohibited* from acting with mercy. They *will* mitigate the capital laws.

Beccaria's concern with human nature was, in the context of English practices of mitigation, extended from the actual or potential criminal to also include judge and jury. For Blackstone, judge and jury could not simply be *commanded* to obey: they needed assurances that the law they applied was not being applied unjustly. This is similar to the problem of moral comfort which Whitman locates in the eighteenth-century emergence of the 'beyond reasonable doubt' rule of criminal procedure.⁵⁸ Blackstone's solution was to remind judge and jury of the king's power of clemency:⁵⁹ but this meant turning the project of enlightened penology in on itself, as a central claim of this discourse was that social justice and legal certainty are inseparable. As Blackstone himself noted, a central Beccarian principle was that "[l]aws ... cannot be framed on principles of compassion to guilt".⁶⁰ Blackstone's solution was to remind the jury of the possibility of a pardon after conviction; but as the seditious libel crisis demonstrated, the promise of judicial clemency after the verdict was not always sufficient to produce a guilty verdict. The problem of squaring the desire for legal certainty with the fact of mitigating juries was ultimately resolved neither by prohibiting clemency nor by promising pardons, but by reconstituting the general verdict. This reconstitution permitted the jury's sentiments, no less than the

⁵⁸ Whitman (n 21).

⁵⁹ Blackstone (n 13), 390.

⁶⁰ Ibid, 389.

potential criminal's desires, to be channelled in some officially permissible direction. This meant more closely exploring the possibility of governing (but not controlling) juries.

This, I contend, is the context in which eighteenth-century jurists turned to the power of judicial directions to bring the jury's general verdict inside the legal system. This is the start of the systematic governance (in a Foucauldian sense) of the jury, and it is therefore within this context of the Enlightenment search for legal certainty that we can locate one of the key conditions in which the inclusionary model of jury power was first able to be described. In the remainder of this chapter, I shall explore two ways in which this emphasis on the power of directions to govern the criminal trial jury was maintained. First, I shall look in the context of homicide defences at the growing sense that a properly directed jury need not be presumed to act in an extra-legal way simply because it had delivered a general verdict. Second, I shall consider the debates surrounding the jury's verdict in cases of seditious libel, and the tension between those who still considered the general verdict to be an institutional form absolutely separating judge and jury and those who saw in judicial directions the possibility of governing even a general-verdict-giving jury. While the general verdict was certainly given a greater role in legal theory during the eighteenth century than earlier theorists such as Coke had afforded it, it is a central part of my contention that this development was not primarily motivated by a desire to protect the perceived autonomy of the jury. Rather, those who argued for a greater role for general verdicts emphasised the ability of the judge's directions to bring even a general verdict within the (legal) confines of the criminal trial and, therefore, to reconstitute the general verdict itself as the product of a cooperation between judge and jury. And this new emphasis on cooperation, with the implication that widespread

mitigation was a thing of the past, implied that English law was in fact equal to the Beccarian challenge of certainty as a basic legal aim.

4.2: The General Verdict and Homicide Defences

In his *History of the Pleas of the Crown*, written some time before his death in 1676, but not published until 1736, Matthew Hale gave a detailed account of the structural relationship between general and special verdicts, explaining the circumstances in which one form of verdict would be more appropriate than the other. The first important thing to note about Hale's jurors is that they are governed more by their oaths than by any judicial attempts to conduct them. Having quoted the petit jurors' oath, he explained that "I have set down the clerk's charge to the jury, because it contains the effect of their inquiry."⁶¹ He then went on to explore the questions of: how to proceed against multiple prisoners; who a juror may speak to after being sworn in; whether all twelve must agree; when and how a mistaken verdict may be corrected; and the form an acquittal-through-defence may take.⁶² These questions he answered primarily by reference to the jurors' oaths, and therefore the conduct of the jurors was, on his account derived more from their own spiritual obligations than from the directions of the judge.

Hale explained that, generally speaking, "[t]he jury may find a special verdict, or may find the defendant guilty of the fact, but vary in the manner."⁶³ Starting with examples of theft and burglary, "[i]f a man be indicted of burglary, *quòd felonice & burglariter cepit*

⁶¹ M Hale, *Historia Placitorum Coronae*, vol 2 (S Emlyn and PR Glazebrook eds, Professional Books 1971) [1736], 294.

⁶² Ibid, 294-305.

⁶³ Ibid, 301-302.

& *asportavit* [that he feloniously and burglariously took and carried away], the jury may find him guilty of the felony, but not guilty of the robbery.”⁶⁴ “So if a man be indicted upon the statute of 1 *Jac.* of stabbing *contra formum statuti* [against the terms of the statute], the jury may acquit him upon the statute, and find him guilty of manslaughter at common law.”⁶⁵ And again, an indictment for stealing ten shillings’ worth of goods may be reduced by the jury to a value of sixpence, thereby finding the accused guilty of a noncapital theft.⁶⁶ So if the jury find the defendant guilty of facts slightly different to those they are accused of, they may return a general verdict of guilty of whatever the facts as found by the jury demand.

Cases of homicide were more difficult, however. Specifically, homicide raised the problem of defences which, while somewhat excusing the accused, did not entirely save them from punishment:

So if a man be indicted of murder *ex malitiâ præcogitatâ* [with malice aforethought], the jury may find him guilty of manslaughter ... or that he kild him *se defedendo* [in self-defence] or *per infortunium* [by misadventure]; but *nota* in these cases it is not sufficient to find it done *se defedendo* or *per infortunium*, but the special matter must be set down how it was done, and if upon the special matter shewn it shall appear to be murder or manslaughter, the court will accordingly judge of it, tho the jury conclude, *Et sic infortunium* [and so misadventure] or *sic de defedendo* ...

And in these cases, tho it be found *per infortunium*, or *se defedendo* upon the special matter set forth, yet this special matter must be recorded, for tho it be not such a felony, as hath judgment of life, yet it is such an offense, as gives the forfeiture of goods, and therefore they may not find a general *not guilty*, but must find the special matter, and leave it to the court to judge.⁶⁷

⁶⁴ Ibid, 302. All translations in this chapter given in square brackets are my own.

⁶⁵ Ibid, 302.

⁶⁶ Ibid, 302.

⁶⁷ Ibid, 302.

A further complication is added by the coroner's inquest, particularly where a killing has been proven, but it was legally justifiable.⁶⁸ If a coroner's jury finds that one person murdered another, and the jury acquits the accused murderer, then the trial jury

must inquire who did it, for here it is apparent there was a man slain, because the coroner takes the inquest upon view of the body, and if they should find him generally *not guilty*, and yet should upon their other inquiry find he kild him, it would be a contradiction in itself, and therefore in this case, they are to find the special matter, and thereupon the court shall give judgment for his discharge.⁶⁹

So the general verdict, for Hale, was generally available as a means of outright conviction, of conviction for most lesser offences, and of general acquittals. But there were specific reasons why defences to homicide did not meet this account of the work which could be carried out under the auspices of the general verdict. Partial defences to murder required punishments which were specifically attached to that kind of homicide (namely, forfeiture of goods); and so it was important for the defence (of misadventure or of self-defence) to enter the official record. Simple acquittals could produce a contradiction in the record, in which one jury says this person committed an act of homicide and another acquits the accused; so it was important for the defence to be recorded. For these reasons (all centred around a concern for the maintenance of the law's integrity), defences to murder required special verdicts.

Hale's view was influential, and obviously well-known before the publication of the *History* in 1736. In Book One of his *Pleas of the Crown* (1716), William Hawkins cited

⁶⁸ Ibid, 303.

⁶⁹ Ibid, 305.

Hale as an important (if imperfect) predecessor,⁷⁰ and offered the following gloss on Hale's comments discussed above:

it is agreed, That no one can plead a Fact amounting to Homicide, *se defedendo*, or by Misadventure, but that in such a Case the Defendant must plead Not guilty, and give the Special Matter in Evidence: And it is also agreed, That where a Special Fact, amounting to justifiable Homicide, is found by the Jury, the Party is to be dismissed, without being obliged to purchase any Pardon, &c.⁷¹

And five years later, in Book Two of his *Pleas*, Hawkins explained that

where the Jury find the Defendant guilty of Manslaughter on an Indictment of Murder, they may give their Verdict generally, without setting out any of the Circumstances of the Fact: But that they shall not be received to find him guilty generally of Homicide *se defedendo*, or *per infortunium*, but must set out the whole Circumstances of the Fact, and in the Conclusion shew of what Crime they find the Defendant guilty, wherein if they be mistaken, it is said, That the Court may notwithstanding give such Judgment as shall appear to be proper from the Circumstances of the Fact specially set forth.⁷²

So again, the role of the judge is enlarged in cases where his special expertise is required, or where an unusual feature of the case requires him to record more than a simple 'guilty' or 'not guilty' from the jury. In any event, doctrinal accounts of the general verdict presume little judge-jury contact; and such contact is generally reserved for a special-verdict situation.

⁷⁰ W Hawkins, *A Treatise of the Pleas of the Crown: Or a system of the principal matters relating to that subject, digested under their proper heads*, vol 1 (PR Glazebrook ed, Professional Books 1973) [1716], unpaginated preface.

⁷¹ *Ibid*, 69-70.

⁷² W Hawkins, *A Treatise of the Pleas of the Crown: Or a system of the principal matters relating to that subject, digested under their proper heads*, vol 2 (PR Glazebrook ed, Professional Books 1973) [1721], 440.

Half a century later, Michael Foster (a judge of King's Bench) urged for a reassessment of the general verdict, particularly in the context of defences to homicide.⁷³ In essence, he wanted a broader role for the general verdict, which should, he asserted, be able to compass the homicide defences within a simple 'not guilty'. Foster set out the overall distribution of cases between general and special verdicts, and the overall distribution of duties between judges and juries, as follows:

In every case where the point turneth upon the question, whether the homicide was committed wilfully and maliciously, or under circumstances justifying, excusing, or alleviating; the matter of fact ... is the proper and only province of the jury. But whether, upon a supposition of the truth of facts, such homicide be justified, excused, or alleviated, must be submitted to the judgment of the court; for the construction the law putteth upon facts stated and agreed, or found by a jury is in this, as in all other cases, undoubtedly the proper province of the court. In cases of doubt and real difficulty it is commonly recommended to the jury to state facts and circumstances in a special verdict. But where the law is clear, the jury, under the direction of the court *in point of law*, matters of fact being still left to their determination, may, and, if they are well advised, always will find a general verdict, conformably to such direction.

*Ad quaestionem juris non respondent juratores.*⁷⁴

Foster ends this passage by quoting only one half of the traditional statement of the division of labour between judge and jury: *et sicut ad quaestionem juris, non respondent juratores, sed iudices: sic ad quaestionem facti non respondent iudices sed juratores.*⁷⁵

The whole phrase limits both parties: the judge is prohibited from answering questions of

⁷³ M Foster, 'Discourse II: Of homicide' in M Foster, *A Report of Some Proceedings on the Commission for the Rebels in the Year 1746 in the County of Surry; and of Other Crown Cases: To which are added discourses upon a few branches of the Crown law* (2nd edn, W Strahan and M Woodfall 1776).

⁷⁴ Ibid, 255-256 (emphases in original).

⁷⁵ E Coke, 'The First Part of the *Institutes*' in E Coke, *The Selected Writings and Speeches of Sir Edward Coke*, vol 2 (S Sheppard ed, Liberty Fund 2003) [1628], 725. The editor translates this as "And just as for questions of law the jurors do not answer but the judges; thus as for questions of fact the judges do not answer but the jurors do." Ibid, 725 (n 4).

fact, and the jury is prohibited from answering questions of law. Foster's full account speaks to each of these prohibitions; yet he concludes by applying the full force of Latin only to the jurors. Taken on its own, this may look like an attempt either to newly constrain the jury, or to free the judge from archaic constraints. As I read Foster, however, the significance of the truncated Latin formula is that he wishes to emphasise that, despite his account of the judge-jury relationship, he still believes juries can only legitimately answer questions of fact. Fearing that his account might be taken as an endorsement of jury lawlessness, he ends by emphasising that he still subscribes to the ancient constraints put upon a jury's cognition.

Foster's concerns are brought into relief by comparing his understanding of the general verdict with that of Coke, discussed in chapter three. For Coke, the judge was barely involved in the general verdict; and judicial intervention resided in the analytically ideal (if actually unusual) special verdict. For Foster, judges always direct their juries, and the special verdict is only 'recommended' 'in cases of real doubt and difficulty'. The special verdict still does important work, but only when judicial directions fail. And he expands on this point later on, in ways which demonstrate that what he was attempting to articulate was a broader role for the general verdict, but in such a form as would not make it seem like he was encouraging jury lawlessness. Crucially, this seems to have been a response to the problem which, according to Green, was left unresolved by the 'constitutionalization of the general verdict': the relationship between jury lenity and legal certainty, as problematised by Beccaria's enlightened followers. What Foster helps to illustrate is how the 'reconstitution' of the general verdict was precisely a response to this problem.

Foster makes it clear that jury lenity and jury error are indistinguishable in practice; and, in Beccarian tone, he takes the opportunity to cast jury dispensation in a negative light:

I will mention a case, which, through the ignorance or lenity of juries, hath been sometimes brought within the rule of accidental death. It is where a blow aimed at one person lighteth upon another and killeth him. This in a loose way of speaking may be called accidental *with regard to the person who dieth by a blow not intended against HIM*. But the law considereth this case in a quite different light.⁷⁶

Despite the opposition apparently thrown up here between the dictates of lenity and those of law, Foster emphasises that he is not categorically opposed to lenity in legal interpretation and application, only that he considers it illegitimate for it to be a jury that engages in such activities. Three pages later, he expresses disapproval for the rule of law which imposed a penalty of forfeiture upon a person found guilty of causing death by misadventure: “where the rigour of the law bordereth upon injustice, mercy should, if possible, interpose in the administration. It is not the part of judges to be perpetually hunting after forfeitures, *where the heart is free from guilt*.”⁷⁷ The difficult knot tied by these two passages, demanding mercy but insisting juries stick to the path of the law, is resolved neatly through an anecdote which skilfully inserts judicial directions into the equation.

“I once upon the circuit tried a man for the death of his wife ...”⁷⁸ The husband and wife had been to visit friends on a Sunday morning, and the husband had brought with him a gun, “hoping to meet with some diversion along the way”.⁷⁹ He met none, unloaded his

⁷⁶ Foster (n 73), 261 (emphasis in original).

⁷⁷ Ibid, 264 (emphasis in original).

⁷⁸ Ibid, 265.

⁷⁹ Ibid, 265.

gun, and left it at his friend's house while the whole party went to church. Meanwhile, a servant of the friend had taken the gun to go hunting. He also failed to find anything, and returned the gun loaded. On the way home, the man's wife, who had been carrying the gun, handed it to her husband to carry. He touched the trigger as he took it, and she died. "I did not enquire, whether the poor man had examined the gun before he carried it home; but being of opinion upon the whole evidence, that he had reasonable grounds to believe that it was not loaded, I directed the jury, that if *they* were of the same opinion they should acquit him. And he was acquitted."⁸⁰ The mercy of the jury is here deemed appropriate, but it is also expressly authorised by the judge, through his directions. So the laws of England may be mercifully applied, but it ought properly to be a mercy authorised by a judge who will not, in his compassion, undermine the laws themselves.

The other noteworthy aspect of this anecdote is that a general verdict of acquittal is given, and accepted, in what amounts to a case of homicide by misadventure. Foster goes on to discuss a growing tendency for those defences which had previously required special verdicts to be resolved by a simple 'not guilty'. Now, "*under the direction of the court*", a phrase which Foster frequently italicises, "they may find a general verdict of acquittal without this circuity".⁸¹ The general verdict ('*under the direction of the court*') is increasingly inserted into spaces which previously called for a special verdict, for two reasons: first, it achieves the same result more efficiently; second, it allows an unjust rule to be nullified through open judicial practices. But death by misadventure, despite Foster's example of the accidentally-killed wife, had not yet been brought within the rule,

⁸⁰ Ibid, 265.

⁸¹ Ibid, 279.

and still required a special verdict. Foster informs us that a common way of explaining this anomaly was to state that “The jury are judges of the mere matter of fact, and the court is to judge upon the special matter found by them, whether the fact was done *per infortunium* or feloniously.”⁸²

So the reason commonly given for the limitation of the general verdict is that *ad quæstionem juris non respondent juratores*: to accept a general verdict in a case of ‘doubt and difficulty’ would be tantamount to allowing the jury to decide questions of law. Foster was not satisfied by this explanation, of course, for on his model of the general verdict the verdict was always reached ‘*under the direction of the court*’, thereby circumventing the possibility of jury lawlessness:

That the matter of fact is the proper province of the jury I have already promised, and will never depart from it. But it was never said, that a jury may not, *under the direction of the court*, give a general verdict in all cases of justifiable homicide; and why not in the case of misadventure, a point seldom so complicated and embarrassed as the other?⁸³

Foster has to ‘promise’ not to deviate from the *juratores non respondent* maxim; and he has to explain how it is that a general verdict in a case of ‘doubt and difficulty’ can do anything other than open up the criminal justice system to a jury lawlessness rooted in a misguided sense of justice, which however well-intentioned can serve only to make impossible the Enlightenment ideal of legal certainty. Foster’s simple answer is to insert at every opportunity the italicised phrase ‘*under the direction of the court*’. The general verdict is explicitly proposed here by a late-eighteenth century judge as the analytically

⁸² Ibid, 279-280.

⁸³ Ibid, 280.

ideal (not simply the most common) form of verdict; and this is done not to encourage jury equity but, rather, to accept that it exists and to channel it into a legally-acceptable form, thereby encouraging certainty and predictability in the administration of the criminal law. The outcome need not be controlled by insisting on a special verdict, for the reconstituted general verdict allows juries to be *governed* into proper action.

In the case of homicide defences, the earlier practice of requiring juries to deliver special verdicts if they wished to invoke a partial defence, such as self-defence or misadventure, emphasises the way in which the general verdict was reconstituted during the eighteenth century as something which no longer brought with it a presumption of total jury autonomy. The fact that these were technical legal issues beyond the understanding of the ordinary citizen was no longer important as, Foster emphasised, each general verdict is reached ‘under the direction of the court’. It is therefore not reached by a panel of twelve uninformed citizens acting on their own but, rather, it is reached by a sufficiently educated jury, acting in cooperation with the judge.

As Blackstone had emphasised several years earlier, the Beccarian concept of framing the criminal law in such a way as would minimise mitigation ought in an English context to be extended to judge and jury as well as that part of the population which may be tempted to act improperly. In Foster we can see a practical example of this thinking; and in the following section I shall argue that the logic Blackstone and Foster followed penetrated deeper than these isolated examples, taking up an important place in the debate over seditious libel which, in Green’s estimation, led to a ‘constitutionalization of the general verdict’. My contention is that in this debate we can in fact clearly see a *reconstitution*, one in which the general verdict was reimagined as a cooperative

enterprise, and which therefore described the jury as an institution presumed to act legally, because it was now conceptualised as an internal part of the criminal trial process. This reconstitution, in short, is the birth of the inclusion thesis.

4.3: Seditious Libel and the ‘Monster in Law’

On 18th May 1688, seven bishops of the Anglican Church wrote to the king, declaring that his attempt at suspending the criminal laws against religious nonconformity was illegal. They were soon charged with seditious libel, but the judges in their trial failed to agree whether the letter should be considered seditious. This, for practical purposes, left the ultimate interpretation of the law with the jury, who acquitted the bishops and thereby lay some important foundations for the Glorious Revolution.⁸⁴

In the century after this Revolution, certainly by 1731,⁸⁵ the crime of seditious libel was developed so as to exclude the jury from the question of the defendant’s guilt, despite the fact that the jury still concluded with a ‘guilty’ or a ‘not guilty’.⁸⁶ By 1770, this practice had become controversial, and in parliament Lord Mansfield was asked, among other things, whether this meant that “the jury have no right by law to examine the innocence or criminality of the paper if they think fit, and to form their verdict upon such examination”.⁸⁷ Mansfield managed on this occasion to avoid the question, but in the 1780s and 1790s the practice came under greater scrutiny until, in 1792, parliament

⁸⁴ ‘The Trial of the Seven Bishops’ (1688) 12 Cobbett’s State Trials (1687-1696) col 183. See also C Hill, *The Century of Revolution: 1603-1714* (Routledge 2002), 198-99.

⁸⁵ ‘The Trial of Mr Richard Franklin’ (1731) 17 Cobbett’s State Trials (1726-43) col 625.

⁸⁶ See generally JF Steven, *A History of the Criminal Law of England*, vol 2 (Macmillan 1883), 298-395.

⁸⁷ *Ibid*, 325.

declared that general verdicts could only properly be given as an answer to the whole case, including the ultimate question of the defendant's guilt.

Green, discussing the verdict required of juries in the seditious libel trials of the mid-eighteenth century, has stated that "the jury was to render what amounted to a special verdict in the form of a general verdict of 'guilty'".⁸⁸ This is no doubt true, but it is not the way Thomas Erskine – defence counsel in the important trial now known as *The Dean of St. Asaph's Case* – saw things. The problem, for Erskine, was precisely whether a 'special verdict in the form of a general verdict' was possible, or whether it should be considered a "monster in law":⁸⁹ a single thing with two natures,⁹⁰ sitting unnaturally *between* special and general verdicts.

By framing the problem in this way, Erskine posed the question: what constitutes a general verdict? This immediately brought him into questions of the proper relationship between judge and jury, a relationship which he considered to be modulated by the question of whether a general or a special verdict is returned: "the intention, even where it becomes a simple inference of legal reason from a fact or facts established, may, and ought to be collected by the jury, with the Judge's assistance ... unless the jury ... [refer] it voluntarily to the Court by special verdict."⁹¹ By insisting on a verdict of 'guilty' which refers only to questions of fact, Erskine argued, the courts had developed an institutional

⁸⁸ Green (n 10), 319.

⁸⁹ *R. v Shipley* [A.K.A. *The Dean of St. Asaph's Case*] (1784) 4 Dougl 73; 99 ER 774, 805.

⁹⁰ See M Foucault, *Abnormal: Lectures at the Collège de France 1974-1975* (V Marchetti, A Salomoni, F Ewald and A Fontana eds, G Burchell trans, Verso 2003) [1974], 63-65.

⁹¹ *R v Shipley* (n 89), 782.

form which was nothing less than monstrous, an unnatural combination of general and special verdicts which completely denied the jury its right to choose to conclude generally.

Erskine argued that it was the jury's right to choose to deliver a general verdict;⁹² and that it could not do so in the absence of legal knowledge. The judge in the Dean's case had, Erskine contended, denied the jury their right to choose, and he had achieved this by denying them cognisance of the law:

The present motion is therefore founded upon this obvious and simple principle, that the defendant has had in fact no trial, having been found guilty without any investigation of his guilt, and without any power left to the jury to take cognisance of his innocence. It is easy to show that the jury could not possibly conceive or believe, from the Judge's charge, that they had any jurisdiction to acquit him, however they might have been impressed even with the merit of the publication, or convinced of his meritorious intention in publishing it: nay, what is worse, while the learned Judge totally deprived them of their whole jurisdiction over the question of libel, and the defendant's seditious intention, he at the same time directed a general verdict of guilty, which comprehended a judgment upon both.⁹³

In essence, Erskine's argument was that a verdict of 'guilty' or 'not guilty' will be impossible unless the jury is given some information regarding the meaning of these two phrases in the context of the case before them. General verdicts are inherently about a combination of law and fact, while special verdicts mean a jury has voluntarily chosen not to include legal questions within its verdict; but to deny the jury cognisance of the law, and then to direct them to find generally, is tantamount to the denial of a trial.⁹⁴

⁹² Ibid, 782.

⁹³ Ibid, 799.

⁹⁴ Ibid, 799.

Crown counsel, as well as Lord Mansfield in the Court of King's Bench, responded with various comments about jury lawlessness. Mansfield disagreed with one of the five lawyers for the Crown, who argued that the jury not only had the power but the right "to take upon themselves the decision of every question of law necessary to the acquittal of the defendant".⁹⁵ The other five Crown counsellors disagreed with the dissentient Bearcroft, insisting that, while juries cannot be *compelled* to follow the law, "[t]he moral duty and obligation ... is equally strong, as if it were enforced by a penal sanction."⁹⁶ Both branches of these arguments, despite their explicit disagreement, were at least agreed on the ground which questions of jury trial rests upon. Law and fact are entirely separate things: the judge has responsibility for the law; while the jury has responsibility for the facts. The difference between Bearcroft and the rest was that, for Bearcroft, the jury has the *right* to occasionally step outside this system; while for the others, it only has the *power* to do so. In any event, questions of jury power are centred around a jury empowered to completely detach itself from the usual judge-jury relationship. In this sense, their views are identical to those of the Restoration pamphleteers explored in chapter three: their disagreement concerns the *legitimacy*, not the *truth* of an exclusionary model of jury power.

Erskine's view of the proper nature of jury trial was different to this, in an important way. Immediately after the arguments of Crown counsel had ended, he restated his claim as follows:

⁹⁵ Ibid, 785 (n 1). See generally the discussion in Devlin (n 3).

⁹⁶ *R v Shipley* (n 89), 785.

in all cases where the law either directs or permits a person accused to throw himself upon a jury for deliverance for pleading, generally, that he is not guilty, the jury, thus legally appealed to, may deliver him from the accusation by a general verdict of acquittal founded (as in common sense it evidently must be) upon an investigation as general and comprehensive as the charge itself from which it is a general deliverance.⁹⁷

The power of the jury, then, does not lie in its purported ability to step outside the legal system, delivering a verdict of ‘not guilty’ in the face of a legally-specified reason. Rather, the power of the jury lies in its ability to comprehensively investigate the comprehensive question: ‘is this person guilty of this crime?’ So jury power is not about escaping the legal system in the name of an inscrutable justice: rather, it is about offering a symmetrically general response to the general issue of guilt or innocence. Jury power, on Erskine’s account, is about placing the jury deeper inside the space of the trial; for Crown counsel, operating on the model of the Restoration pamphleteers, jury power is about escaping this space. Mansfield agreed with Crown counsel, and did not accept Erskine’s contention that the trial judge’s refusal to direct the jury on questions of law meant that a retrial was required.⁹⁸

Passed in 1792, Fox’s Libel Act responds to arguments such as these by stating that juries cannot be compelled to return special verdicts, and that they must act under direction of the court; in this way, Erskine and Foster’s model of the general verdict was ‘constitutionalized’. But the late eighteenth century did not see a neat, instant replacement of the older exclusionary model of the general verdict (general verdicts put the jury beyond judicial control) with the newer inclusionary model (a general verdict cannot truly

⁹⁷ Ibid, 792.

⁹⁸ Ibid, 824.

exist unless the judge has given the jury a brief legal education). For many, Mansfield's contention still rang true: what was being demanded by the reformers was that "the law shall be, in every particular cause, what any twelve men, who shall happen to be the jury, shall be inclined to think; liable to no review, and subject to no control, under all the prejudices of the popular cry of the day".⁹⁹ It is difficult to conclude from his response, however, that Mansfield had actually understood Erskine's argument. Erskine's reconstitution of the general verdict, centred around the importance of adequate legal directions, was met with an argument about jury lawlessness. Similarly, in the parliamentary debates preceding the passage of Fox's Libel Act eight years later, proponents of exclusionary and inclusionary models of the general verdict talked at cross purposes, criticising and praising unrelated concepts of jury power.

In the libel debates of 1791-92, the general verdict was frequently described in an exclusionary way; and the jury's political function was illustrated through an opposition between conscience and the (judges') law. For Lord Camden, juries have "a right to decide upon the criminality, upon the law and upon any fact stated in the record",¹⁰⁰

and the strongest and most convincing proof of this was, that the verdict of the jury was final against all the judge could say. He added to this, a matter which he conceived should be imprinted on every juror's mind, that if they found a verdict of the publishing, and left the criminality to the judge, they had to answer to God and their consciences for the punishment that might, by such judge, be inflicted on the defendant, whether it was fine, imprisonment, loss of ears, whipping, or any other disgrace, which was the sentence of the court.¹⁰¹

⁹⁹ Ibid, 824.

¹⁰⁰ *Parliamentary History of England, from the Earliest Period to the Year 1803*, vol 29 (TC Hansard 1817), col 729.

¹⁰¹ Ibid, cols 729-730.

So jury power is guaranteed institutionally by the general verdict, and ethically by the juryman's soul.

From the other side, the Lord Chancellor, Lord Thurlow, insisted that "the law arising from the fact was always for the determination of the court".¹⁰² This ideal separability, positing an exclusionary vision of jury trial, is underscored by Thurlow's inability to reconcile a prohibition on directed convictions with a judicial duty to instruct the jury on the law: "He observed, that this bill involved some contradictions; for, after telling the judge what he is not to do, it proceeds to telling him what he is to do, and these not consistent with each other."¹⁰³ For both supporters and opponents of the Bill, it was possible to view it as an attempt to keep (or make) the jury separate from the judge, and this through a legal protection of the general verdict. Judicial directions, when they were acknowledged, were not seen as much of a palliative to the independence guaranteed to the jury by Green's 'constitutionalization of the general verdict'.

Other voices were keen to situate the general verdict within a system of judge-jury cooperation, however; and they held that judicial directions would limit a total subversion of the law on the part of the jury. In the House of Commons, Fox stated that the judicial duty to direct the jury on the law was perfectly obvious, and that including it in the Bill risked unnecessarily complicating its message.¹⁰⁴ But Erskine, perhaps forgetting his

¹⁰² Ibid, col 1039.

¹⁰³ Ibid, col 1040.

¹⁰⁴ *Parliamentary Register: Or history of the proceedings and debates of the House of Commons*, vol 29 (J Debrett 1791), 589-590.

failure with the jury in *The Dean of St. Asaph's Case*,¹⁰⁵ argued that a jury, jealous of its jurisdiction, could always be induced to find a guilty libeller innocent if defence counsel pointed to the judicial refusal to let them truly deliberate on the guilt of the accused.¹⁰⁶ The Marquis of Lansdown argued that this situation could be avoided if judges gave their juries the space – under direction of the court – to decide the whole case, free from direct judicial control.¹⁰⁷ Lord Loughborough described the refusal to direct the jury on the law as “the refuge to which libellers had fled for safety”.¹⁰⁸ “Experience had convinced him, if the judge did his duty by explaining the law with care, juries would decide with perfect justice.”¹⁰⁹

Looking back a century later, in his *History of the Criminal Law of England*, Stephen observed that “convictions after the Libel Act were as common as they were before, if not commoner.”¹¹⁰ In other words, the argument that general verdicts should not be permitted in such cases because they would empower the jury to acquit against the law had not borne fruit. In the Libel Act, judges were commanded to give juries legal directions not only because the general verdict, if it is to be less than monstrous, must be a conclusion on *legal* guilt. More than this, it was feared that a flat denial of their power to consider legal questions would inflame the jury’s jurisdictional jealousies; and that this

¹⁰⁵ According to the trial judge’s account, it appears that Erskine unsuccessfully attempted to tell the jurors that they were seeking to nullify the law: “They [the jury] brought in a verdict of guilty of publishing only, which I refused to take; in which, I conceive, I did right. The jury were asked if they found it a libel: they said, no. An improper use was made of that: the counsel for the defendant [Erskine] said, they find it no libel. The jury said they found it no such thing: they did not mean to find whether it was a libel or not, one way or the other.” *R v Shipley* (n 89), 779.

¹⁰⁶ *Parliamentary Register* (n 104), col 562.

¹⁰⁷ *Ibid*, cols 738-739.

¹⁰⁸ *Ibid*, col 1295.

¹⁰⁹ *Ibid*, col 1296.

¹¹⁰ Stephen, (n 86), 363.

natural passion could best be channelled away from unwarranted acquittals by giving juries legal directions, thereby ending the necessity of the judge-jury conflict. The Libel Act, on this reading, is about the proper government – but not control – of juries. So at the time of the Act’s passage through parliament, both supporters and opponents of the Bill were divided, some seeing it in exclusionary terms, while others viewed it in the terms of the inclusion thesis.

The judges were less ambivalent in their reading of the Act. In the decades after 1792, they consistently interpreted the Libel Act in an inclusionary way, holding that the jury must act under direction of the court. But this ‘direction’ was specifically understood more as a question of governance than of control. Baron Parke, faced with claims that judges must direct jury verdicts of conviction or acquittal, agreed that a trial judge “might have given his own opinion as to the nature of the publication”,¹¹¹ but insisted that he “was not bound to do so as a matter of law”.¹¹² The normal verdict will not be a product of such domination but, rather, will be the decision of a jury acting freely within a legal space laid out by the judge: “it has been the course for a long time for a judge, in cases of libel, as in other cases of a criminal nature, first to give a legal definition of the offence, and then to leave it to the jury to say, whether the facts necessary to constitute that offence are proved to their satisfaction”.¹¹³

¹¹¹ *Parmiter v Coupland and Another* (1840) 6 M&W 105; 151 ER 340, 342.

¹¹² *Ibid*, 342.

¹¹³ *Ibid*, 341.

Chief Justice Best had, a decade earlier, made it clear that this freedom did not extend to any legitimate interpretive power. But the kind of jury lawlessness Best anticipated was very different to that discussed a century-and-a-half earlier:

I mean, however, to protest against juries, even in criminal cases, becoming judges of the law: the [1792] act only says that they may find a general verdict. Has the jury then a right to act *against* the opinion of the Judge, and to return a verdict on their own construction of the law? I am clearly of opinion that they have not.¹¹⁴

Whereas for the Restoration pamphleteers jury power consisted of ignorance, of an attitude which regarded the judge as irrelevant, for the English judges after 1792 jury power consisted of a positive act taken against the judge. With a reconstituted general verdict, now understood as an inclusive act of cooperation, even jury misbehaviour was set in this judicialised context. Jury power was no longer about wilful ignorance: rather, it was about listening to what the judge had to say and then refusing to obey in this particular, exceptional case.

4.4: Conclusions

The reconstitution of the general verdict which took place during the second half of the eighteenth century is more than the mere ‘constitutionalization’ alluded to by Green. Far from being simply a legal and political guarantee of a pre-existing institution, it was also a reimagining of the institution itself. Until the second half of the eighteenth century, the general verdict was viewed as unproblematically excluding both judge and jury from their own separate spheres. Depending on your point of view, the general verdict gave the jury

¹¹⁴ *Levi v Milne* (1827) 4 Bing 195; 130 ER 743, 745 (emphasis added).

the ‘perilous’ task of deciding the whole question of guilt or innocence (simultaneously shielding the judge from such responsibility); or it empowered the jury to attend to their consciences rather than the law; or it unjustifiably subverted the law’s integrity; or it quite properly handed the adjudicatory task to the jury in easy cases, saving the dignity of the judge for the less usual special verdict case. It is important to emphasise that this perspective on the general verdict did not commit a person either to conclude that the institution was good or bad: as Mansfield’s dispute with Bearcroft in the *Dean of St. Asaph’s Case* shows, it was possible to agree that the general verdict gave the jury the capacity to act against the law while simultaneously reaching different conclusions on whether this capacity should be considered a power or a right. It is this exclusionary model of the general verdict which Green asserts was ‘constitutionalized’ by the 1792 Act; but I would argue that in fact the Libel Act is part of a wider event in which an opposing – inclusionary – model of the general verdict was proposed.

The new, inclusionary, model of the general verdict involved viewing the verdict not simply as a jury’s independent response to a case but, rather, as a response reached within parameters set by the judge. The key question for this discourse was not ‘is it legitimate for the jury to place its conscience above the law?’ Rather, it asked ‘how far can and must a judge go in directing his jury?’ As before, the general verdict placed the ultimate decision with the jury. What was new was the focus on the judge’s ability to shape this decision. On the one hand, it was seen as an ontological precondition of the general verdict – and this is already very different to what had come before – that ‘guilt’ or ‘innocence’ are inherently legal terms, and that therefore a verdict which determines an accused’s guilt will only be possible if the judge has already told the jury what guilt

consists of. On the other hand, Enlightenment penology's concern with avoiding criminality by governing populations away from crime was modulated in an English context, making judge and jury part of this governable population. As a key element of enlightenment penology's project of governance was legal certainty, practices of mitigation and nullification were seen as problematic. The solution was twofold. On the one hand, judicial directions could be used to channel merciful desires down judicially-sanctioned routes; on the other, by turning away from directions to convict and towards more advisory directions, it was anticipated that juries could be governed in ways which would not inflame their jurisdictional jealousies. All these problems refocused the general verdict as something still delivered independently, but within a space created by the judge through a careful use of judicial directions. This meant that jury misbehaviour could be avoided; but it also meant that when it did happen it could only ever be exceptional. The duties and powers of the jurors, in this discourse, are tied not to the citizen's political conscience but, rather, to the juryman's legal consciousness.

In this chapter, I have tried to show that the exclusionary model of the general verdict was not immediately replaced by the newer inclusion thesis, but rather that these two perspectives, with their very different understandings both of the juror's identity and the meaning of jury power, simply talked past each other. In chapter six, which concerns jury power in England and Wales today, I shall explore the ways in which jury power and jury trial more generally are discussed both in academic and in judicial texts, and I shall suggest that there is still a basic tension between exclusionary and inclusionary accounts of jury power. First, in chapter five, I shall discuss the implications of the discursive split I have identified for the USA, specifically for the America of the nineteenth century. The

issues explored in nineteenth century England and America with regard to the proper function of the general verdict were not entirely distinct, and in the next chapter I shall occasionally use English materials.

My reason for temporarily taking this thesis to the USA is twofold: first, the accomplishment of American independence took place against a backdrop of discontent surrounding British regulation of colonial juries;¹¹⁵ second, independence was achieved at the precise moment when English judges and parliamentarians were vigorously pursuing distinct theories of the nature of the common law jury. These factors made achieving some ‘true’ understanding of the jury’s legitimate role uniquely important in nineteenth-century America. In tracing the tension between exclusionary and inclusionary perspectives on jury power, the nineteenth-century American debates are unavoidable.

¹¹⁵ See generally JP Reid, *The Constitutional History of the American Revolution: The Authority of Rights* (University of Wisconsin Press 1986), 47-59, particularly at 52-55

CHAPTER 5: THE EXCLUSION AND INCLUSION THESES IN NINETEENTH-CENTURY AMERICA

In 1789, Thomas Jefferson wrote that trial by jury was “the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution”.¹ A little over a century later the US Supreme Court decided, in *Sparf and Hansen v United States*,² that while it was impossible to prevent a jury substituting its own view of the law for that of the trial judge, any such exercise of jury independence was not, and never had been, legitimate.

As judicial control of constitutional questions grew, the jury’s (legitimate) control of questions of law diminished. But this change was not effected in a single, straight-forward manner. For some, judicial control of the law required the judge, so far as possible, to limit the jury to a simple finding of fact. For others, total control of the jury was neither possible nor desirable, and the proper administration of the criminal law could only be guaranteed by adequately governing the jury, directing rather than prohibiting their non-legal inclinations. While Jefferson’s argument (that jury trial was the best way of reviewing the constitutionality of the state’s actions) quickly fell into disuse, the role of the jury in nineteenth-century America was still the subject of considerable contention.

¹ T Jefferson, *The Writings of Thomas Jefferson: Volume III* (HA Washington ed, Taylor & Maury 1853), 71.

² *Sparf and Hansen v United States* (1895) 156 US 51.

What I would like to do in this chapter is to situate American jurists' changing attitudes to the jury within this context of a tension between exclusionary and inclusionary models of jury power.

Writing in the mid-1990s, Alschuler and Deiss could complain that, while the history of the criminal trial jury in England was a well-worn subject, and while the American politics of jury trial in the twentieth century had been closely scrutinised, the history of the criminal jury in America during the long nineteenth century had barely been studied.³ This is no longer quite so true as it then was as, following Alchuler and Deiss' example, several more studies have been published regarding this section of the trial jury's history.⁴ But this scholarship tends to paint a rather simplistic picture of the movement between statements like Jefferson's, quoted above, and the 1895 decision of the US Supreme Court denying the legitimacy of jury law-finding, a picture in which judges struggle against lawyers and legislators in their search for total control of the laws.

My interest in nineteenth-century America lies precisely in the fact that, as McDermott has argued,⁵ the movement towards the position in *Sparf* was more complicated than the standard accounts suggest; and that the problem faced by a bench which was increasingly uncomfortable with the American tradition of jury law-finding seems not to have been resolved by baldly outlawing the practice (given the colonial experience with British

³ AW Alschuler and AG Deiss, 'A Brief History of the Criminal Jury in the United States' (1994) 61 U Chi L Rev 864, 864-869. The phrase "the long nineteenth century" refers to the rough 'period' lying between the Revolutions at the end of the eighteenth century and the outbreak of the First World War.

⁴ See SP McDermott, *The Jury in Lincoln's America* (Ohio UP 2012), 231 n 89 and the sources discussed therein.

⁵ Ibid, 127.

attempts to curtail the right to trial by jury, this was an extremely delicate matter which had to be approached with sensitivity).⁶ Rather, the solution in nineteenth-century America, as in eighteenth-century England, seems to have been to turn to techniques for the good governance of trial juries.

Throughout the eighteenth century, English judges had developed a doctrine of seditious libel which attempted to absolutely separate the functions of judge and jury into a legal and a factual role, respectively. When challenged, the judges insisted that to relax this model would be to give the jury too much autonomy, destroying the possibility of certainty in the administration of the criminal law. To permit a jury to give a general verdict on the whole question of guilt or innocence would, in cases of seditious libel at least, effectively put the jury beyond the constraints of a just legal system. Others argued that allowing a general verdict and including the jury within systems of legal control were not mutually exclusive, for judicial directions could be used in such a way as would redirect the worst excesses of a culture of jury mitigation into judicially-approved channels. By the end of the eighteenth century, two clear perspectives on the meaning and possibility of jury power had been set out: the exclusionary, in which jury power is a question either of a right (to judge according to conscience) or of a prohibition (not to substitute the juror's gut feeling for the judge's expertise); and the inclusionary, which sees the jury as something to be governed. The second of these two perspectives did not immediately supersede the first, however: the completely different terms of reference meant that, as the eighteenth century came to an end, proponents of the two perspectives

⁶ On the colonial-era constitutional history, see JP Reid, *The Constitutional History of the American Revolution: The Authority of Rights* (University of Wisconsin Press 1986), 47-59, particularly at 52-55

more often than not talked past each other. There was, at most, a tension between the two models of jury trial. In America, too, some jurists saw the jury in exclusionary terms, while others imagined it as a governable body which could be manipulated, if not quite controlled. It is the American manifestation of this tension which I shall explore in this chapter.

5.1: The Judge and the Laws

In England, at least since the days of Coke, the judiciary had been presented as an elite body, distinct from the wider population. In his judicial practice, Coke had successfully limited the power of the ecclesiastical courts, recasting English law as primarily the possession of the common law courts;⁷ in his theoretical statements, he had emphasised the distinct education of the common lawyers.⁸ In the American colonies, however, judges were not so clearly distinguished from the wider population. Schweber, tracing the parallel development of the American legal profession and American legal science during the century after the revolution, has argued that these developments saw American lawyers following a “two-step pattern of separation upward and turning inward”: in short, knowledge of the law became, as it had been in England, something exclusive.⁹ And it is worth emphasising just how far the professional judges at the start of the twentieth century

⁷ See in particular GW Thomas, ‘James I, Equity and Lord Keeper John Williams’ (1976) 91 EHR 506.

⁸ I Williams, ‘The Tudor Genesis of Edward Coke’s Understanding of History and the Common Law’ (2012) 43 *Sixteenth Century Journal* 103.

⁹ H Schweber, ‘The “Science” of Legal Science: The model of the natural sciences in nineteenth-century American legal education’ (1999) 17 LHR 421, 437.

were from their colonial and early republican forbears. Early in the nineteenth century, the farmer-judge John Dudley famously charged a jury as follows:

You have read, gentlemen of the jury, what has been said in this case by the lawyers, the rascals! They would govern us by the common law of England. Trust me, gentlemen, common sense is a much safer guide for us, – the common sense of Raymond, Epping, Exeter and the other towns which have sent us here to try this case between two of our neighbours. A clear head and an honest heart are worth more than all the law of the lawyers.¹⁰

For the judge, no less than for the jury, the task here is not to look to the law so much as it is to look to justice, or ‘common sense’. The jury here is not directed to act against legal precepts if these might lead to injustice in the case at hand: rather, they are directed to go straight to their own common sense, with ‘the law’ barely even registering as advice.

This situation, of course, did not last. As the judge became a professional and the law became professionalised, justice became a legal concept and the jury, to the extent that it acted against the dictates of the lawyer-judge, also acted against justice. In tracing this change, I shall briefly consider the reception of the common law in post-revolutionary America, inasmuch as its reception concerns the proper relationship between judge and jury; and I shall also consider the impact of a burgeoning American legal science on the legitimate capacity of the jury to disagree with the judge’s legal directions. Some judges saw in the older law-finding model a complete anachronism, and saw the prospect of a jury putting ‘common sense’ before the law as evidence that jury power was an unjust aberration. Either a jury followed the directions of a judge, or it acted unjustly: the jury

¹⁰ W Plumer Jr, *Life of William Plumer* (Phillips, Sampson and Co 1856), 153-54. See also the account in McDermott (n 4), 20-21, of the repeated American publication of a story, first published in England in 1805, of an Irish juror who refused to put the law of the lawyers before his own conscientious judgment.

reached its verdict either inside or outside the law. For others, the possibility of a jury finding according to Dudley's 'common sense' was not so monstrous a thought: if a jury acted against judicial directions, this was a legitimate corrective to the law. Such 'verdicts according to conscience' were always delivered in full cognisance of the law, and were therefore still delivered to some extent within a zone of influence set out by the judge. Even after the development of an American legal science, the legitimate or possible actions of the criminal trial jury were still contentious issues.

For a judge like Joseph Story (Supreme Court justice 1811-45, and crucial contributor to the development of a specifically American legal science),¹¹ the common law was a product of what Parker calls 'historical time', subject to interpretation within something like a Foucauldian episteme.¹² As Parker has explained, Story believed that his own age was characterised by Baconian induction: "Bacon's method had taken centuries to establish itself. Its 'triumphant adoption,' Story maintained, 'was reserved as the peculiar glory of our own day.'"¹³ And Story thought that this epistemic change was, itself, a product of specific historical events.¹⁴ Story's claim, that his own age was characterised by a kind of Baconian inductivism, has been vindicated by more recent legal historical

¹¹ KM Parker, *Common Law, History, and Democracy in America, 1790-1900: Legal thought before modernism* (CUP 2011), 140; RK Newmyer, *Supreme Court Justice Joseph Story: Statesman of the old republic* (University of North Carolina Press 1985).

¹² See M Foucault, *The Archaeology of Knowledge* (AM Sheridan-Smith trans, Routledge 2002) [1969], 211. Story's claim appears not to be that Baconian inductionism acts as a legislator for all early nineteenth-century thought, but rather that it offers the best way of describing the commonalities between all the discourses of his own age. It therefore seems to me that he is describing something like an episteme, in the Foucauldian sense.

¹³ Parker (n 10), 140, quoting from J Story, 'Developments of Science and Mechanic Art: A discourse delivered before the Boston Mechanics' Institute, at the opening of their annual course of lectures, November, 1829' in WW Story ed., *The Miscellaneous Writings of Joseph Story* (Little & Brown 1852) [1829], 479.

¹⁴ Parker (n 10), 141, quoting from J Story, 'Progress of Jurisprudence,' in WW Story ed., *The Miscellaneous Writings of Joseph Story* (Little & Brown 1852) [1821], 200.

research;¹⁵ and while this meant that the emphasis of the common law would shift, becoming more scientific in its outlook, it did not mean that the content of the common law itself would change. Rather, the task was to “tether a reformulated common law to the U.S. Constitution”.¹⁶

When Story turned to the proper relationship between judge and jury, his view that the laws of America ought to be viewed as the object of an exclusive science (in the sense of a rational system)¹⁷ prevailed over claims that lay jurors were legitimate interpreters of the common law. In his notoriously anti-law-finding decision in *Battiste*, Story held that there was no “reason to doubt that an intelligent jury can understand the principles of law applicable to the subject, as well as the Court; for they are the principles of common sense.”¹⁸ But despite the apparently common-sense nature of the case, it was nonetheless essential for the rights of the accused both judge and jury should consider it their duty to observe the *juratores non respondent* maxim: “This is the right of the citizen; and it is his only protection.”¹⁹ Story, it should be noted, did not cite a single authority in support of his claim that the law is for judges while the facts are for juries: rather, he stated this position – “a point ... upon which I have had a decided opinion during my whole

¹⁵ Schweber (n 8). Parker emphasises the importance of the concept of ‘the age’ in early nineteenth-century thought generally. Parker (n 10), 117-124. To this extent, it seems we are dealing with Enlightenment concerns about the specific identity of present times: see M Foucault, *The Government of Self and Others: Lectures at the Collège de France, 1982-83* (F Gros, F Ewald, A Fontana and AI Davidson eds, G Burchell trans, Palgrave 2010) [1983], 1-40, for a discussion of I Kant, ‘An Answer to the Question: “What is Enlightenment?”’ in I Kant, *Political Writings* (H Reiss ed, HB Nisbet trans, CUP 1970) [1784], in which Foucault emphasises this problem.

¹⁶ Parker (n 10), 142.

¹⁷ Schweber (n 8), 421.

¹⁸ *US v Baptiste* (1835) 2 Sumner 240, 244.

¹⁹ *Ibid*, 243.

professional life”²⁰ – axiomatically. Story proceeded on the basis of the necessary symmetry between judge and jury, and the justice entailed in this harmony. Rather than appealing to specific constitutional provisions, he appealed to general common-law principles, principles which called for aesthetic balance above all else.

But it was not true that common-law thinking necessarily meant denying the jury its contended-for right to determine legal questions. In the 1804 case of *People v Crosswell*, Justice Kent, speaking for two out of four judges in an irreconcilably divided New York Supreme Court (the fifth, Jacob Radcliff, had retired several months earlier), argued almost exclusively from common law authorities. And Kent, like Story, was committed to a development of the common law in a specifically American context.²¹ For Kent, as for Story, the post-Revolutionary reception of the common law had to be set in a context of revolutionary rupture, while simultaneously connecting with the timeless, abstract principles of the ancient constitution. But for Kent, unlike for Story, timeless common law principles set in an American context entailed a respect for the different skills possessed by judges and by jurors:

[Judges’] rules may have too technical a cast, and become, in their operation, severe and oppressive. To judge accurately of motives and intentions, does not require a master’s skill in the science of the law. It depends more on a knowledge of the passions, and of the springs of human action, and may be the lot of ordinary experience and sagacity.²²

²⁰ Ibid, 243.

²¹ Parker (n 10), 88. See also *People v Crosswell* (1804) 3 Johnson’s Cases 337, 375.

²² Ibid, 376.

Kent's version of what Nelson has called 'the Americanization of the common law'²³ represents something new, in a way which Story's version does not. For Coke, and for Story, the artifice of the lawyer's reason or science means that they are necessarily better placed than juries to consider legal questions. For Kent, the lawyer's science and the layman's humanity cooperate in order to yield a just result; and in this sense he appears to be echoing the concerns of the English jurists who, a generation earlier, had emphasised the undesirability of controlling (as opposed to guiding) juries. But despite their differences, both Kent and Story considered the common law, properly contextualised, to undergird the American constitutions.

In chapter four, I suggested that the "constitutionalization of the general verdict"²⁴ can be seen as the event in which the general verdict is reconstituted in its modern form. When, in 1792, Parliament secured the jury's right to deliver a general verdict, it made it perfectly clear that the general verdict was no longer about an absolute jury independence, for a major part of the controversy regarded the judges' refusal to give juries the guidance contained in a judicial direction. By the turn of the nineteenth century, the English general verdict was explicitly reconstituted as a question of cooperation between judge and jury, thereby blurring the previously clear distinction between general and special verdicts. *Crosswell* engages with similar issues, and can therefore be considered the American counterpart of *The Dean of St Asaph's Case*;²⁵ and here, too, we can see the general

²³ WE Nelsen, *Americanization of the Common Law: The impact of legal change on Massachusetts Society, 1760-1830* (Harvard UP 1975)

²⁴ TA Green, *Verdict According to Conscience: Perspectives on the English criminal trial jury, 1200-1800* (University of Chicago Press 1985), 355.

²⁵ *R v Shipley* [AKA *The Dean of St Asaph's Case*] (1784) 4 Dougl 73; 99 ER 774.

verdict being reimagined as a cooperative endeavour. The jury may disagree with the legal principles delivered by the judge, but this must be an educated disagreement, informed by the judge's presumptively authoritative advice.

Despite their differences of opinion, what Kent and Story were both agreed upon was that the general verdict should be given under direction of the court; and Kent stated in his opinion in *Crosswell* that "it is not likely often to happen, that the jury will resist the opinion of the court on the matter of law",²⁶ leaving jury disobedience an exceptional corrective rather than a normal practice. Over the following nine decades, American lawyers and judges had to work out the extent to which jurors should consider themselves bound by the compulsory 'opinion' of the judges; until finally, in *Sparf and Hansen*, the idea of a jury reaching an independent legal conclusion could be presented as unjust and nonsensical. As Bodenhamer has shown in the specific context of antebellum Indiana, a constitutional provision giving juries the right to decide law and fact was quickly followed by a statute requiring the judge to direct the jury on the law; and the judges seem to have made full use of this responsibility in order to put "a particularly effective judicial restraint on jury power".²⁷ Even as legislation and constitutional amendments continued to affirm that the jury had a law-finding right, the judges were keen to set that right within judicially-defined limits.²⁸

²⁶ *People v Crosswell* (n 21), 376.

²⁷ DJ Bodenhamer, 'The Democratic Impulse and Legal Change in the Age of Jackson: The example of criminal juries in antebellum Indiana' (1983) 45 *Historian* 206, 217.

²⁸ See Alschuler and Deiss (n 3), 908-911.

The growing illegitimacy of the jury's older law-finding right seems to have been linked to the increasing formality of the legal system, and judges repeatedly explained the inadequacy of jury law-finding in the context of this specific historical change. With the development of an American legal science, the older capacity of trial juries to act with something approaching true independence came to be seen as an anachronism. A particularly detailed expression of this view was given by the trial judge in the case of Francis Kane, who in January 1879 was tried for selling alcohol on an election day. The judge interpreted the relevant legislative provision as encompassing alcohol sold even after voting had ended, and defence counsel sought a direction informing the jury that this should be regarded only as *advice*, not as a statement binding upon the jurors. The trial judge conceded that he had formerly supported such a doctrine, but explained that in the light of structural developments in the operation of the law a jury law-finding right was no longer appropriate: "when the new [1873 Pennsylvania] constitution, and the legislation in pursuance of it, gave defendants in a criminal court writs of error, the reason which led to the adoption of the doctrine ceased, and the doctrine no longer exists."²⁹ So the legitimate power of the criminal trial jury to interpret the law was a historically-specific practice, one which for this judge at least lost its legitimacy as soon as the situation which justified it (the lack of an appeal against unfair directions) was remedied. For as long as the injustices of the law could not be corrected after the delivery of a verdict, the jury's decision had to stand in for an appeal; and it was therefore legitimate for legal theory to place the jury outside of the trial *qua* legal institution. But once the legal system

²⁹ *Kane v Commonwealth* (1879) 8 Norris 522; 89 Pa 522, 523-524.

offered remedies to injustice after the trial, there could be no further justification for theorising the jury as anything other than an internalised part of the process.

In the complex, important decisions of the Supreme Judicial Court of Massachusetts in *Commonwealth v Anthes*,³⁰ Justice Thomas' dissent shows once again that the image of the judicial reception of jury law-finding was never simple. In *Kane*, we saw how institutional developments were seen to undermine the justifications which had formerly attached to the contended-for right of the jury to decide legal questions independently of the judge. But for Thomas, the institutional setting of jury trial helped to justify the practice, demonstrating that even with a law-finding right the jury would not act in an unconstrained manner. The tradition of presenting the jury with divergent judicial opinions, as well as of permitting defence counsel to argue the law to the jury, Thomas argued, demonstrated that there must have been a law-finding tradition in Massachusetts. Otherwise, how would the jury ever know whether the prisoner was guilty or not?³¹ The impugned legislation in this case, giving juries the duty "to decide at their discretion, by a general verdict, both the fact and the law involved in the issue, or to find a special verdict at their election",³² contrary to an earlier judicial decision denying the right,³³ was rendered acceptable for Thomas by considering the institutional setting of a jury trial. The

³⁰ *Commonwealth v Anthes* (1855) 5 Gray 185; 71 Ma 185.

³¹ *Ibid*, 274.

³² Quoted in *Ibid*, 187.

³³ A decade earlier, Shaw CJ had explained that "it is the duty of the court to instruct the jury on all questions of law which appear to arise in the cause, and also upon all questions, pertinent to the issue, upon which either party may request the direction of the court, upon matters of law. And it is the duty of the jury to receive the law from the court, and to conform their judgment and decision to such instructions, as far as they understand them, in applying the law to the facts to be found by them; and it is not within the legitimate province of the jury to revise, reconsider, or decide contrary to such opinion or direction of the court in matter of law." *Commonwealth v Porter* (1845) 10 Metcalf 263; 51 Ma 263, 286

fact that judges now gave authoritative directions to juries meant that, if the defendant was convicted, the jury's verdict may be challenged via an appeal against the direction.³⁴ Equally, the jury will usually follow the directions of the judge, unless they know the judge's interpretation of the law to be wrong;³⁵ and if the judge perceives that a (guilty) verdict must be based upon a legal error on the part of the jury, he will set the verdict aside.³⁶

Basically, for Thomas, the jury's law-finding power could be justified by this mutual checking of judge and jury. As Kent had put it in *Crosswell*, "[t]his distribution of power, by which the court and jury mutually assist, and mutually check each other, seems to be the safest and, consequently, the wisest arrangement, in respect to the trial of crimes."³⁷ Judge and jury will usually cooperate, but may occasionally disagree; and this creates an *ad hoc* system of checks and balances, decreasing the chances of an unjust conviction. This argument again situated the jury inside the trial as a legal institution, for the implication seems to be that judge and jury are engaged in a sort of dialogue, and that any failure to follow the judge's directions will therefore take the form of a temporary disagreement with the acknowledged expert, rather than a presumption that the jury must act only according to its conscience.

Those judges who supported this form of the inclusion thesis were unapologetic about its lack of beauty. Six years earlier, in *Croteau*, Hall J had complained that the few judicial

³⁴ *Commonwealth v Anthes* (n 30), 256.

³⁵ *Ibid*, 281-282.

³⁶ *Ibid*, 256-257.

³⁷ *People v Crosswell* (n 21), 376.

decisions which opposed the contended-for right of the jury to settle legal questions all ignored questions of justice and instead treated the question “as resting upon the comparative knowledge of judges and jurors in regard to the law, and in the supposed violation of the harmony of the legal system, which an admission of the right of jurors would occasion”.³⁸ And Thomas also criticised those who did not believe in the contended-for right along these lines, arguing that they were excessively concerned with the aesthetics of the common law: in the earlier case of *Porter*, he explained:

The question...was not whether a division of power, by which, in criminal trials, the court only should decide the law and the jury the facts, gave to the system greater symmetry, worked out a more perfect theory; but what was the right of the citizen under the common law, as ‘usually practised on’ in Massachusetts.³⁹

So while everyone seemed, by mid-century, to be agreed that the judge had a technical knowledge of the law, and that it was within the power of the jury to occasionally go against his findings, the precise meaning of this jury misbehaviour was a subject of disagreement. On the one hand, there were those who saw any disagreement between judge and jury as a jury usurping the judicial role, acting unlawfully and therefore subverting the harmony and justice of a proper legal system. On the other hand, there were those who insisted that even a verdict seemingly reached against the directions of a judge should not be understood as a verdict somehow made from outside the legal system. An errant verdict was, for these judges, still made in full cognisance of the law; and as a corrective it could help bring the abstract law of the judges closer to the humanity of the

³⁸ *State v Croteau* (1849) 23 Vt 14, 21.

³⁹ *Commonwealth v Anthes* (n 30), 283.

jurors. In this sense, even jury misbehaviour was seen as somehow contributing to the legal system itself.

But as with the similar developments in England during the previous century, this reimagining of jury trial was not universally accepted. Writing in 1852, the anarchist Lysander Spooner gave an account of jury trial which would not have been entirely out of place during the English Restoration, almost two centuries earlier. Spooner, arguing for a jury law-finding right, held that “[u]nless such be the right and duty of jurors, it is plain that, instead of juries being a ‘palladium of liberty’ – a barrier against the tyranny and oppression of the government – they are really mere tools in its hands, for carrying into execution any injustice and oppression it may desire to have executed”.⁴⁰ Spooner, like some of the Restoration pamphleteers discussed in chapter three, restricted judicial directions to mere advice, “such advice and information to be received only for what they may chance to be worth in the estimation of the jurors.”⁴¹ And for Spooner this was all necessary because of the responsibility which jurors ought to feel when reaching, and delivering their verdict:

It is absurd to say that they have no moral responsibility for the use that may be made of their verdict by the government, when they have reason to suppose it will be used for purposes of injustice. ... The consequence is, that jurors must have the whole case in their hands, and judge of law, evidence, and sentence, or they incur the moral responsibility of accomplices in any injustice which they have reason to believe will be done by the government on the authority of their verdict.⁴²

⁴⁰ L Spooner, *An Essay on the Trial by Jury* (John P Jewett and Company 1852), 5.

⁴¹ *Ibid*, 123.

⁴² *Ibid*, 190.

There are important differences between Spooner's position and that explored in the final section of chapter three, most notably the fact that the spiritual danger of the Restoration juror has been replaced by a more general sense of moral responsibility; but broadly speaking this is still an exclusionary vision of jury trial. The jurors have a responsibility to reach the correct verdict, and this responsibility precludes the involvement of the judge other than as an assistant. But as we have seen, by mid-century even those judges who in principle supported the right of the jury to find both law and fact focused upon those factors which would in fact bring the jury's presumptively free verdict within the trial *qua* legal institution. It was mainly those judges who *opposed* the contended-for right of the trial jury to determine questions of law who continued to see things in the exclusionary terms set out by Spooner.

5.2: The Jury and the Facts

It was not only the judges' control of the laws which was a contentious subject in the nineteenth-century American understanding of jury trial. Beyond this, the discretion juries had with regard to the facts was also deeply contested. Should a jury be given free rein to interpret the evidence presented to them as they saw fit? Or was it the duty of the judge, no less on the facts than on the laws, to direct the jury? In exploring this issue, we can continue to see how questions of the government of the jury were a live issue, just as much as they had been in eighteenth-century England. A strong judicial power as regarded the laws was largely mirrored by an insistence that the jury should be permitted to resolve the factual question as it saw fit. Meanwhile, there were also those who contended that, as jury trial was essentially a cooperative endeavour between judge and jury, it was the judge's task to set out to the jury his own views on the strength and

meaning of the evidence. Here, no less than in the more obviously partisan question of the jury's law-finding power, we can see the tensions between a model of jury trial which sets out clearly the respective functions of judge and jury, and one which asserts that jury trial is only really possible 'under direction of the court'.

The common law tradition gave judges considerable scope to direct the jury on the facts. The seventeenth-century English jurist Matthew Hale had written that one of the most important tasks for a judge in a jury trial was to ensure that the jury focused on the legally-relevant questions of fact, and that they considered them in a sensible manner.⁴³ And as Langbein has noted, judges enjoyed considerable control over their juries even in the wake of *Bushell's Case*. This, he argues, demonstrates that ideas of jury independence have never represented much more than mythology.⁴⁴ Hale and Langbein describe a judiciary which was happier with the value of their own observations than Vaughan CJ appears to have been in *Bushell's Case*. For them, judicial directions were able to contribute something more than Vaughan's tentative – and explicitly hypothetical – advice to jurors could have done. In England, *Fox's Libel Act* was consistently interpreted by the courts so as to make it the jury's duty to follow judicial directions on all legal questions.⁴⁵ This was also what most American courts would ultimately take the provision and those American ones echoing it to mean.⁴⁶ But the idea that the general verdict was essentially now a question of cooperation between judge and jury was

⁴³ M Hale, *History of the Common Law of England* (CM Gray ed, University of Chicago Press 1971) [1713], 164-65. Although it should be noted that Hale also states that a jury may give a verdict against (a majority of) the evidence delivered in court, if they know or suspect it to be wrong: *Ibid*, 164.

⁴⁴ See generally the discussion in chapter three.

⁴⁵ See the discussion in chapter four, at nn 111-114.

⁴⁶ MD Howe, 'Juries as Judges of Criminal Law' (1939) 52 Harv L Rev 582, 585-88.

sometimes taken, in an American context, to prescribe general judicial control of the verdict, even as regards the factual side of the case.

So it is, for example, that Lucilius Emery could write in 1915 that judicial directions on the facts were a basic constitutional principle, without which the parties could not have a true jury trial.⁴⁷ Similarly, Wigmore, in his classic text on the law of evidence (first published in 1904), described judicial comment on the evidence as “historically ... an essential and inseparable part of jury trial”.⁴⁸ It is significant that Wigmore’s earliest source for this ‘historically essential and inseparable’ feature of jury trial comes from 1794, two years after the enactment of Fox’s Libel Act. Destroying this principle would be disastrous, Emery feared, not so much because of the value of jury trial but, rather, because of the value of limiting juror independence:

Taking away the centuries long approved check, taking away the restraining, steadying influence of an able, learned and impartial judge (as all judges should be and would be if the people so willed) often leaves the liberty, property and reputation of the citizen practically in the power of twelve ordinary men fortuitously assembled, without individual responsibility, often inexperienced and unskilled in the sifting and weighing of evidence, forbidden the aid of disinterested experts, and often prone to decide upon impulse or first impressions rather than after patient, dispassionate, laborious reasoning. In the last analysis it subjects the citizen to a government by jury, instead of a government by law.⁴⁹

The problem Emery faced was that state legislatures had started to deny the judges their common law right to direct the jury on the evidence. In England, and at the federal level,

⁴⁷ LA Emery, ‘Government by Jury’ (1915) 24 Yale LJ 265, 266.

⁴⁸ JH Wigmore, *Evidence in Trials at Common Law in Ten Volumes: Volume 9* (JH Chadbourn, Little Brown 1981) [1904], 664.

⁴⁹ Emery (n 47), 273.

what he considered to be the proper judicial control had not been diminished; but in many states ‘true jury trial’ (i.e. jury trial under direction of the court) was no longer possible.⁵⁰

Many American judges in the late nineteenth century were, however, determined to stress that juries were, and ought to be, independent as regards the factual question: ‘what happened?’ They were keen to emphasise that their own legitimate power went no further than setting limits within which the jurors were to operate: that once they had marked out an area proper for the jurors’ independent decision-making, the judges would go no further. The judges were keen to downplay what Emery sought to emphasise: the power granted the judge by the use of judicial directions. In fact, as Krasitsy has emphasised, it is the judges’ awareness of the power directions have in shaping the jury’s verdict which seems to have motivated the move, at the state level, away from the traditional common law practice of judges commenting on the evidence. While it is true, he argues, that some state legislatures did in fact ban the practice, many others either passed ambiguous legislation on the issue or no legislation at all; and in the latter two contexts it was the judges themselves who decided that they should no longer comment upon the evidence.⁵¹

As one judge noted in 1882, if the judges continued to comment upon the evidence then “it would be but seldom indeed jurors could be obtained with sufficient strength of character to impartially weigh the testimony under such conditions”.⁵² In the final quarter of the century, senior American judges repeatedly defended trial judges’ refusal to allow

⁵⁰ Ibid, 267-69.

⁵¹ KA Krasitsy, ‘The Role of the Judge in Jury Trials: The elimination of judicial evaluation of fact in American state courts from 1795 to 1913’ (1985) 62 University of Detroit Journal of Urban Law 595, 599-609.

⁵² Ibid, 618. Quoting from *People v Lyons* (1882) 49 Mich 78, 82.

juries to consider lesser charges than the ones which, in the judge's opinion, could be supported by the evidence; but they simultaneously insisted that juries were free to answer these judicially-selected questions either with a guilty or a not guilty, according to the facts as they understood them. The judges, in short, attempted to tread a fine line between bringing the decisions of the jury into the trial *qua* legal institution and ensuring that the jury was still permitted to judge the facts independently of the judge. This highlights some of the practical difficulties involved in the inclusion thesis, and it shows up the kind of problem regarding jury independence which we might easily overlook if we focus too much upon the legal protection of the general verdict.

In *Sparf and Hansen*, one of the main issues was whether the trial judge had been right to inform the jury that they could only convict of murder, or of nothing at all. Harlan J concluded that such a direction was perfectly correct;⁵³ and Middlebrooks, in his recent article on the case, contends that in fact the evidence would have supported a lesser charge.⁵⁴ Middlebrooks claims in his article to be resurrecting 'Thomas Jefferson's jury', a system in which juries were apparently still free to decide legal questions without judicial control;⁵⁵ and so his internal critique of Harlan's opinion is particularly interesting. Rather than contending the major premise – that it is for the judge to determine which crimes the evidence will support – Middlebrooks only disputes the minor premise – that in *Sparf* the evidence could only support a conviction for murder. Middlebrooks' internal critique of Harlan presumes that this judicial selection of the

⁵³ *Sparf and Hansen v United States* (n 2), 103-06.

⁵⁴ DM Middlebrooks, 'Reviving Thomas Jefferson's Jury: *Sparf and Hansen v United States* reconsidered' (2004) 46 Am J Legal Hist 353, 384-87.

⁵⁵ *Ibid*, 353-54.

available verdicts is legitimate, and overlooks the possibility that this may actually have been an important aspect of the governance of the general-verdict-giving jury. In chapter six, we shall see how a twentieth-century English judge, without meaning to undermine the system, explained this close judicial selection of the charges and of the evidence as an important part of what he called “the control of the jury”.⁵⁶ And in the present context it is possible to see how such control was made to work, again without any intention of fundamentally undermining jury trial.

Various appellate court decisions deal with this important question, of the judicial determination of the possible range of verdicts. In 1890, the Kansas Supreme Court held that “This court has repeatedly said that instructions should conform to the testimony of the case, and that no instructions should be given which would be inapplicable to the facts as disclosed in the evidence, as such instructions might mislead and confuse the jury.”⁵⁷ Twelve years earlier, the Supreme Court of Louisiana had asked: “If the jurors are unqualifiedly the judges, the sole judges of the law, why is it made the duty of the court to charge them, and exclusively as to what is or is not applicable to the cause submitted to them?”⁵⁸ A federal case from 1876 expanded a little on the relationship between this power of selecting the possible verdicts and the resolution of the factual question:

Decided cases may be found where it is held that, if there is a *scintilla* of evidence in support of a case, the judge is bound to leave it to the jury: but the modern decisions have established a more reasonable rule; to wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a

⁵⁶ P Devlin, *Trial by Jury* (Stevens & Sons 1956), 61. See generally the discussion in chapter six.

⁵⁷ *State v Estep* (1890) 44 Kas 572, 575.

⁵⁸ *State v Johnson* (1878) 30(2) La Ann 904, 905.

verdict for the party producing it, upon whom the burden of proof is imposed.⁵⁹

The language of the *scintilla* is helpful, for it demonstrates just how far we are from the original language of early-modern jury autonomy, explored in chapter three. In Restoration England, and beyond, the jury's perceived right to disregard the opinion of the judge was grounded in the language of conscience; a language in which the *scintilla* had been an important part at least since Jerome's discussion of Ezekiel, where the *scintilla* or divine spark is explicitly placed alongside the concept of *synderesis*.⁶⁰ By this point the language of conscience is gone, and *scintilla* refers to nothing other than a minimum of legally-recognised evidence. The criminal jury, without the slightest attempt at resurrecting the special verdict, has here been reconstituted as an exclusively fact-finding institution, with nothing to do with justice beyond the fact that, in applying the law as propounded by the judge, jurors ensure that legal justice is achieved.

To this extent, even the jury's fact-finding task was only legitimate inasmuch as it observed the limits set upon it by the judge, only finding a verdict of manslaughter rather than murder (for example) when the judge determined that such a verdict was consistent with the facts of the case. This is very different to the hypothetical use of directions described two centuries earlier in *Bushell's Case*. It represents an important shift towards the inclusion thesis, in which directions are not simply understood as advice but are, instead, seen as constitutive of the jury's decision. The jury acts within the space set out

⁵⁹ *Commissioners of Marion County v Clark* (1876) 94 US 278, 284.

⁶⁰ Jerome, 'Commentary on Ezekiel' in TC Potts, *Conscience in Medieval Philosophy* (TC Potts trans, CUP 1980).

by the judge, rather than simply benefiting from the judge's long experience with similar cases.

The judges were keen to emphasise that this shift did not constitute an assault on the jury system itself but, rather, that it reflected their concern to guarantee the aesthetic justice of the law.⁶¹ The jury was entirely free to assess the evidence, and even where the facts of the case were not disputed the jury was still required to retire, deliberating about the application of the known facts to the known laws. In 1891, Morse J explained that a Michigan judge may encourage a jury to bring in a verdict of guilty where there is no real dispute on the facts. But he was keen to underscore the limited nature of the judge's role in such a 'directed' verdict:

In this ruling we do not intend to encourage the practice of directing a verdict against the accused in criminal cases. In all such cases the jury should be permitted to retire to the jury-room, and there deliberate, and the trial judge should content himself by stating the law as applied to the facts, and with an admonition to the jury of their plain duty in the premises.⁶²

In a federal case decided nine years earlier, the following explanation was appended to a denial of the possibility of a directed verdict:

By his plea of not guilty, the defendant must be understood as denying the truth of the information or indictment ... This is so, notwithstanding the fact that no witnesses for the defendant contradicted the statements of the witnesses for the prosecution.

In this condition of the testimony, it was the right of the jury to pass upon the credibility of the witnesses, even if unimpeached as to character, and to

⁶¹ Although this position had to some extent been forced upon them by state legislatures, who had started to deny them the right to comment upon the evidence. See E Dale, 'Criminal Justice in the United States, 1790-1920: A government of laws or men' in M Grossberg and C Tomlins eds, *The Cambridge History of Law in America*: vol 2: The long nineteenth century (1789-1920) (CUP 2008), 150-151; Emery (n 47). But see also Krasity (n 51), 599-609.

⁶² *People v Neuman* (1891) 85 Mich 98, 105.

consider whether, upon applying all the tests of manner, clear or confused statement, prejudice, and accuracy of memory, they were to be believed.⁶³

The jury is not given no role at all by a bench which has wrested control of the law from the Bar and from the jury. Rather, the jury is given the positive role of sifting evidence, becoming, as Jerome Frank would put it almost a century later, “witnesses of the witnesses”.⁶⁴ This is how, in an American context, we reach the jury concerned solely, but positively, with the factual side of the case.

Emery’s concern, writing in 1915, was that American judges at the State level could no longer make statements like the following, made by the English Chief Justice of Common Pleas in 1841:

The whole objection amounts to this, – that the opinion of the judge was delivered in favour of the defendant. I think it is no objection that a judge lets the jury know the impression which the evidence has made upon his own mind. At all events, the party objecting to such a course should shew that the impression entertained by the judge was not justified by the evidence...⁶⁵

He might equally have turned to the decisions of the new English Court of Criminal Appeals, set up seven years before the publication of Emery’s article.⁶⁶ There, the judges said things like: “Nor is it a mistake of law for a judge to venture his own opinion on the facts to the jury ... where the judge’s comment was natural: the jury would not think themselves bound by it, and can always form an independent opinion.”⁶⁷ Again, where a Recorder had told a jury that the prisoner “practically stands convicted by the evidence

⁶³ *US v Taylor* (1882) 3 McCrary 300, 506.

⁶⁴ J Frank, *Courts on Trial: Myth and reality in American justice* (Princeton UP 1949), 22.

⁶⁵ *Davidson v Stanley* (1841) 2 Man & G 721; 133 ER 936, 939.

⁶⁶ Criminal Appeal Act 1907, s1.

⁶⁷ *R v Martin* (1908) 1 Cr App R 52, 53.

of the prosecution”,⁶⁸ the appeal court emphasised the eloquent speech made by defence counsel, and concluded that “[t]he Recorder only attempted to administer an antidote ... We are unable to say that there was anything in the summing-up which precluded the jury from doing justice.”⁶⁹ Without a judicial system in which judges were free to make direct comments on the evidence, Emery argued, true jury trial would not be possible. Even on the factual side of the case, jury trial could not exist without strong judicial guidance.

For American jurists at the end of the nineteenth and the beginning of the twentieth century, questions of fact, no less than questions of law, raised issues central to the proper governance of the trial jury. The English and the federal judges had a power to directly comment on the evidence, a power which the judges in many state jurisdictions did not have. But even in the state courts, the jury’s verdict was set within limits, and its autonomy consisted largely of the decision whether to believe the witnesses or not: the verdict was channelled quite closely into a binary decision between guilty or not guilty of this or that *particular crime*. But at the same time, the judges emphasised that this tightly-regulated choice was, ultimately, still a free choice. Jury autonomy existed, they argued, albeit within precise limits. Again, there is a clear tension here between the freedom of the jury and its governance; a tension which would be overlooked by any account that simply asked how well-protected the general verdict was at this or that point in time.

⁶⁸ *R v Hepworth* (1910) 4 Cr App R 128, 129.

⁶⁹ *Ibid*, 130-131.

5.3: Defining ‘True’ Jury Trial

In the Restoration literature which I explored in chapter three, ‘true’ jury trial was defined as a trial by twelve jurors who acted independently, both of the judge and of each other. In the late eighteenth century, ‘true jury trial’ was redefined as a trial by a jury acting under the direction of the court. In nineteenth century America, jurists sat unsteadily between these two positions. By the end of the century, in *Sparf and Hansen*, a majority of the US Supreme Court declared that the jury had never been understood as having a right to step outside the law: that it was the duty of the jury to take its law from the court, and if the jury attempted to act ‘according to conscience’ it was denying the accused their right to a true jury trial.

In framing the discussion in this way, the majority opinion clearly adhered to a version of the exclusion thesis, holding that a jury which failed to follow judicial directions must necessarily be acting according to some extra-legal standard. Gray J, delivering a powerful dissent, has sometimes been seen as offering an important final support to the previously mainstream view that it is the jury’s right (and perhaps even its duty) to sometimes act against the law.⁷⁰ What is overlooked by those who take this approach to Gray’s dissent is how different his arguments were from those of the Restoration pamphleteers who first proposed an exclusionary model of jury power. It was not the case, at the end of the American nineteenth century, that a single standard of jury power was being articulated, with a minority of brave judges supporting the idea, and a majority abhorring the idea as monstrously illegal. Rather, there were two standards of jury power

⁷⁰ See, in particular, Middlebrooks (n 54), 372-82.

being articulated; and the division between the majority in *Sparf* and Gray's dissent is evidence of a continuing tension between exclusionary and inclusionary models of jury power.

A key statement in the discourse which attacked jury law-finding on exclusionary grounds came in the form of the mid-century case *US v Morris*, which concerned the refusal of a trial judge to allow a jury to be told that “if any of them [i.e. the jurors] conscientiously believed the Act of 1850, commonly called the ‘Fugitive Slave Act’ to be unconstitutional, they were bound by their oaths to disregard any direction to the contrary which the Court might give them”.⁷¹ The judge in this case, Curtis J, quickly dismissed earlier cases against his position as being obviously illogical. *Georgia v Brailsford*,⁷² a 1794 decision of the US Supreme Court, was dismissed on the grounds that it illogically stated both that the jury has the right to decide law and fact, and that the jury will usually abide by the directions of the court. Curtis dismissed this apparently difficult argument by expressing his “doubt regarding the accuracy of this report”.⁷³ Discussing two cases from the 1830s which seemed to partially support the contended-for right of the jury to settle questions of law,⁷⁴ Curtis cited academic commentary suggesting that a later case – *Battiste*⁷⁵ – had in fact stated the rule correctly (by stating that the jury had no such right),⁷⁶ and concluded that the 1830s cases were only correct inasmuch as they anticipated the decision in the

⁷¹ *US v Morris* (1851-53) 1 Curtis 23, 48.

⁷² *Georgia v Brailsford* (1794) 3 Dall R 4; 3 US 1.

⁷³ *US v Morris* (n 71), 58.

⁷⁴ *US v Wilson and Porter* (1830) Baldw R 78; *US v Shive* (1832) Baldw R 510.

⁷⁵ *US v Baptiste* (n 17).

⁷⁶ A Conkling, *A Treatise on the Organization and Jurisdiction of the Supreme, Circuit and District Courts of the United States* (2nd edn Gould, Banks & Co 1842), 425-27.

later case.⁷⁷ Turning to *Battiste* itself, Curtis noted that this case “denied that this right existed, and gave reasons for the denial of exceeding weight and force”.⁷⁸

Curtis’ discussion of the contended-for right of juries to settle questions of law discussed precedent, but used past cases in a very interesting way. Rather than trying to piece together what the rule was according to past case law, carefully constructing the *ratio decidendi* of each case, he proceeded on the basis that some cases state the law correctly and others do not. He explicitly stated his method in the following way: “I will first state what is my own view of the rightful powers and duties of the jury and the Court in criminal cases, and then see how far they are in conformity with the authorities, and consistent with what is admitted by all to be settled law.”⁷⁹ So his statements on what jury trial truly consists of actually preceded his discussion of the authorities, with the implication that, in this matter at least, reason precedes authority. Previous judicial arguments in favour of the contested ‘right’ can be dismissed not because they are bad law, but because they do not fit Curtis’ own rationalisations.

But Curtis’ concern was not only that the alleged right of juries was irrational: more than this, the lack of legal certainty which would follow were the right to be recognised rendered it a dangerous claim, tending strongly towards injustice:

I do consider that this power and corresponding duty of the Court, authoritatively to declare the law, is one of the highest safeguards of the citizen. The sole end of courts of justice is to enforce the laws uniformly and impartially, without respect of persons or times, or the opinions of men. To enforce popular laws is easy. But when an unpopular cause is a just cause,

⁷⁷ *US v Morris* (n 71), 59.

⁷⁸ *Ibid*, 59.

⁷⁹ *Ibid*, 53.

when a law, unpopular in some locality, is to be enforced there, then comes the strain upon the administration of justice; and few unprejudiced men would hesitate as to where that strain would be most firmly borne.⁸⁰

The abstract reason which Curtis considers before he turns to the authorities is ultimately grounded in justice, but it is important to note that this is a justice of a very specific kind. Here, justice is about keeping the laws steady in their application, enforcing unpopular laws rather than submitting to local caprice. As long as the law was knowable in advance, Curtis could “apprehend very little danger of the laws being wrested to purposes of injustice”.⁸¹

The fugitive slave laws, which formed the legislative background to *Morris*, were based on federal provisions apparently designed to hold the slave-owning South and the non-slaving-owning North together;⁸² but for many in the North this constituted an unacceptable compromise. The defendant in this case was a black lawyer, prosecuted for blocking the capture of an escaped slave. For the defendant, the law’s capacity to capture and deport fugitive slaves was a question of justice. For Curtis it was no such thing, or at least not in the way that the laws deal with justice: the fact that this was a fugitive slave case was irrelevant, for legal justice is unrelated to substantive justice. Legal justice *is* legal certainty. To the extent that juries might subvert this specifically legal justice, they are acting improperly.

⁸⁰ Ibid, 62-63.

⁸¹ Ibid.

⁸² See Story’s opinion in *Prigg v Pennsylvania* (1842) 41 US 539; and analysis in AG Amsterdam and J Bruner, *Minding the Law* (Harvard UP 2000), Chapter Five: Narratives at Court. See also *ibid*, 257-261.

True jury trial, then, is only possible not simply if the judge directs the jury on the law but, crucially, if the jury actually follows the judge's directions. Institutional features such as the general verdict do not demonstrate the right of the jury to disobey the judge. At best, they enable the jury to do so; but, as another judge had put it a decade earlier: "That the jury have the power to overrule the instructions of the court does not show that they have the right. If jurors see fit to disregard the rules of law, they must answer it to their own consciences."⁸³ But while a jury deciding against judicial directions is here equated with an act of conscience, the implication still seems to be that the conscientious juror ought really to act under direction of the court.

The judges' unease regarding the possibilities opened up, in Green's phrase, by 'the constitutionalization of the general verdict' is demonstrated in an early case, *Townsend v State*.⁸⁴ Townsend was granted a licence to sell alcohol, by the local magistrates, for 25 cents; but the enabling statute provided that licences could only be acquired for between \$5 and \$25. Townsend's counsel contended that, because criminal juries were judges both of law and of fact, they were entitled to see the licence; but the presiding judge disagreed, holding that his finding that the granting of the licence was ultra vires could not be reconsidered by the jury, and that the jury should therefore be kept unaware of its existence. The jury, believing that Townsend had simply failed to acquire a licence, convicted him of a misdemeanour. Holman J considered it impossible that the jury might have the right to settle legal questions, as the existence of such a right "would not only

⁸³ *State v Small* (1842) in Anon, *Reports of the Cases of the State vs Samuel Small, and the State v Andrew Pier, Jr & Tried in the County of Strafford, January Term, 1842* (Concord 1842), 17.

⁸⁴ *Townsend v State* (1828) 2 Blackf (Ind) Rep 151.

render the rules of decision uncertain, and the rights of individuals, precarious, but it would also prostrate the dignity of the Court; and would ultimately effect a material change, if not the destruction, of this branch of the government.”⁸⁵ Turning to the problem of the general verdict, he continued:

The misapprehension of the province of the jury, as to questions of law, has principally arisen from the fact that they may find a general verdict; which involves the law with the facts; and, in finding such a verdict, they may decide the law to be different from what the Court has determined it to be. This they can do, but it is classed by all writers on the subject among their powers of doing wrong. It is a violation of their oaths; and surely the question is not, how illegally a jury may act, but what is the proper sphere of their action. It is the duty of the Court to determine the law, and the presumption is that it determines it correctly: if the jury have a right to find the law to be otherwise, it would necessarily follow, that they have a right to determine the law to be what it is not. Besides, if the jury find the law contrary to the direction of the Court, the Court is bound to set aside the verdict; and it would seem strange, that the jury have a right to do, what the Court is bound to undo.⁸⁶

By the end of the century, most judges seem to have taken this position: that the jury had no right to act against the directions of the judge regarding legal interpretation and application. But this raised the question: how can a criminal trial jury be made to behave?

In 1898, Associate Justice of the US Supreme Court Horace Gray felt able to give the following, very precise, definition of the term ‘trial by jury’:

‘Trial by Jury,’ in the primary and usual sense of the term at the common law and in the American Constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his

⁸⁵ Ibid, 159.

⁸⁶ Ibid, 159.

opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books.⁸⁷

In this statement, no less than in the statements of the Restoration pamphleteers, we are presented with a complete list of the qualifications we should demand of a jury-like body before we should concede that it is in fact a jury. Once again, we are dealing with a statement along the lines of ‘true jury trial is...’ And once again, the qualifications of a ‘true’ jury are explicitly tied to questions of the jury’s governance by the trial judge.

There are two figures in Gray’s description: that of the jury and that of the judge. We are told that a jury must be a body of twelve men, and we are told that they must deliver a verdict, but beyond that everything *happens to* the jury. Furthermore, both these positive characteristics of the jury are given in the first half, where we are told ‘this is not sufficient’. Even if a jury is maximally jury-like, this will not be enough to guarantee that we are really dealing with a trial by jury. So it is the judge who guarantees that an apparent trial by jury really is an actual trial by jury. But the judge, in fact, is split in two. In the first half of the account, we are told about an ‘officer’, rather than a judge as such. This officer ‘causes’ the jury ‘to be summoned and impanelled’; it ‘administers oaths’; and ‘enters judgment and issues execution’. But this is insufficient. In order to guarantee that we are really dealing with a true trial by jury, we need more than an officer: we need a judge. The judge will have all the powers of the officer, but in addition will also have powers of ‘superintendence’ over the jury; will be ‘empowered to instruct them on the law’; can ‘advise them on the facts’; and can set aside the verdict in all cases other than

⁸⁷ *Capital Traction Co v Hof* (1898) 174 US 1, 13-14.

that of a criminal acquittal. To guarantee that we are really dealing with a trial by jury, we need to be sure that the jury is superintended by an adequately empowered judge. ‘Trial by jury’, then, cannot exist in anything more than an illusory sense unless we have the kind of judicial control guaranteed by the ‘constitutionalization of the general verdict’.

That Gray’s definition of jury trial is about judicial empowerment is confirmed by considering the context of his remarks. In 1896 a Mr Hof, seeking \$300 damages from a tram company based in Washington DC, had taken his case to a local Justice of the Peace (JP), and asked for a jury trial. In 1823, the US Congress (which exercises direct rule over the District of Columbia)⁸⁸ had legislated to the effect that JPs could preside over jury trials, subject to appeal to the DC Court of Appeals, which would hear the appeal with a fresh jury.

Gray was unhappy with this situation, and asked how it could be that one jury might try a case already settled by an earlier jury, particularly if the earlier verdict had not been set aside. His solution was to declare that, whatever the US Congress had chosen to call it, the JPs’ jury was not a true jury at all. Hence the need to define jury trial so precisely: unless one or other of the juries could be disqualified from being properly described as such, the law would be forced into illogical action. He explained:

...such persons [as the JPs’ jurors], even if required to be twelve in number, and called a jury, were rather in the nature of special commissioners or referees. A justice of the peace, having no other powers than those conferred by Congress on such an Officer in the District of Columbia, was not, properly speaking, a judge, or his tribunal a court; least of all, a court of record. The proceedings before him were not according to the course of the common law; his authority was created and defined by, and rested upon, the acts of

⁸⁸ US Constitution, Art 1(8).

Congress only. The act of 1823, in permitting cases before him to be tried by a jury, did not require him to superintend the course of the trial or to instruct the jury in matter of law; nor did it authorize him, upon the return of their verdict, to arrest judgment upon it, or to set it aside, for any cause whatever; but made it his duty to enter judgment upon it forthwith, as a thing of course. *A body of men, so free from judicial control, was not a common-law jury*; nor was a trial by them a trial by jury, within the meaning of the Seventh Amendment to the Constitution.⁸⁹

In the unusual instance of an appellate court having to decide which of two seemingly incompatible jury systems represents ‘true’ jury trial, the answer is simple: whichever jury is more effectively controlled by judicial directions will be the truer jury. ‘A body of men, so free from judicial control, was not a common-law jury’.

It is, in itself, interesting to note a senior American judge explicitly linking the possibility of true jury trial to an opposition between jury freedom and judicial control. My central contention here is that the reimagining of the general verdict which took place at the turn of the nineteenth century was basically about bringing the general verdict into judicially-specified limits; and so it is interesting to note that by the turn of the twentieth century American judges saw this particular configuration of the judge-jury relationship as logically necessary. But more than this, it is interesting to find this particular judge making this argument. In *Sparf*, decided by the US Supreme Court four years earlier, Gray had offered a powerful seventy-five-page dissent to Harlan’s fifty-page majority opinion. And yet four years later Gray cited parts of the majority decision in *Sparf* as support for his contention that ‘there are unequivocal statements’ of the proper judge-jury relationship ‘in the books’.

⁸⁹ *Capital Traction Co v Hof* (n 87), 38-39.

In *Sparf*, Gray had justified his defence of jury law-finding on two grounds: knowledge and public policy. The criminal trial jury is duty-bound, he explained, to be

governed by the law, and not by willfulness or caprice. The jury must ascertain the law as well as they can. Usually they will, and safely may, take it from the instructions of the court. But if they are satisfied on their consciences that the law is other than as laid down to them by the court, it is their right and their duty to decide the law as they know or believe it to be.⁹⁰

Gray continued: “The rules and principles of the criminal law are, for the most part, elementary and simple, and easily understood by jurors taken from the body of the people”;⁹¹ and so it will be easy for a conscientious jury to spot a judge who has become ‘case-hardened’,⁹² and for them then to substitute the true criminal law for that espoused by the judge. ‘Conscience’ here has its now unusual meaning of ‘true knowledge’,⁹³ and the claimed ability of the jurors to grasp the rules of criminal law exists “especially after being aided by the explanation of the law by counsel and court”.⁹⁴ Jury independence, on this account, is about negating the excesses of a case-hardened trial judge, not about declaring that a whole branch of the criminal law is illegitimate.

Gray’s second justification for dissenting from Harlan’s majority opinion is more about public perceptions: on this point, he quotes approvingly Alexander Hamilton’s argument in *People v Crosswell*, decided almost a century earlier, that the criminal trial jury is given power to determine both law and fact “for reasons of a political and peculiar nature, for

⁹⁰ *Sparf and Hansen v United States* (n 2), 172.

⁹¹ *Ibid*, 173.

⁹² The way Gray puts it is like this: “it is a matter of common observation, that judges and lawyers, even the most upright, able and learned, are sometimes too much influenced by technical rules; and that those judges who are wholly or chiefly occupied in the administration of criminal justice are apt, not only to grow severe in their sentences, but to decide questions of law too unfavourably to the accused.” *Ibid*, 174.

⁹³ See chapter 2.2.

⁹⁴ *Sparf and Hansen v United States* (n 2), 173.

the security of life and liberty”.⁹⁵ Four years later, in his *Hof* definition of trial by jury, Gray noted that the otherwise essential power of the judge to set aside a jury’s verdict did not apply in a criminal acquittal. Perhaps if we combine his comments in *Hof* and in *Sparf*, we might conclude that control of the jury through directions and the power to set aside verdicts is usually essential, but that it is also politically, peculiarly essential that this power is denied the judge in a criminal acquittal, because of the importance of allowing lay jurors to set their consciences against the demands of case-hardened judges.

But this interpretation must be tempered by the peculiar sense in which Gray uses the word ‘conscience’. Conscience here is more about true knowledge than the moral dictates of the internal law-giver; so the temptation to hold Gray up as a late judicial supporter of the ‘verdict according to conscience’ must be resisted. We should also note that the jurors’ conscientious rejection of the trial judge’s wishes comes ‘after being aided by the explanation of the law by counsel and court’. Even here, directions are a crucial part of the jury’s verdict, and the conscience of the juror is a conscience which must confront factual rather than moral problems.

5.4: Conclusions

In the early decades of the nineteenth century, American judges seem to have been reasonably sympathetic to the idea of a jury deciding the whole question – facts and laws – by its own lights. But this particular image of jury independence did not imagine a violent overthrow of the judicial role: rather, the judge was viewed as little more than an

⁹⁵ Ibid, 175.

assistant, there to benevolently assist the jurors whenever they were unsure how to proceed. In this respect, the farmer-judge John Dudley described trial by jury in the same exclusionary terms as those put forward by the pamphleteers of the English Restoration, explored in chapter three. But the increasing legal specialisation of the Bench brought with it an Enlightenment-style feeling (similar to that felt in England during the previous century) that legal certainty is the highest moral aim of a civilized system of laws. The idea that a judge might merely *advise* a jury therefore came to seem both unreasonable and immoral to the judges, who began to insist that true jury trial was only possible on condition that the jury reached a verdict in accordance with the law as set out by the judge. Strategies were accordingly developed for producing juries and jury verdicts which fitted this inclusionary model of jury trial. Despite their insistence that the facts were for the jury alone to assess, the judges were careful to set these facts in the proper legal context, only giving the jury the opportunity to deliver a verdict which they believed the evidence could sustain: In *Sparf*, for instance, the jurors eventually found the defendants guilty of murder only after being instructed several times that manslaughter was not an option: all they were allowed to choose between was a conviction for murder and a total acquittal. But the fact that the judges would not directly tell their juries what they thought about the evidence also stemmed from their awareness of the power legal directions could have in shaping a jury's thoughts about a case. By the end of the century, American judges were well aware of the potential for producing correct verdicts which an inclusionary focus on techniques such as the legal direction could have. This is an understanding which is also observable in the contemporary Anglo-Welsh criminal trial, as I shall explain in chapter six.

Having come to the end of my historical discussions, I should make a proviso about my claims regarding the exclusion and inclusion theses. I am absolutely not arguing that the position put forward in *Bushell's Case* and the surrounding pamphlet literature is the only possible way of thinking about jury independence. My claim is not that 'true' jury independence has been progressively destroyed by the professional judiciaries of England and, later, the USA. What I think has happened is that the development of the inclusion thesis has destroyed some of the practical potential for the particular kind of jury independence explored in chapter three. To the extent that 'the juror' is no longer understood as a fully-formed citizen, reaching a verdict in a state of total cognitive separation from broader legal processes, it makes less sense to see the possibility of jury independence in exclusionary terms than it once did. And to the extent that judges deliberately attempt to govern their juries, ensuring that their decisions take place within certain evidential and cognitive limits, it makes less sense to make exclusionary claims regarding jury power.

Throughout this thesis I have tried to treat power in a Foucauldian way, with two implications. First, this means treating power not as something necessarily negative or prohibitive, but rather as something constructive. I have therefore sought in the eighteenth- and nineteenth-century developments of what Devlin would later call "the control of the jury"⁹⁶ not simply an attempt to reign in the perceived excesses of widespread mitigation of the criminal law; rather, I have tried to discover whether, in this

negation of the historic sense of ‘true’ jury trial, there might not also be a positive sense in which ‘true’ jury trial is constituted anew. The second implication of my Foucauldian perspective is that ‘resistance’ (which in the present context means ‘jury independence’ of one sort or another) is not about fighting in the hope of overcoming some abstract concept of power, so much as acting in a way which engages with the particular technologies of power which act upon a person. Having, I hope, demonstrated that since at least the second half of the eighteenth century a particular set of these ‘technologies’ have reconstituted the judicial vision of jury trial, in the final substantive chapter I shall go on to ask what possibilities of resistance there might be for a juror who finds themselves constituted in this way.

In essence, my claim is that by defining ‘true’ jury trial as a trial by a jury constituted ‘under the direction of the court’, we distinguish between the ordinary citizen and the juror in a way which was not possible under the exclusion thesis, which located the whole possibility of a jury’s resistance to power in the fact that the jurors went into the jury box pre-armed with a set of civic obligations which had supremacy over any sense of the duty of a jury *qua* jury. But by seeing the juror as something different from the ordinary citizen, we perhaps concede that the juror may be able to speak truthfully about matters relating to the trial and, crucially, that he or she may be able to speak *more truthfully* about it than anyone else. What my suggestion boils down to is the claim that jury independence, under the inclusion thesis, may ultimately be more about resisting state action *after* the trial than, as the exclusion thesis states, that it is simply about using the general verdict to resist the state *during* the trial.

McDermott has possibly recorded an instance of this specific kind of resistance in the actions of an 1850 Illinois jury:

The jury sentenced [the defendant] to one year in the penitentiary, but then each juror signed a petition calling for his early release. The petition for clemency submitted to Illinois governor Augustus C. French argued: 'From the facts developed on the trial, as well as from our personal knowledge we are satisfied that this is his first criminal offence that he is quite young and has hitherto sustained a fair and unblemished character and that even in the opinion of the jury who tried him there is doubt whether he intended to commit a larceny.' The petitioners added: 'We therefore earnestly recommend him as a fit subject for executive clemency believing that the exercise of the pardoning power vested in you will in this case prove acceptable to the people as it will be most judicious and deserving.'⁹⁷

This jury, despite having its doubts about the justice of convicting the accused, nonetheless acted in accordance with the formal wishes of the wider legal system. On an exclusionary account, this jury failed to act with the independence guaranteed it by the 'constitutionalization of the general verdict'. But by seeing things in inclusionary terms, we can see here a jury which, once the trial was over, used its status as a jury in order to speak out against what it considered the injustices of a state action which it had been intimately involved with. And so even if, by the end of the eighteenth and nineteenth centuries, the trial jury had been more or less reconstituted as something existing within the wider system of criminal trials, there may still be a meaningful sense in which jury independence might be considered possible. It is to this possibility which I shall turn in the next chapter.

⁹⁷ McDermott (n 4), 104-105.

CHAPTER 6: JURY INDEPENDENCE

AFTER DEVLIN¹

In this final substantive chapter, I will shift my focus a little. Where previously my primary concern has been to set out the different positions which have been taken regarding the relationship between jury independence and the general verdict, here I return to a question posed in the introduction: what can a silent jury do? Standard accounts of jury power tend to focus on the inscrutable nature of the general verdict, and the power this apparently gives each trial jury to exclude itself from the normal legal procedures of the common law criminal trial.² In the preceding chapters, I have attempted to disrupt the self-evidence of this position, demonstrating that it actually emerged as an argument in specific historical circumstances; and that a rival ‘inclusionary’ perspective has challenged the dominance of the exclusion thesis since the second half of the eighteenth century. But the competing perspectives on jury power do not simply describe different objects: they are, to echo the title of a pamphlet discussed in chapter three, ‘guides to juries’ in the dual senses both of describing the object ‘juries’ and of ‘guiding’ the subject ‘the jury’.³ The exclusion thesis presumes a citizenry which comes into the criminal trial pre-formed, passes judgment – “not only upon the accused, but also upon the justice and

¹ The following publication is based on sections 2.1 and 2.2 of this chapter: K. Crosby, ‘Controlling Devlin’s Jury: What the jury thinks, and what the jury sees online’ [2012] Crim LR 15.

² This theoretical stance presumes that judges will be unwilling or unable to hear evidence concerning the manner in which a jury reached its verdict. In *R v Mirza; R v Connor and Rollock* [2004] UKHL 2 [2004] 1 AC 1118, the House of Lords stated that, while this exclusionary rule of evidence will generally apply, it may not do if the evidence suggests that the jury was subject to extraneous influences when reaching its decision. See chapter 1, n 18.

³ See the text at chapter 3, n 90.

humanity of the law”⁴ – and then returns to its ordinary life, without ever losing its integrity as a body of citizens. The inclusion thesis, on the other hand, sees a jury as something constructed within the trial, principally through judicial directions. It is to these questions of subjectivity, built up from the historical discussions in the previous chapters, and their implications for independent juror action in the contemporary Anglo-Welsh trial, to which I shall turn in this chapter. What kind of independence can a juror enjoy today?

6.1: Jury Trial and Jury Power In and After Devlin

In 1956, Patrick – later Lord – Devlin delivered his Hamlyn lectures on the jury system, lectures which famously ended with the claims that “trial by jury is ... the lamp that shows that freedom lives” and that “[e]ach jury is a little parliament”.⁵ These words have come to stand as the most popular shorthand for the idea of ‘jury nullification’, in which it is claimed that the jury has the power to do the following three things:

(1) they reject the law that criminalizes the wrong for which the defendant is being tried; (2) they reject not the criminalization of the act but the level of sanction attached to it; or (3) the jurors accept the law and concomitant sanction but simply have no wish to see them applied to the particular defendant on trial.⁶

Criticising the notion of jury nullification several decades ago, WR Cornish saw it primarily in terms of a conflict with parliament, and emphasised that jury nullification is problematic because what it nullifies is statute law, the commands of a democratically-

⁴ EP Thompson, ‘The State versus its “Enemies”’ in *Writing by Candlelight* (Merlin 1980), 108.

⁵ P Devlin, *Trial by Jury* (Stevens & Sons 1956), 164.

⁶ D Allen, *The World of Prometheus: The politics of punishing in democratic Athens* (Princeton University Press, Princeton 2005), 5, quoted in M Matravers, “‘More Than Just Illogical’: Truth and jury nullification” in A Duff, L Farmer, S Marshall and V Tadros eds, *The Trial on Trial*, Vol 1: Truth and due process (Hart 2004), 74.

elected parliament.⁷ Similarly, one decade ago, Auld LJ argued that Devlin's rhetoric of the jury as a little parliament was misguided as it amounted to holding that a local jury could legitimately trump parliament's democratic right to legislate on any issue it wishes.⁸ But Auld did not only oppose jury nullification because it offended against the doctrine of parliamentary sovereignty: more than this, it is an "irrational" idea,⁹ and amounts to a claim that the juror's oath to try the case truly can and ought to be permitted to fall into disuse.¹⁰ Auld provocatively asked: if this is what we want, why do we bother making jurors swear an oath at all?¹¹ The oath should be taken as the guiding standard against which jurors should conduct themselves. Whether jurors actually do behave themselves is no more than a matter of observation, something which the judge has very little to do with.

Matravers, responding to Auld's comments, has argued that dismissing jury nullification as 'irrational' suggests a 'naïve' dichotomy between the strict legal answer to the case and the answer the jury actually gives; and that this dichotomy is caused by jurors self-consciously 'lying' in order to deliver what they deem a just result.¹² Rather, he says, we should ask whether juries are not acting in accordance with the question: 'What does this person deserve?' 'The law', as embodied in this instance by Auld LJ, is interested in the alternative question: 'Did this defendant commit this act prohibited by this law?' Matravers' distinction between the lawyer's question and the juror's question about the

⁷ WR Cornish, *The Jury* (Pelican 1971), 133.

⁸ Auld LJ, *Review of the Criminal Courts of England and Wales* (HMSO 2001), 175-176.

⁹ *Ibid*, 175.

¹⁰ *Ibid*, 176.

¹¹ *Ibid*.

¹² Matravers (n 6), 74-76.

same case has echoes of Bankowski's much earlier suggestion that a policeman's 'he did it' cannot be sensibly used as a means of evaluating the jury's 'he is guilty'.¹³ The policeman and the jury reach their conclusions through different rationalities, or "truth certifying procedures",¹⁴ and it is only possible to determine which of these is 'correct' if we overlook the fact that juries and policemen are unlikely to look at a case in exactly the same way as one other.¹⁵

Following the logic of this argument, we might ask whether juries and parliaments might legitimately look at the same facts with different eyes. But the difference between a parliamentarian's and a juror's perspective on murder, say, or on any other substantive question of the criminal law need not be grounded on a difference in *how* they see, for they might conceivably see different *things*: where a parliamentarian is concerned with, as Kelsen would say, "general norms created in the legislative process",¹⁶ a juror's role is to apply these general norms to particular facts. Kelsen continues: "[t]he general norm, attaching an abstractly determined consequence to an equally abstractly determined material fact, requires individualization if it is to have normative meaning at all... Only the preconceived notion that all law is contained in the general norm, the mistaken identification of law with the statute, could have obscured this insight into the judicial decision *qua* continuation of the law-creating process."¹⁷ A justification of jury

¹³ Z Bankowski, 'The Jury and Reality' in M Findlay and P Duff eds, *The Jury Under Attack* (Butterworths, London 1988), 9.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ H Kelsen, *Introduction to the Problems of Legal Theory* (BL Paulson trans, SL Paulson ed, Clarendon 1992), 65.

¹⁷ Ibid., 67-68.

nullification based on different rationalities does not advance the argument much as regards the relationship between juries and parliaments, because the two institutions are engaged at different levels of the legal system. At the level at which juries are engaged, law-creation is a question more of application and interpretation (‘individualization’) than of the validity of general legal rules; and the jury’s chief rivals at this level are the professionals in the trial, professionals who, in Auld’s language, are no less chosen by “selection, not election”¹⁸ than are juries.

Remember that Bankowski’s argument compares not jury rationality and legislative rationality, but the rationality of juries and of policemen. In this connection he rejected those empirical studies which sought to quantify cases of jury nullification by comparing jury verdicts to the opinion of the professionals involved in the trial.¹⁹ If Bankowski’s claims regarding the differences between lay and official rationalities are correct, the implication must be that jury nullification is not simply a question of juries subverting the wishes of a parliament: it is also a question of challenging the position created by legal officialdom as regards the execution of parliamentary commands. Those theorising about the relationship between the jury and the laws over the past few decades have tended to imagine an exclusionary juror, who comes into the trial from the outside, disrupting either the legitimate legislative aims of the legislator or the unjust commands of the judge, depending on your perspective. At least two accounts from the past half-century or so

¹⁸ Auld (n 10), 175.

¹⁹ Bankowski (n 15), 18-19. Bankowski was specifically referring to H Kalven and H Zeisel, *The American Jury* (Little Brown 1966); S McCabe and R Purves, *The Shadow Jury at Work* (Blackwell 1974); M Zander, ‘Are Too Many Criminals Escaping Conviction? A study in Britain’s two busiest courts’ (1974) 37 MLR 28; and J Baldwin and M McConville, *Jury Trials* (OUP 1979).

have, however, focused on the idea that the trial might be conceived of as a cooperative endeavour between judge and jury; and it is to these accounts which I now turn.

Mungham and Bankowski, writing a little over a decade before Bankowski's article discussed above, criticised the notion of a 'jury system', arguing that this 'system' should be conceived of only as part of a broader juristic system focused upon the judge:

[I]t is *this* 'system' which provides the juror with his cues and his idea of what and what not to do in the trial. The juror learns this by the actual experience of being in court, where his view of reality is usually subsumed beneath the court's legal view. People ... come with no experience or with[out] any idea of their rights and duties as jurors. All they know is that they are told by the judge and the other court officials that they have become most important people. Yet in practice they see that this is not so. It becomes clear from the outset that the most important figure in the 'system' is the judge. Everyone defers to him. He is in control; even his position in the geography of the court marks him out as the central personage.²⁰

Despite clearly hinting at the idea that theoretically satisfactory accounts of the jury system ought really to focus on the interplay between judge and jury, and despite including a brief research study emphasising the importance of judicial directions in shaping a jury's thoughts about a case,²¹ Mungham and Bankowski also asserted that:

the notion of the 'good juror' is intimately bound up with the idea of the 'good citizen'. The good citizen is the person who trusts in and follows the law ... Yet at the same time the juror's everyday life – his pre-trial experiences and knowledge – can also serve as the source of a resistance, a refusal to believe in, the legal way of settling the world.²²

²⁰ G Mungham and Z Bankowski, 'The Jury in the Legal System' [referred to in the book's content's page as 'The Jury as Process'] in P Carlen, *The Sociology of Law* (University of Keele 1976), 206 (emphasis in original).

²¹ Ibid, 210-213.

²² Ibid, 208.

I do not wish to criticise Mungham and Bankowski for not pursuing a particular line of thought, but their argument that the jurors' status as citizens might allow them to overthrow the wider legal system seems to be thrown into doubt by their own findings regarding the role of judicial directions in shaping the jurors' thoughts. Nonetheless, they seem to have been alive to the possibility that the question of the jury's independence might not be a question which can be answered simply by focusing upon the institutional independence guaranteed the jury by the legal protection of the general verdict. To this extent, they seem to have seen trial by jury in the terms of the inclusion thesis, while still holding on to the idea that jury independence consists of a refusal on a jury's part to be contained within a formal body of laws.

Lord Devlin's classic account of jury power is famous principally for two phrases: 'the lamp that shows that freedom lives' and 'each jury is a little parliament'. Matravers searches for justifications of jury nullification, and in the end concludes that, while logical arguments in support of the idea are possible, the decision to support or to oppose the idea ultimately comes down to a felt preference (no doubt 'irrational') that it is good to have "means of resistance";²³ and in truth Devlin too has little to commend jury nullification beyond a Whiggish praise of traditional English liberty. All this is summed up in the first of his two phrases: that the jury is 'the lamp that shows that freedom lives'. But his second phrase – that 'each jury is a little parliament' – is much less about justifying jury nullification and much more about describing how it works.

²³ Matravers (n 6), 83.

Opponents of jury nullification often focus on the illegitimacy of setting up jury power in opposition to the democratic will of parliament. Devlin's phrase, that the jury is 'a little parliament', seems to justify the presumption that this is what jury power is all about, for at first glance it appears to imply that the jury, as a body of local citizens, might be treated as a smaller version of parliament, and that therefore it might legitimately offer an alternative account of 'the will of the people' to the one given by Members of the House of Commons. Hence Auld's comment that, "[w]ith respect to Lord Devlin", he considered it unrealistic to consider "the selection, not election, of 12 jurors from one small area as an exercise in democracy, 'a little parliament', to set against the national will".²⁴

But while his words have often been interpreted in this way, this is not what Devlin meant when he called the jury a little parliament. The analogy rested not with the representative nature of the two institutions but, rather, with their powers to occasionally veto the wishes of those who usually controlled them. Devlin considered the jury's sound judgment to be largely derived from its location within the English class system.²⁵ And while the property qualification (which Devlin thought excluded the poor from jury service) and the professional exemptions (which Devlin thought excluded the upper middle classes) are now gone,²⁶ their presence in Devlin's account shows that Devlin is misunderstood when

²⁴ Auld (n 10), 175. See also B Schäfer and OK Wiegand, 'It's Good to Talk: Speaking rights and the jury' in A Duff, L Farmer, S Marshall and V Tadros, *The Trial on Trial*, vol 2: Judgment and calling to account (Hart 2006), 118.

²⁵ Devlin (n 4), 20.

²⁶ Devlin wrote years before the 1972 abolition of the property qualification for jury service, a qualification which he thought excluded lower-class membership on juries: Ibid, 20; Criminal Justice Act 1972, s25. Devlin considered "any alteration in property qualification" to be "very unlikely": Devlin (n 4), 22. He also wrote decades before the abolition of the professional exclusions in 2003, exclusions which he thought prevented upper-class membership on juries: Ibid, 20; Criminal Justice Act 2003, s321. For Devlin, the jury was a very middle-class institution.

his argument that each jury is a little parliament is characterised as an argument about the representative, democratic nature of the jury. Devlin did not expect juries to represent the locality in the same way as an MP is expected to. For Devlin, the analogy with parliament lay in the fact that, just as parliament is usually under the control of the executive, the jury is usually under the control of the judge.²⁷ The executive gets this control through the whip system, and the judge gets it primarily through judicial directions. But both means of control may occasionally be thrown off, he says, “in matters of conscience”.²⁸ This is what Devlin meant when he said that “[t]he jury sense is the parliamentary sense”.²⁹ The phrase ‘each jury is a little parliament’ emphasises not the tension between jurors and parliamentarians, but the coupling of systematic control and occasional revolt which, in his opinion, typified each institution’s relationship with its masters.

For Devlin, as for Bankowski and Matravers, there are different ways of seeing the same facts: there can be no doubt, he says, that there is a qualitative difference between the reasonable man and the reasonable lawyer.³⁰ Where one is trained to frame reality through predefined legal categories, the other has a less legalistic worldview, being twelve random citizens for whom the law means “something but not everything”.³¹ On this account, the value of having juries is precisely that, viewed from a legalistic perspective, they are an ‘irrational’ body of citizens, capable of injecting “lay acid”³² into the system. The

²⁷ Devlin explicitly drew this link in Devlin (n 4), 161-163. See also the similar points made by Lord Hailsham twenty years later: Lord Hailsham, ‘Elective Dictatorship’ (1976) 76 *The Listener* 496.

²⁸ Devlin (n 4), 162-163.

²⁹ Ibid, 164.

³⁰ Ibid, 63.

³¹ Ibid, 154.

³² Bankowski (n 15), 20.

problem this raises is less one of how we might account for a subversion of the national will at a local level, and more one of how the difference between the policeman's 'he did it' and the juror's 'he is guilty' can be accommodated within the same system of criminal trials.

For Devlin, this difficult feat is achieved through the activities of the judge regarding the formation of the jury's verdict. In a double chapter entitled "The Control of the Jury",³³ he argues that juries are limited by the judge from two directions.³⁴ First, the judge may control what evidence the jury sees. This is achieved principally, he says, though the laws of evidence, which have traditionally prevented the jury from hearing evidence of bad character, of unreliable evidence such as hearsay, etc.³⁵ The aim here is to ensure that juries only convict on evidence which the law deems appropriate, and therefore to guarantee that verdicts always meet a certain minimum standard of legality. Devlin's second strategy for ensuring that juries usually act in a legally acceptable manner is to control the way the jury, having already come into possession of a certain body of evidence, thinks about the case during its deliberations. This, on Devlin's account, is primarily achieved through the use of judicial directions. The jury, Devlin explains, is limited at these two ends, but is relatively free within the space lying between them to act as it sees fit:

[T]he object of the process is to produce a directed verdict if 'direction' be given its double meaning of guidance as well as of commandment. The jury

³³ Devlin (n 4), 61-125.

³⁴ Ibid, 120-121.

³⁵ This evidential context has since changed, however, having been significantly changed by Part 11 of the Criminal Justice Act 2003. On the impact of the 2003 Act, see generally G Durston, *Evidence: Text and Materials* (2nd edn, OUP 2011), 171-223 and 248-280. See also the discussion below, at [...].

is not allowed to search for a verdict outside the circumference delineated by the judge; and within the circumference its search is directed by the judge in that he marks out the paths that can be taken through the facts, leaving to the jury the final choice of route and destination.³⁶

But this control of the jury is, as with the control of the MP through the whip system, always subject to temporary revolt when either the executive or the Bench appear to be using their powers of control to bring about an injustice.

Briefly surveying a few key theoretical statements regarding the meaning and possibility of jury independence from the last half-century or so, it is clear that there is still no clear resolution to the tension between exclusionary and inclusionary perspectives to the problem. As with the libel debates of the 1790s, those who think that jury power is about a jury of citizens coming into the trial and simply refusing to behave themselves can have a meaningful disagreement with one another regarding the legitimacy of the practice. But they seem not to notice an inclusionary argument, one which suggests that jury mitigation might be able to be contained within appropriate limits if we imagine that the jury is to some degree constructed within the trial. The exclusion and inclusion theses still, in short, seem unable to speak to one another.

The difficulty with this is that the practice of the courts seem for the last two-and-a-half centuries to have more closely fitted the inclusion thesis; which raises the possibility that the actual potential for jury independence in its traditional exclusionary sense might be eroded without proponents of the exclusion thesis noticing. Exclusionary accounts, positing a jury which can act however it wants, pay little attention to the governance of

³⁶ Devlin (n 4), 120-121.

the jury; while in inclusionary accounts questions of governance form the entire problem. If, as I shall contend it is, the governance of the jury in England and Wales is being adapted in response to the rise of internet communications, a theoretical perspective which overlooks the governmental element risks missing the fact that anything is happening. It is for this reason that, in the following section, I shall hold up certain practices of the courts against the most detailed inclusionary account of recent decades: Lord Devlin's theory of jury trial.

6.2: The Inclusion Thesis and Internet 'Evidence'

In the past decade, internet use has become ever more prevalent, so much so that in 2010 30.1 million people in the UK (60 per cent of the total adult population) reported using the internet either every day or almost every day; which is almost double the number doing so four years earlier.³⁷ And despite the warning jurors now receive as a matter of course, alerting them to the dangers of accessing the internet to download extra 'evidence',³⁸ Cheryl Thomas found in 2010 that between 5 and 12 per cent of jurors

³⁷ Office of National Statistics, 'Internet Access 2010: Households and individuals' (Office for National Statistics, 27 August 2010) <<http://www.ons.gov.uk/ons/rel/rdit2/internet-access---households-and-individuals/2010/stb-internet-access---households-and-individuals--2010.pdf>> accessed 2 August 2012. The 2011 data is silent on this point: Office of National Statistics, 'Internet Access: Households and individuals, 2011' <http://www.ons.gov.uk/ons/dcp171778_227158.pdf> accessed 2 August 2012.

³⁸ See Judicial Studies Board, 'Crown Court Bench Book: Directing the jury' (March 2010) <http://www.judiciary.gov.uk/Resources/JCO/Documents/Training/benchbook_criminal_2010.pdf> accessed 2 August 2012, 9. This guidance has been reiterated in newer publications by the Judicial College: Judicial College, *Crown Court Bench Book: Directing the Jury – First Supplement* (2011) <http://www.judiciary.gov.uk/Resources/JCO/Documents/eLetters/CCBB_first_supplement_071211.pdf> accessed 2 Jul 2013, 10-11 (giving a lengthy example of such a direction); Judicial College, *Crown Court Bench Book Companion* (2011) <http://www.judiciary.gov.uk/Resources/JCO/Documents/eLetters/Bench%20Book%20Companion_revised%20complete%20march%202012.pdf> accessed 2 Jul 2013, 2 (giving an outline of the issues to be discussed, following Lord Judge's comments, at i, to the effect that trial judges were still too often using Judicial Studies Board/Judicial College guidance as templates).

actively look for information about their trial online, while between 13 and 26 per cent “saw media reports on their case on the internet during the trial” (the difference within the groups represents the difference between ordinary and high-profile cases).³⁹ And as Thomas points out, her data goes no further than being information volunteered by jurors, meaning these figures may represent only a minimum of juror use of the internet.⁴⁰ In this section, I shall explore the possibility that the ways the courts of England and Wales have responded to this problem may undermine the practical possibility of an independently-minded jury. It is at this point that my historical argument regarding the rise of the ‘inclusion thesis’ first meets the problems of the contemporary criminal justice system of England and Wales, as it provides the conceptual basis of my critique.

Lord Judge CJ has suggested that juror use of the internet is to some extent inevitable in a society in which the internet is increasingly seen as the natural place to find information, even on matters as serious as health and illness.⁴¹ But he rejects any suggestion that the battle to control the evidence jurors see is necessarily lost, for once the jury starts to acquire external evidence it loses what he considers its chief political function: the

³⁹ C Thomas, *Are Juries Fair?* (Ministry of Justice Research Series 1/10, 2010), 43.

⁴⁰ Ibid, 43. Internet use *per se* is not prohibited; only uses which undermine the reliability of the jury’s verdict. In the latest version of its *Companion* to the old Judicial Studies Board’s *Crown Court Bench Book*, the Judicial College recommended that the trial judge mention Facebook and Twitter when instructing the jury not to discuss the case with anyone until the case is completed; and recommends a specific warning that jurors should not use the internet to search for information about the case. Judicial College, *1st Update to Part I* (2012) <http://www.judiciary.gov.uk/Resources/JCO/Documents/eLetters/Bench%20Book%20Companion_1st%20update_March%202012_final.pdf> accessed 2 Jul 2013, 2. The Judicial College’s guidance also mentions more traditional means of discovery, i.e. visiting relevant places and taking into account media reports: *ibid*. The internet is different to these more traditional means of discovery, however, owing both to the volume of information and to the ease of access to information which the internet opens up to jurors.

⁴¹ Lord Judge, ‘Jury Trials’ (Judicial Studies Board Lecture 2010) <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/speech-lcj-jury-trials-jsb-lecture-belfast.pdf>> accessed 2 August 2012, 3.

independent assessment of the government's case. For Lord Judge, the issue is not so much jury nullification as the related matter of the jury as an independent arbiter of the facts in a case.⁴² Nonetheless a social change appears to be underway, one which would tend to undermine the jury's ideal separation from the collection of evidence. The jury is likely to come into court already armed with 'knowledge' about a case beyond the traditional levels of exposure associated with more traditional means of communication. For Devlin, the implication of this would be that the fabric of the legal system is under threat, as constraints such as a limitation on the evidence a jury sees exist to ensure that verdicts accord to a minimum standard of legality. For Judge, the implication is that the jury's ability to hold the government to account through an independent assessment of the government's evidence is under threat. Other voices, however, disagree with the idea that we should regulate the jury's vision so closely, claiming instead that we should 'trust' the jury.

In the debates on the Bill which would ultimately become the Criminal Justice Act 2003, the then Home Secretary David Blunkett defended his government's decision to relax the rules surrounding such things as pre-trial publicity and evidence of a defendant's previous bad character through a call for greater trust in the jury's ability to get it right:

I am painfully aware that people are worried that publicity will make matters difficult for juries; however, we must trust them. They have to assess the evidence and the facts... I believe that, if we are careful and the safeguards are right, we can trust the jury to get it right, and that we can trust the Appeal

⁴² Ibid, 2: "It is not an accident that for very many years now there has been a widespread belief, crossing all political and social lines, that from the time when the jury system ceased to be trial by immediate neighbours who would know the facts, the responsibility for the verdict was vested in the jury as a body examining the evidence, this system helped to ensure the administration of justice as well as the preservation of civil liberties."

Court not to allow through the gateway presentations of evidence that do not stand up to scrutiny.⁴³

To leave the jury latitude in the way it responds to a case is not new. In gross negligence manslaughter, for example, as counsel for the appellant argued in *Misra*, the jury is basically told that the defendant's negligence is gross, and therefore criminal, *if the jury believes that a crime has been committed*.⁴⁴ Rejecting the argument that the definition of the crime is therefore left in the hands of the jurors, Judge LJ (as was) emphasised that:

On examination, this represents one example, among many, of problems which juries are expected to address on a daily basis. They include equally difficult questions, such as whether a defendant has acted dishonestly, by reference to contemporary standards, or whether he has acted in reasonable self-defence, or, when charged with causing death by dangerous driving, whether the standards of his driving fell far below what should be expected of a competent and careful driver.⁴⁵

What was new in Blunkett's defence of the future Criminal Justice Act 2003 was that not only could the law be seen to be 'trusting' the jury: more than this, a government minister was explicitly using the rhetoric of 'trust' as a normative claim, used to push through new legal provisions. 'Trust' at this stage appears to have become more than just a fact of the system: more than this, it appears to have become a self-perpetuating normative goal, at least as far as the evidence a jury sees was concerned.

Lord Phillips, in a piece called 'Trusting the Jury', has recently set out the story of this growing trust as regards the laws of evidence.⁴⁶ He traces the growth of this 'trust' to the

⁴³ Hansard HC vol 395, col 922 (2002).

⁴⁴ *R v Misra and Srivastava* [2004] EWCA Crim 2375 [2005] 1 Cr App R 21, 336.

⁴⁵ Ibid, 348.

⁴⁶ Lord Phillips of Worth Matravers, 'Trusting the Jury' (Criminal Bar Association Kalisher Lecture 2007) <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_trusting_juries_231007.pdf> accessed 2 August 2012.

early 1970s,⁴⁷ when policy-makers, as he sees it, started to treat jurors as adult participants in the courts. Phillips, discussing the reforms of the Criminal Justice Act 2003, cited limitations on the accused's right to silence,⁴⁸ the jury's right to draw adverse inferences from the accused's failure to give evidence at trial,⁴⁹ and the increased ease with which either hearsay⁵⁰ or evidence of a defendant's bad character can be presented to a jury.⁵¹ Viewed from one angle, this is further evidence of McBarnet's claim that the law does not need to be abused in order to deny a suspect their 'rights';⁵² but Phillips saw things differently: "We now place much more trust in the jury. I, for one, believe that this is a firm step in the right direction."⁵³ And as with Blunkett, Phillips saw the phenomenon of a growing 'trust' in the jury in more than purely descriptive terms: here, too, 'trust' became a normative goal, for Phillips lamented the pressure the appellate courts still placed upon judges to give juries complex directions. It would be much better, he said, if these directions were simplified, leaving an even greater trust in the jury's ability to get it right.⁵⁴

This is the background against which jurors have gained access to the internet. While causality cannot possibly be established, the rhetoric of 'trusting the jury' has acquired normative force at the same time as it has, as a matter of fact, become increasingly difficult to control what evidence the jury sees. In itself, this would amount to a rejection

⁴⁷ Ibid, 5.

⁴⁸ Ibid, 5-7.

⁴⁹ Ibid, 7.

⁵⁰ Ibid, 8-11.

⁵¹ Ibid, 11-14

⁵² D McBarnet, *Conviction: Law, the state and the construction of justice* (Macmillan 1981).

⁵³ Phillips (n 49, above), 15.

⁵⁴ Ibid, 14-15.

of Devlin's model of jury control, for simultaneously control of what the jury sees has become less possible and control of what the jury thinks has become less desirable. The courts, in short, are being urged to scale back their governance of the jury, leaving juries greater freedom to assess the evidence. But of course things are not really as simple as that. In the passages I have cited, both Blunkett and Phillips referred to the admission of evidence through a judicially-controlled 'gateway',⁵⁵ thereby suggesting that even a 'trusted' jury must still be subject to a level of judicial governance, and in that sense they still describe the jury in inclusionary terms.

The case law on juror use of 'evidence' gained outside the normal bounds of the trial can be traced back to the mid-twentieth century,⁵⁶ and it was quickly established that "once the summing-up is concluded, no further evidence ought to be given".⁵⁷ During his Chief Justiceship (1946-1958), Lord Goddard alternated between statements along these strict lines and ones which took into account the circumstances of the trial.⁵⁸ Two decades later, Lord Widgery CJ settled the position by laying down a two-stage test for whether evidence acquired after the summing-up should be treated as creating a miscarriage of justice: first, the appellate courts should ask whether the jury has been given any evidence it should not have seen; second, it should ask whether, in the circumstances, it seems likely that a miscarriage of justice has actually occurred.⁵⁹ The factors to be considered

⁵⁵ See Criminal Justice Act 2003, ss 98-131. On the 'gateways' for the admissibility of bad character evidence, see s 101.

⁵⁶ Following the references in the case law back to earlier cases leads you to *R v Browne* (1944) 29 Cr App R 106, at which point the trail goes cold, for Cassels J, delivering the judgment of the Court of Appeal, cites no earlier cases.

⁵⁷ *R v Owen* [1952] 2 QB 362.

⁵⁸ See *Ibid*; *R v Sanderson* [1953] 1 WLR 392; and *R v Wilson* (1957) 41 Cr App R 226.

⁵⁹ *R v Davis* (1976) 62 Cr App R 194, 201-202.

in this connection have included the inferences which might reasonably be drawn from the dubious new evidence,⁶⁰ whether or not the accused consented to the new evidence being given,⁶¹ and whether the accused can demonstrate that they have suffered some prejudice because of the production of the new evidence.⁶² These factors all depend on the court knowing what ‘evidence’ has been acquired after the summing-up, something which will not always be possible if, as in the case of downloaded material, it is the jurors themselves who have produced it.

Before internet cases had emerged, recent cases in which the jury had been one way or another “self-informing”⁶³ can be split into those cases in which jurors had prior independent knowledge or expertise relevant to the case, and those in which they formed their independent knowledge through the use of experiments conducted in the jury room. In the first class of case, the most important factor is the quality of judicial directions. Where a juror had brought an economics textbook to court, the subsequent conviction was deemed safe because the trial judge had instructed the jurors not to use it.⁶⁴ Where one of the jurors in a case involving stolen tyres was a tyre specialist, the trial judge instructed the jury that they could rely on his expert knowledge if and only if he was sure that it was accurate. The Court of Appeal considered this a misdirection and therefore thought the guilty verdict was unsafe.⁶⁵ Where a jury had used measuring equipment in

⁶⁰ *R v Cadman* [2008] EWCA Crim 1418, para 36.

⁶¹ *R v Khan* [2008] EWCA Crim 1112, para 43.

⁶² *Ibid.*

⁶³ For the history of the ‘self-informing’ jury, see J Oldham, *The Varied Life of the Self-informing Jury* (Selden Society 2005).

⁶⁴ *R v Oliver* [1996] 2 Cr App R 514.

⁶⁵ *R v Fricker*, *The Times* (13 July 1999).

the jury room, the Court of Appeal held that magnifying glasses, rulers and tape measures “are the sort of objects which any member of the jury might easily have in his pocket when called upon to serve upon the jury, and there could be no possible objection to his using it in the jury room”;⁶⁶ but that the trial judge should be careful to warn jurors not to use such equipment for the sake of conducting independent experiments.⁶⁷ These cases demonstrate that the more difficult a control of the evidence put before the jury becomes, the more important, as per Devlin’s model, judicial directions become.⁶⁸

Where jurors have used the internet to access additional ‘evidence’ for their case, the judicial direction becomes one of the judge’s only tools for ensuring that the ensuing verdict meets minimum standards of legality. Where jurors in a rape case had downloaded information about attacks on women, but it was only found in the jury room after the verdict was in, the Court of Appeal upset the conviction on appeal.⁶⁹ Later that year, it refused to disturb a conviction in a drug possession case where the jury had downloaded information regarding drug addiction. In this case, the jurors had actively sought directions on its use and so the trial judge had been able to direct them to disregard it.⁷⁰

Lord Phillips says ‘trusting the jury’ began in the 1970s, and argues that we should now begin to limit the volume of directions given to the jury, ‘trusting’ them to get it right. If he is correct about the origin of jury trust, it should be noted that “[i]n the 1970s the

⁶⁶ *R v Maggs* (1990) 91 Cr App R 243, 247.

⁶⁷ *R v Maggs* (1990) 91 Cr App R 243; *R v Thomas* The Times (9 February 1987); *R v Stewart*; *R v Sappleton* (1989) 89 Cr App R 273.

⁶⁸ See also *R v F* [2009] EWCA Crim 805, where the fact several jurors had spoken to a law student about their case during deliberations created a presumption that they were disregarding judicial directions.

⁶⁹ *R v Karakaya* [2005] EWCA Crim 346, [2005] 2 Cr App R 5.

⁷⁰ *R v Hawkins* [2005] EWCA Crim 2842.

Judicial Studies Board began to publish Specimen Directions whose purpose was to assist trial judges preparing their legal directions to juries in summing up”.⁷¹ Just as a general ‘trust’ in juries began to emerge, the traditional Devlinian means of controlling juries’ thoughts – the judicial direction – was tightened up. Now, as this ‘trust’ is forcibly expanded by the rise of internet communications, and as the fact of this trust becomes a normative proposition, means of controlling juror thought are once again being explored. The two ways in which this seems to be happening are through a growing acceptance of the special verdict system and through a development of ‘route to verdict’ directions. The upshot of all this is that the overall purpose of Devlin’s model – to ensure that juries are generally made to comply with the requirements of Crown Court legality, but that they are free to occasionally revolt – may be rebalanced, as the ‘governance’ side of the equation comes to outweigh the ‘independence’ side.

The most significant shift in this area in the period following the rise of the internet as a means of mass communication has been the development of several varieties of written judicial directions. As New Zealander judge William Young noted in an article published a decade ago on empirical approaches to the judge’s summing up to the jury, “[a] criminal jury needs assistance from the judge to decide a case on the evidence and within the appropriate legal framework. This assistance is primarily provided when the judge sums up.”⁷² Young argued that the primary difficulty a jury is likely to face relates to the systematic analysis of complex factual situations and legal terms; and concluded that “[i]n

⁷¹ Judicial Studies Board (n 41), vii.

⁷² W Young, ‘Summing up to Juries in Criminal Cases – what jury research says about current rules and practice’ [2003] Crim LR 665, 665.

cases of any length, the oral process of the criminal trial process requires some written supplementation if jurors are to recall enough of the evidence and the summing up to be able to deliberate efficiently and to reach verdicts on the evidence and in accordance with the law”.⁷³ In the decade since Young wrote, the criminal courts of England and Wales have steadily moved in this direction, ensuring that a jury reaches its verdict within the correct legal framework by developing two forms of written direction: first, a written summary of the main points of the oral direction; and second, a more tightly-structured ‘routes to verdict’ document, which sets out the precise questions which a jury must answer in order to come to any particular conclusion. In 2010, the Judicial Studies Board signalled its support for routes to verdict, setting out a large quantity of examples of such directions.⁷⁴ The Board (renamed the Judicial College in 2011) has since emphasised that judicial directions should not simply be copied and pasted from such guidance, however, and so more recently has opted to set out the issues which should be discussed in a particular direction, rather than providing examples which might deter cautious Crown Court judges from drafting directions sufficiently focused on the peculiarities of the case at hand.⁷⁵

Routes to verdict, whether in the idealised versions presented in the 2010 Bench Book, or in the versions used in actual trials, have the feel of a flowchart.⁷⁶ In a joint enterprise

⁷³ Ibid, 689. See also Cheryl Thomas’ similar findings: comparing the legal understanding of jurors only provided with oral directions with that of jurors given written directions, she found that written directions result in the jurors’ formulations of the relevant issues more closely fitting the formulations given them by the trial judge. Thomas, (n 44), 37-38.

⁷⁴ See generally Judicial Studies Board (n 43).

⁷⁵ Judicial College (n 43), iii.

⁷⁶ Penny Darbyshire has also found this metaphor helpful, stating that “the instructions usually took the form of a sequence of questions, or sequences following alternative routes, rather like a flow-chart”: P Darbyshire, *Sitting in Judgment: the working lives of judges* (Hart 2011), 216.

case reviewed by the Court of Appeal in 2011, for example, the trial judge had set out the following ‘routes’ for the jury to follow:

(1) In respect of Paul Carpenter, is it proved that by the time he arrived at the car park he knew that Joe Carpenter was armed with a knife?

(2) If no, your verdict will be ‘not guilty’.

(3) If yes to (1) go on to answer this question: is it proved that he shared Joe Carpenter’s intention to kill or to do really serious injury or realised that Joe Carpenter might use the knife with that intention and nevertheless took part by restraining Frederick Price Senior, to prevent him from intervening in order to protect Shane Price?

(4) If yes to (3), your verdict will be ‘guilty’.

(5) If no to (3), go on to answer this question: is it proved that he knew that Joe Carpenter had a knife and intended to use it to cause some injury or harm but falling short of killing or causing really serious injury or he realised that Joe Carpenter might use the knife to cause some injury falling short of really serious injury and nevertheless took part by restraining Frederick Price Senior, to prevent him from intervening in order to protect Shane Price?

(6) If yes to (5), your verdict will be ‘not guilty of murder but guilty of manslaughter’.

(7) If no to (5), your verdict will be ‘not guilty’. You should then answer the same questions in relation to Tracy Carpenter, substituting her name for that of Paul Carpenter and the name ‘Eileen Price’ for ‘Frederick Price Senior’.⁷⁷

Where routes to verdict are used, the deliberative task of the jury is set out in a highly detailed, tightly structured way. This way of conducting a trial must make it very difficult for a jury to act in the absence of legal forms of thought, in the way which classical exclusionary accounts of jury independence rely upon as a background presumption. At the very least, it can be seen that this way of conducting a trial presumes that it is not appropriate for a jury to act in the absence of legal forms of thought: as Young noted in

⁷⁷ *R v Carpenter* [2012] 2 WLR 1414, 1417.

2003, in terms which echoed Devlin, the problem is to ensure that a jury reaches its verdict “on the evidence and within the appropriate legal framework”.⁷⁸ In this way, the development of routes to verdict – and to a lesser extent simple written directions – can be understood as an extension of the judicial tendency to view jury trial in the inclusionary terms which were explored in chapters four and five of this thesis.

There is little evidence regarding the incidence either of written directions or of routes to verdict, but there is a widespread perception that in the past few years they have been used with growing frequency. It is difficult to quantify their use, however, as the author of a 2010 case comment noted, discussing “what appears to be an increasingly common practice of giving juries directions on law in writing. It is surely time that there was some review of this practice: as far as I know, there has been no formal study.”⁷⁹ The following year, in her research study on the judicial profession in England and Wales, Penny Darbyshire reported that, while most of the judges she consulted (23 out of 27) had used written directions at some point in the past, nonetheless “written directions were the exception”.⁸⁰ In a 2013 article, Cheryl Thomas confirmed the paucity of the evidence on this point, noting that prior to the publication of her article “no reliable data exist[ed] on how many judges use written directions and how often they are used”.⁸¹ In her own research, contrary to Darbyshire’s findings that written directions are exceptional, Thomas has found that seventy per cent of juries received written directions, in a study

⁷⁸ Young (n 88), 665.

⁷⁹ Anon, ‘Case Comment: *R v Badza*: case in detail’ [2010] Archbold Review 4, 5.

⁸⁰ Darbyshire (n 92), 216.

⁸¹ C Thomas, ‘Avoiding the Perfect Storm of Juror Contempt’ [2013] Crim LR 483, 497.

of 20 trials held in Greater London between 2012 and 2013.⁸² The evidence on how often either form of written direction is used is patchy at best, then, but documents such as the 2010 Bench Book make it clear that they are currently viewed as an important means of guaranteeing a properly-conducted jury trial.

While it is difficult to confidently assess the frequency of either form of written direction, it is somewhat easier to understand both why the two techniques have been developed in recent years, and the circumstances in which judges consider their use to be appropriate. The general policy, as described by the Lord Chief Justice in 2010, is that individual trial judges should be free to use their discretion when deciding how to direct a jury, subject to a number of broad principles:

The trial judge must decide whether to reduce his directions of law, or some of them, into writing, or whether written steps to verdict which may be particularly useful if there are several possible bases for conviction, or several possible offences, or defences to consider, may be of assistance to the jury. It has become much more common for a written extract of the central or critical part of the directions of law, or written steps to verdict, to be provided. Whether either practice will be helpful to a jury in a particular case must remain for the judgment of the judge. In a single issue case he may conclude that no document is needed. In others, he may be concerned that reducing directions to writing would either burden the jury with over-long material or would isolate, potentially unfairly, and give prominence to, some parts of the directions rather than others. In others, it will be apparent that either the central parts of the legal direction will be helpful if reduced to writing, or, more often perhaps, that a one-page “steps to verdict” written analysis will enable the jury to remember the more discursive legal directions and apply them systematically.⁸³

It is interesting to note here that Lord Judge anticipated routes to verdict would be used more often than simple written directions, as he thought that ‘routes’ would be easier for

⁸² Ibid, 497.

⁸³ *R v Thompson and Others* [2010] EWCA (Crim) 1623 [2011] 1 WLR 200, 205-206.

juries to understand. This suggests a judicial strategy conceived in the terms of the inclusion thesis, for here the judge's primary responsibility with regard to the jury is to ensure that the jury receives an adequate legal education: whichever strategy is more likely to enable the jury to act 'systematically' in a particular case will describe the preferred way to proceed.

A little more guidance on which cases are likely to involve either a simple set of written directions or a more succinct route to verdict document can be gleaned from the case law. In another 2010 case, Hughes LJ considered that the trial judge's "decision to give the jury both (commendably brief) written directions and, even more helpfully, a 'route to verdicts' document should be applauded. Judges need to decide case by case whether such aids are required, but a multi-handed murder with more than one possible basis for verdict to be considered is one which will ordinarily call for a 'steps to verdict' document at least."⁸⁴ This may be usefully contrasted with a 2011 case, in which Hughes LJ declined to endorse routes to verdict in a relatively simple case. Hughes LJ held that, in a simple case such as the one under consideration (which centred around the question whether a father had encouraged his sons to murder his daughter), a routes to verdict document "would actually have complicated the jury's task rather than simplified it".⁸⁵ This was because the factual question in this case could "be put in a sentence. It was not a case of sequential decisions being needed and in this case there was no call for the kind of steps to verdict document which is so often of enormous help to juries in criminal cases."⁸⁶

⁸⁴ *R v A and Others* [2010] EWCA Crim 1622 [2011] 2 WLR 647, 649.

⁸⁵ *R v Chomir Ali* [2011] EWCA Crim 1011, para 48.

⁸⁶ *R v Chomir Ali* [2011] EWCA Crim 1011, para 48.

Here we can see an interesting reflection of the classical position regarding general verdicts set out in chapters two to four, where the general verdict covered standard cases in which little judicial intervention was needed, and the special verdict was reserved for cases ‘of real doubt and difficulty’. In chapters four and five, I traced the early development of the idea that a general-verdict-giving jury no longer needed to be considered ‘independent’ in the traditional exclusionary sense, as judicial directions could be used to ensure that even a general verdict would usually be given by a jury reaching its decision through legal frames of thought. Here we can see how a new judicial technique – the routes to verdict direction – is reserved for cases of real doubt and difficulty, or in other words cases in which a jury might otherwise fail to respond to a case in a legally-sanctioned way.

The role of legal directions in ensuring that unreasoned jury verdicts nonetheless comply with a defendant’s right to a fair trial has also been considered at a European level by the European Court of Human Rights, most recently in the 2012 *Taxquet* decision. Noting that the general rule is that an appellant must be able to understand the reasons for his or her conviction, the Grand Chamber of the European Court of Human Rights emphasised that juries do not have to give reasons for their decisions, provided the procedural safeguards in place in a particular trial system enable the defendant (and the public) to “understand the verdict that has been given”.⁸⁷ In considering the safeguards which may be used in order to offset the apparent inscrutability of a jury’s verdict, the Grand

⁸⁷ *Taxquet v Belgium* (2012) 54 EHRR 26, para 90.

Chamber focused on the assistance which the trial judge (or judges) in a particular system are able to give their juries:

Such procedural safeguards may include, for example, directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced ... and precise, unequivocal directions put to the jury by the judge, forming a framework on which the verdict is based or sufficiently offsetting the fact that no reasons are given for the jury's answers.⁸⁸

In the *Taxquet* case itself, the Grand Chamber found that Article 6(1) had been breached due to the fact that the questions the judge had put to the jury had not been sufficiently tailored to the facts of the defendant's specific case for him to be able adequately to grasp the basis of his conviction.⁸⁹ This is precisely the role ascribed to routes to verdict: to ensure that a jury's decision is focused on the case at hand, and that the jury does not get lost in a confusing area of law.

The Court of Appeal has been keen to stress that *Taxquet* does not fetter the discretion of a trial judge to direct the jury as he or she deems appropriate. In *Chomir Ali*, Hughes LJ emphasised that even a non-written direction to an English jury is comprehensive in its explanation to the jury of its deliberative task: "The direction to the jury in ... English cases, is a comprehensive direction as to law and a resume of the facts and evidence. It involves careful warning to the jury about how it should approach particular parts of evidence and what is and what is not legitimate reasoning."⁹⁰ The decision of an English jury is sufficiently foregrounded in the legal frames of thought imparted to the jurors through judicial directions that, even in the absence of a written direction or a routes to

⁸⁸ Ibid, para 92.

⁸⁹ Ibid, para 96.

⁹⁰ *R v Chomir Ali* [2011] EWCA Crim 1011, para 51.

verdict document, the Court of Appeal is confident that a jury's reasons will usually be capable of being reconstructed from the trial judge's approach to the case. Where routes to verdict are used, of course, the task of reconstructing the jury's thoughts will be made considerably easier, making it possible for example for a judge to ask a jury what steps it had taken through the flowchart in order to, for example, reach a verdict of manslaughter rather than of murder.⁹¹

It is, in large part, the jurors themselves who have expressed their desire to have their deliberations organised through some judicially-sanctioned structure.⁹² As I have argued throughout this thesis, however, this tendency towards the imposition of structure has been an important part of the judicial understanding of the jury verdict since at least the middle of the eighteenth century. In this way, the recent impetus towards judges delivering instructions in a form more likely to be retained by jurors can be understood both as a recent effort to increase jurors' comprehension in a particular case and as part of a historical tendency as old as the modern adversarial trial itself. In a 2007 case in the Court of Appeal, for example, Kay LJ criticised a trial judge for giving the jury several days of oral directions which reiterated the evidence in the trial and noticeably bored the jurors.⁹³ Kay LJ noted that the appellant's "central contention [was] that the summing up at no stage provided the jury with a clear structure for their task",⁹⁴ and concluded that "the case was not properly left to the jury because the summing up did not assist them to

⁹¹ The Judicial Studies Board gave this example in its 2010 Bench Book *Directing the Jury*: (n 43), 95.

⁹² See n 84, above.

⁹³ *R v Sampson and Others* [2007] EWCA Crim 1238, para 88.

⁹⁴ *Ibid*, para 88.

the minimum level that fairness required”.⁹⁵ Here, we can see both threads being tied together, with flawed directions being understood both in terms of their inability to engage the jurors and in terms of their inability to guarantee the defendant a fair, lawful trial. It is this familiar concern – that without adequate directions an adequate verdict cannot be reached (adequate in each of the relevant senses disused here) – which seems to have motivated the growth of written directions and routes to verdict.

One Crown Court judge, in an empirical study of the effects on verdicts in his own court of using written directions, found that doing so resulted in more passive juries, who were more likely to convict and less likely either to fail to reach a decision or to acquit:

Handing out written directions seems to have almost eliminated requests from juries for reminders or further guidance on the law. Juries also seem to be reaching verdicts more quickly. There has also been an increase in the proportion of convictions. This is borne out by an analysis of verdicts in my court over the last two years. In those cases where the jury were not given a typed version of the legal directions, 44 per cent of defendants were found guilty, 47 per cent were found not guilty and the jury was discharged because there was no prospect of them reaching a verdict in respect of 9 per cent of defendants. In cases where juries were given a typed version of the legal directions, 60 per cent of defendants were found guilty and 37 per cent were acquitted. Perhaps most significantly, to date, only one jury which had typed directions has failed to reach a verdict.⁹⁶

While the evidence of a single court is of course only of limited value, as has been previously been mentioned there is little empirical evidence to go on in this area. Based on this evidence of the *effect* of written directions – which Darbyshire noted had

⁹⁵ Ibid, para 89.

⁹⁶ N Madge, ‘Summing Up – a judge’s perspective’ [2006] Crim LR 817, 821-822.

persuaded one of the judges in her sample to adopt the practice⁹⁷ - the practice appears to operate to the detriment of defendants. While this is only evidence from a single study, the possibility that written directions may have this effect raises a further question-mark over the possibility of a jury deploying its extra-legal sense of justice in order to reach an independent conclusion.

At this stage it may be well to recall Bankowski's analysis of the jury as something which sees the world differently to the policeman, and the importance to Devlin of the idea that jurors come to court as people to whom the law means 'something but not everything'. This thesis has not been about the value of jury independence but rather the forms it might take, and it seems to me that the success of written documents in bringing jurors' worldviews in line with that of prosecutors suggests the rise of written directions and of 'routes to verdict' documents may tend to undermine the possibility of a particular type of independence. In the next section I shall ask what form jury independence might take in its current historical context, in which the juror is something produced within the tightly regulated space of the criminal trial, rather than simply coming in from the outside to judge the justice of the laws as a body of mere citizens.

6.3: The Exclusion Thesis and the Citizen-Juror

The exclusion thesis postulates a juror who, temporarily coming into the trial in order to cast judgment both upon the accused and upon the criminal justice system, is nothing other than a citizen. This perspective has been used as the basis of a model of jury power

⁹⁷ Darbyshire (n 92), 216.

by writers as distinct as the Quaker pamphleteers of the late seventeenth century and, in an American context, by the former prosecutor Paul Butler.⁹⁸ Just as Lord Justice Auld, in his *Review*, dismissed ideas of jury independence as representing “more than just illogicality” (they were also an affront to the legal system),⁹⁹ in a more recent article Redmayne has singled Butler out as a key proponent of what he calls “more anarchic forms of nullification”.¹⁰⁰ In fact, the argument from proponents of exclusionary forms of jury power is not that laws should be subjected to ‘anarchic’ nullification but, rather, that the ethical choice of the jurors *as citizens* not to apply the law is a choice informed by a civic duty preceding (and trumping) the duty of the jurors *as jurors*. Butler’s proposals, in particular, emphasise that the systematic acquittal of non-violent black defendants should be followed by attempts on the part of the community to reintegrate the offender.¹⁰¹ Nullification, on Butler’s model, does not offer an anarchic solution to the problem of a racially disproportionate criminal justice system: rather, it proposes an alternative (equally rational) solution built upon ideas of civic duty.

Exclusionary models of jury independence presuppose that ‘the juror’ is practically indistinguishable from ‘the citizen’; while inclusionary approaches focus upon the creation of the juror within the trial. In this section, I shall explore some of the ways in which this question of the subjectivity of the juror has been addressed in recent debates

⁹⁸ P Butler, ‘Racially Based Jury Nullification: Black power in the criminal justice system’ (1995) 105 Yale LJ 677.

⁹⁹ Auld (n 10), 175.

¹⁰⁰ M Redmayne ‘Theorising Jury Reform’ in A Duff, L Farmer, S Marshall and V Tadros (eds), *The Trial on Trial*, vol 2: Judgment and Calling to Account (Hart 2006), 107.

¹⁰¹ Butler (n 93), 715-18. And Butler specifies: “I am not encouraging anarchy. Instead, I am reminding black jurors of their privilege to serve a higher calling than law: justice.” Ibid, 723.

on jury trial. If, as I argued in the previous section, the courts of England and Wales are increasingly concerned with the *governance* of the criminal trial jury, what possibility is there for jury independence? If judicial practice currently favours an inclusionary model of jury trial, and the juror is therefore imagined as something created anew in each criminal trial, what possibility is there of a jury opposing what it regards as an injustice?¹⁰²

During the second half of the twentieth century, the jury changed from a relatively elite institution to one in which normality and representativeness are regarded as its primary virtues. While the ‘self-informing’ nature of the jury had already long-since come to an end (Vaughan CJ has been heavily criticised for partially relying upon the idea even in *Bushell’s Case*, in 1670),¹⁰³ this development has seriously undermined any residual sense that the jury has anything other than its normality to contribute to the trial. The ‘special jury’ is a case in point. Special juries were intended as a way of guaranteeing either a higher status or a more highly-qualified jury in appropriate cases (which might simply be those cases in which the parties could afford one).¹⁰⁴ The system was virtually abolished in 1949, with the exception of commercial cases in the City of London.¹⁰⁵ Shortly after this final ‘expert’ jury was abolished in 1971,¹⁰⁶ interest grew in the jury’s

¹⁰² By this idea of the juror being ‘created anew’ in each trial I do not mean, in Goffman’s sense (see text at ch 1, nn 73-74), that the citizen presents themselves as a juror and, therefore, acts according to their sense of what this particular position entails. Rather, I am thinking of a juror-self which is created through the judicial techniques which I have sought to associate with the ‘inclusion thesis’. In this sense, I view the creation of the juror in the more strongly Foucauldian terms of self-creation than in the terms of Goffman’s self-presentation. This theoretical selection is essential for my later argument about the practice of ‘jurors’ speaking out as jurors after the trial has ended. Their claim that they are still in some sense ‘jurors’ rests upon the implicit claim that they have actually been constituted as such by their experiences at trial, and that they were not simply presenting themselves in the way they thought they ought to do, *if they were in fact jurors*, for the duration of the trial.

¹⁰³ See text at chapter 3, nn 10-12.

¹⁰⁴ See JC Oldham, ‘The Origins of the Special Jury’ (1983) 50 U Chi L Rev 137.

¹⁰⁵ Juries Act 1949, ss18-19.

¹⁰⁶ Courts Act 1971, s40.

capacity to follow proceedings in complex fraud trials. In 1986 the Roskill Committee recommended that trial by jury be abolished in such cases,¹⁰⁷ and in 2001 Auld reiterated that it would be difficult to find jurors with sufficient qualifications to try complex financial cases;¹⁰⁸ and in both instances it was recommended that jury trial be replaced by a judge sitting with two expert lay assessors.¹⁰⁹ The jury, as an institution which could no longer be regarded as an expert body, could no longer be trusted with particularly difficult cases.

And this is not a peculiarity of fraud trials. The virtue of the jury is generally regarded as lying in its representative nature: its status as an institution which legitimates the criminal trial by ensuring that its decisions are authorised by a cross-section of the population. For Auld LJ, the great benefit of an institution like the Jury Central Summoning Bureau, which for the first time gives responsibility for summoning jurors to a central, national body, is that it brings us closer to a true random selection of jurors.¹¹⁰ But he goes on to explain:

Randomness is not an end in itself. It does not necessarily improve the quality of decision-making. Its value is that it is considered to be the best, albeit a rough and ready way, of empanelling a jury that is likely to be collegiately independent and to reflect the community at large.¹¹¹

The key is representativeness, a point which the then Home Secretary, David Blunkett, was keen to stress when defending the 2003 Criminal Justice Bill: “The whole argument

¹⁰⁷ Lord Roskill (Chair), *Fraud Trials Committee Report* (HMSO 1986), 134-39.

¹⁰⁸ Auld (n 10), 205.

¹⁰⁹ Ibid, 207. Roskill (n 102), 149-152.

¹¹⁰ Auld (n 10), 141.

¹¹¹ Ibid, 143.

for jury trial”, he explained, “is its representative nature.”¹¹² The Roskill proposal (replacing juries in serious fraud cases with lay assessors) meant “abandon[ing] the jury and inventing a new proposition”,¹¹³ one which lacked the argument from representativeness which at least a true jury has on its side.

But it is not just rhetoric or ideology which asserts that the jury is now overwhelmingly made up of ‘normal’ men and women. In 1972, the property qualification for service was removed, and in 2003 the traditional professional exemptions were repealed.¹¹⁴ The result of this is that the pool of potential jurors is no longer as homogenised as it once was; and while some critics have argued that the actual representativeness of juries is still undermined by the continued use of the electoral register as the primary document from which to source potential jurors (potentially excluding ethnic minorities from service),¹¹⁵ empirical research has shown that juries are now generally representative of the local populations from which they are drawn.¹¹⁶ And while the pool of potential jurors is now very large, the selection of actual jurors may in some cases be informed by reference to certain standards of political normality. In 1978, the then Attorney General announced that for at least the previous four years “a practice had grown up, mainly at the Central

¹¹² Hansard HC vol 405, col 698 (2003), col 733.

¹¹³ Ibid, col 734.

¹¹⁴ Criminal Justice Act 1972, s25; Criminal Justice Act 2003, s321.

¹¹⁵ See P Darbyshire, A Maughan and A Stewart, ‘What Can the English Legal System Learn From Jury Research Published up to 2001?’ (Kingston University 2002) <<http://eprints.kingston.ac.uk/23/1/Darbyshire-P-23.pdf>> accessed 2 August 2012, 3-9.

¹¹⁶ C Thomas, *Diversity and Fairness in the Jury System* (Ministry of Justice Research Series 2/07, 2007), 56-58. Although Thomas also notes that jury selection may still be problematic in those cities (Thomas gives the example of Nottingham) where the ethnic mix of an inner-city area is effectively cancelled out by a wide juror catchment area with an overwhelmingly white population: *ibid*, 66-69. A further potential limitation on the representative nature of the jury is that “[t]hose with the lowest household income and those who were economically inactive were the least likely to serve if summoned”. *Ibid*, 117. The overall thrust of Thomas’ report, however, was that the jury is much more representative than some critics had feared.

Criminal Court, of prosecutors asking the police officer in charge of certain cases, to check police records for information concerning potential jurors.”¹¹⁷ The brief data provided alongside the story explained that, between 1974 and 1978, this vetting power had been used twelve times in IRA cases, twice in official secrets cases, four times in murder cases, five times in armed robbery cases and twice in cases of international fraud. These powers over the administration of justice have never since been disowned by a government¹¹⁸ (the CPS website still contains guidance on jury vetting);¹¹⁹ and we know for example that in 1985 the jury which acquitted Clive Ponting had been vetted,¹²⁰ and that in 2002 the prosecution requested that a particular jury be vetted.¹²¹ Juries today are a predominantly ‘normal’ institution, both in the positive sense that they are no longer selected for their ability to comprehend the details of particular cases, and in the negative sense that they may be vetted in order to exclude those potential jurors who would come to their trial with political opinions beyond normal limits.

When rejecting proposals both for special juries and for mixed panels partially made up of ‘lay assessors’ between 2002 and 2007, the government struggled to articulate a position which emphasised that the a priori ‘normal’ men and women of the jury (or of the proposed lay panel) could not cope with a complex trial, but to articulate this position without suggesting that these laypeople were presumptively stupid. The solution,

¹¹⁷ Anon, ‘Attorney General gives guidelines on juries’ *The Times* (11 October 1978) 4.

¹¹⁸ Although Silkin’s own government had previously denied that they existed: see H Harman and J Griffith, *Justice Deserted: The subversion of the jury* (National Council for Civil Liberties 1979), 22-25.

¹¹⁹ Crown Prosecution Service, ‘Jury Vetting’ <http://www.cps.gov.uk/legal/h_to_k/jury_vetting/> accessed 2 August 2012.

¹²⁰ C Ponting, *The Right to Know: The inside story of the Belgrano affair* (Sphere 1985), 166-167.

¹²¹ R. Norton-Taylor, ‘Shayler team seeks to block jury vetting’ *Guardian* (London, 29 July 2002) <<http://www.guardian.co.uk/uk/2002/jul/29/freedomofinformation.politics>> accessed 2 August 2012; I have been unable to ascertain whether they were successful.

ultimately, was to focus not upon the limited knowledge of the average juror but, instead, upon his or her mental capacities and upon the stresses which a complex trial would necessarily put upon them. And this argument was countered not by denying the premises, but instead by focusing on the formative nature which such a difficult experience could have upon a person. Jury service, in other words, might have beneficial psychological and pedagogical effects upon the citizens called upon to serve. The juror might be something more than the mere citizen.

Their focus on strain is one of the more obscure arguments made by the government in the 2002-2003 Criminal Justice Bill debates, but by 2006-2007 (in the debates on the Fraud (Trials Without a Jury) Bill) it had become the main justification for resisting either special juries or, what amounts to the same thing, 'lay assessors'. In 2002, David Blunkett was pursued vigorously on his suggestion that jurors, not being experts, might struggle with the evidence in a serious fraud case. In particular, critics of the proposals wanted to know how this could be squared with the government's insistence that jurors could be 'trusted' with evidence of a defendant's bad character and previous convictions.¹²² In the 2002-2003 Criminal Justice Bill debates, the government's arguments against jury trial in long and complex trials lacked consistency, and failed to articulate much more than a list of the issues involved: "We must take into account complexity, the length of time involved in jury service, and the enormous burden placed on individuals who would not wish to serve on a jury in such circumstances."¹²³ By 2006-2007, the argument had become much clearer. In a series of debates which made much of Sally Lloyd-Bostock's

¹²² See HC 4 December 2002, col 922.

¹²³ HC 4 December 2002, col 921-922.

interviews with the jurors in the Jubilee Line case,¹²⁴ which collapsed after a little under two years at trial, opposition MPs argued that the jurors had clearly understood the evidence. The government agreed, and insisted that the problem was not caused by a lack of understanding but rather by the extraordinary pressures which sitting on the trial had caused the jurors.¹²⁵ By 2006, it was being argued that the problem with fraud juries was not primarily their intelligence but their resilience. As the Solicitor General argued:

Many of the complex deals and financial transactions that can be involved in serious and complex fraud cases will be outside the experience of members of the public, facing jurors with a steep learning curve to master the financial theory as well as the practical evidence.¹²⁶

And so even where these issues do come into play, the question is not whether jurors are insufficiently ‘special’: rather, the claim is that a juror can only reach the required expertise at great personal cost.

But because jury trial was seen as something very difficult, putting massive strains upon its members, particularly in long trials, it was also put forward as something life-changing. Jury trial becomes a key moment in a person’s life, and it begins to change who they are.

As a dissenting government backbencher said in the 2006-2007 debates:

... as the hon. Member for Beaconsfield (Mr Grieve) said earlier, jury service can be and often is a pleasure, particularly on long trials. He mentioned that long associations are made between jurors and that occasionally they marry. I recollect being invited to just such a wedding after my client, no doubt as a result of the representation he received, was convicted by those jurors.

We live in an age when our fellow citizens are accused of hedonism, apathy and indifference to social responsibilities and the way in which they live.

¹²⁴ S Lloyd-Bostock, ‘Report on Interviews with the Jurors in the Jubilee Line Case’ (HMCPSI 2005).

¹²⁵ HC 29 November 2006, cols 1094-1095.

¹²⁶ HC 29 November 2006, col 1098.

Nobody who has sat through a long fraud case or a long trial and watched how jurors – our fellow countrymen – deal with these cases can agree. People come as jurors to trials believing that they will never understand them. After weeks, the fascination with the trial grows. The jurors learn; they bring concentration to the trial. All that gives the lie to the false psychology that tells us that our fellow countrymen have an attention span of three minutes.¹²⁷

This binding-together of the jurors in a long trial is also recorded by Lloyd-Bostock:

Several commented that they were thrown together and did not choose each other, and it could not be expected that they would all like each other. However, many of them formed lasting friendships within the jury. Two compared being on the jury with being on ‘Big Brother’ and the jury was also likened to a family.¹²⁸

The juror, in these accounts, is someone who is inevitably deeply affected, and possibly even transformed, by the overpowering strangeness of the trial, particularly of the lengthy trial.

These observations chime with empirical work conducted in the USA on the long-term impact jury deliberation has on a person’s willingness to engage with local and national politics, and the form that engagement is likely to take.¹²⁹ Specifically, this research has noted that former jurors became more actively engaged, and tend to view politics as something fundamentally deliberative in nature:

Rather than treating jury duty as an isolated, almost private responsibility performed exclusively while ‘on duty,’ these conversations [about their experiences as jurors] increase the likelihood that jurors *remain jurors in spirit* after leaving the courthouse. Still wearing their Jury duty badges after leaving the courthouse, these jurors become more likely than their peers to

¹²⁷ HC 25 January 2007, col 1658

¹²⁸ Lloyd-Bostock (n 118), 22.

¹²⁹ See in particular J Gastil, EP Deess, Philip J Weiser and C Simmons, *The Jury and Democracy: How jury deliberation promotes civic engagement and political participation* (OUP 2010).

maintain a heightened sense of responsibility to continue their public service
– in other ways – after being dismissed by the judge.¹³⁰

The researchers found that jurors tended to treat the deliberative model they experienced when reaching their verdict as a model for wider political engagement, with politics increasingly being understood as something to be participated in through discussion, rather than simply agreed with or disagreed with through an uncomplicated act of voting.¹³¹ This evidence strongly suggests that former jurors are more likely to be independent citizens, forming their own judgments on political issues rather than limiting their activity to their choice between a handful of political parties come election time (and thereby undermining the practical possibility of Lord Hailsham's famous 'elective dictatorship').¹³² However, these findings do not speak to the issue of jury independence as such. Is it possible to go beyond the notion of the independent *citizen* produced by the deliberative jury model and explore what impact this model of jury-creation has on the meaning and possibility of the independent *jury*?

This focus on the transformative qualities of jury service is, I would argue, a particular expression of the inclusionary picture of jury trial: rather than coming into the trial already armed with particular competencies, or with a moral sense of what is to be done in a particular trial, the jurors are formed by their experiences at court. The citizen only seems to figure in this account of the jury's formal activity as a symbol of the homogenous normality which typifies the diversity of those who make up each trial jury. So the inscrutable actions of the jurors are more a product of each specific trial than they are of

¹³⁰ Ibid, 116 (emphasis in original).

¹³¹ Ibid, 173-179.

¹³² Lord Hailsham (n 32).

any generalised notions of the juryman's soul or of the citizen's conscience. But this does not mean that jury power is no longer possible: what it means is that this power, understood as resistance to particular practices rather than as a timeless principle of popular legality, can no longer be understood in terms simply of the independent-minded citizen who already understands his or her duties before the trial starts.

Certain juries, most notably the jury in the 2004 ricin terror trial, have shown how this kind of jury, produced during the trial, might resist what they consider unjust practices. Such juries, like the 1850 Illinois jury discussed in the conclusion to chapter five, seem to express their 'independence' not by delivering a verdict either against the evidence or against the law but, rather, by taking their status as 'jurors' as a qualification entitling them to speak truthfully after the trial is over. They continue to participate, not just in the sense of becoming more politically engaged generally, but in the specific sense of participating in the continuing public debate surrounding their specific case. And this, I contend, is a form of jury independence intimately connected to a historical setting in which trial by jury is regarded as something necessarily conducted 'under the direction of the court'. Basically, when 'the juror' is understood as something fundamentally different to 'the citizen', then those who have served as jurors in particular trials are able to speak out, after the trial, *in their capacity as jurors*.

In November 1999, an anonymous juror from the trial of the child killers of James Bulger lamented the total lack of concern showed to the child defendants in the case by both the media and the courts:

I have no doubt that they did commit a dreadful act and I have the most profound sympathy for the parents of James Bulger. But was justice really

served? I felt that we, the jury, were forced into a verdict of ‘guilty of murder’. A more appropriate verdict would have been ‘guilty as frightened and largely unaware children who made a terrible mistake and who are now in urgent need of psychiatric and social help’.¹³³

Similar concern for the fate of the accused after a trial was shown by a group of jurors in another high-profile case five years later. In April 2004, four of the five defendants in the ricin terror trial were acquitted by their jury (a fifth, Kamel Bourgass, was convicted only of conspiracy to cause a public nuisance; the jury failed to reach a verdict on his charge of conspiracy to murder). Over the next few years, two anonymous jurors, as well as the jury’s foreman – Lawrence Archer – repeatedly criticised attempts to have the acquitted men deported to Algeria on grounds of national security, as well as the government’s placing of two of the acquitted defendants under house arrest.¹³⁴ Archer went so far as to co-write a book on the trial, in which he detailed the failings of the police, the prosecution and the government;¹³⁵ and he also agreed to be listed as a ‘Known Associate of Terrorists’ in order to gain access to his friend, the acquitted Mouloud Sihali.¹³⁶

¹³³ Anon, ‘A Bulger juror’s verdict’ *Guardian* (5 November 1999) <<http://www.guardian.co.uk/uk/1999/nov/05/bulger.guardianletters>> accessed 2 August 2012.

¹³⁴ Anon, ‘Freedom’s bright lamp’ *Guardian* (21 May 2005) <<http://www.guardian.co.uk/politics/2005/may/21/immigrationpolicy.ukcrime>> accessed 2 August 2012; M Riddle, ‘Trust in the judge and jury’ *Observer* (31 July 2005) <<http://www.guardian.co.uk/politics/2005/jul/31/humanrights.terrorism>> accessed 2 August 2012; M Bright, ‘Ricin jurors attack new terror laws’ *Observer* (9 October 2005) <<http://www.guardian.co.uk/uk/2005/oct/09/terrorism.politics>> accessed 2 August 2012; Anon, ‘Our verdict was ignored’ *Guardian* (19 September 2006) <<http://www.guardian.co.uk/commentisfree/2006/sep/19/comment.terrorism>> accessed 2 August 2012; L Archer and F Bawdon, *Ricin! The Inside Story of the Terror Plot That Never Was* (Pluto, London 2010); F Bawdon, ‘A friendship that crossed the threshold’ *Guardian* (1 February 2011) <<http://www.guardian.co.uk/society/2011/feb/01/algerian-asylum-seeker-ricin-plot-friendship>> accessed 2 August 2012; and A Travis, ‘Y, the bookshop worker held to be a national security threat’ *Guardian* (25 August 2011) <<http://www.guardian.co.uk/uk/2006/aug/25/terrorism.immigrationpolicy>> accessed 2 August 2012.

¹³⁵ Archer and Bawdon, *ibid.*

¹³⁶ Bawdon (n 124).

What unites these jurors is their willingness to speak out, to use their position as jurors to make authoritative statements on the issues raised by their trial. The anonymous Bulger juror was appalled by the treatment of the child defendants, and used his or her position as a juror to bring shame upon the legal system and the press for failing to treat them humanely. When the ricin jurors retained an interest in their trial after the defendants had been acquitted, they quickly found that their own prior importance had disappeared:

They [i.e. the ricin jurors] rapidly learned that, although jurors are required to hang on every word of a case for the life of the trial (and there are stringent penalties for those who don't take their role seriously), their interest is not expected to outlive delivery of the verdict. No matter what demands a trial may have made on jurors, often over months, the justice system loses interest in them the minute the trial has ended.¹³⁷

A small group of the jurors from the ricin case refused to be dissuaded, however, and started to speak to journalists whenever they became aware of a control order on one of the acquitted men or of an attempt to deport them on the ground that, despite their acquittals, they were nonetheless terrorists and therefore a threat to national security. The jurors' activities after the trial essentially consisted of a claim that they, not the government (or, for that matter, the press),¹³⁸ knew the truth about who the acquitted men really were; and to that extent their activities constituted a continuation of the jury's traditional political role.

¹³⁷ Archer and Bawdon (n 124), 153.

¹³⁸ See Ibid, 145, where the press are castigated for attending very little of the trial, and therefore completely missing (and therefore not reporting) the cinematic revelation under cross-examination that within days of the initial raids on the 'factory of death' government scientists had discovered that not only had no ricin in fact been produced, but that there was also very little chance of it ever being produced other than incidentally and in small quantities using the equipment available in the flat.

In traditional accounts of jury equity, jury nullification, etc., the jury is supposed to come to court already fully furnished with whatever tools will enable it to reject the verdict which would be yielded by a purely professional tribunal. Sometimes this means that the jury comes to court with a greater knowledge of the relevant facts than the court authorities possess; sometimes it means that the jurors, as community representatives, have a more legitimate claim to knowing what the law means in these circumstances than the professional lawyers; and sometimes it means that laymen see the world differently to lawyers, and can therefore see problems relating to the administration of justice differently to the professionals working on the trial. What is different about the political power claimed for the jury by the ricin jurors is that their ability to reach a different conclusion to the professionals (be they professional judges, professional journalists or professional politicians) is grounded in the difficult experience of serving as a juror. It is jury service which qualifies this small group of people to act politically: it is not as Lawrence Archer the citizen that the most prolific of them spoke, but as Lawrence Archer, the foreman of the jury in the ricin case. In this way, a jury constructed within the trial can still lay claim to a power of resistance. I cannot see how the actions of the ricin trial jurors can be accounted for by proponents of the exclusion thesis; and I find it significant in this connection that they have not been previously discussed in the academic literature.

6.4: Conclusions

In July 1933, one of the 23 members of the last grand jury to ever sit in Wessex gave an account of his experience to *The Times*. His letter ends with the following words:

So ended my first, and presumably my last, Grand Jury. Or perhaps it did not quite end there, for some of us discussed the coming abolition of this alleged

unnecessary safeguard of the liberty of the subject over the County Hotel luncheon table afterwards, and the Nestor of the party gave it as his opinion that there could hardly be too many safeguards in days when liberty, like currency, was at a discount all over the world.

And then, warming to his work, he drew his little homily to a conclusion. ‘Take it from me, gentlemen, what a Grand Jury wants is not less but more power, so that we could deal out common-sense justice and not merely professional law. But we are all busy men, and it’s no use crying for the moon, so we’ll just drink his Majesty’s health, and leave it at that. Gentlemen, the King – and his last grand jury!’¹³⁹

Despite being spoken by a grand juror, these words give a good sense of what juries are commonly expected to do: they are expected to ‘deal out common-sense justice and not merely professional law’. As Bankowski has emphasised, ‘common-sense justice’ and ‘professional law’ are no better than each other: they are simply different.

But this raises questions about where this ‘difference’ is supposed to come from. According to the exclusion thesis, it comes from the fact that the jury is made up of ordinary men and women who, by virtue of their status as citizens, come into the court armed with a sense of what it is that justice requires. Over recent decades, the normality or representativeness of the average jury has probably been increased: while jurors are still only chosen from the electoral register, which immediately precludes much of the population from serving, in the past half century the property qualification and the professional exemptions have been repealed, ending the *de jure* character of the jury as a middle class institution. But since the mid-1970s the vetting of juries in politically sensitive trials has been authorised, meaning that the ideal representativeness of the criminal trial jury must here also be considered less than completely realised. Serious

¹³⁹ Anon, ‘The Last Grand Jury: a footnote to history’ *The Times* (London, 5 July 1933) 17.

questions hang over the identity of the juror; and, therefore, over his or her ability to come to the trial pre-armed with the sense of civic duty which the exclusion thesis presumes.

Other important questions about the identity of the juror are raised by the debate regarding the average citizen's capacity to cope with a long and complex trial. Jury service, some people argue, is likely to be a significant life event for those who find themselves faced with a trial that lasts for many months. Worse still, jurors may find that after all this time their presence was not necessary. This was the case with the Jubilee Line jurors who suddenly learnt that their defendant had been acquitted; it was also the case with the ricin jurors who, having acquitted their defendants, learnt that their verdict was of little practical consequence, as the acquitted men were to be imprisoned anyway. The 'normal' juror, in this context, will have learnt a lot from their trial and, however normal they may be in every other matter, on the question of their trial they will have become experts. This is the kind of jury power which is demonstrated in the practice of the ricin jurors, and to a certain extent also in the letter by the Bulger juror. The juror, transformed by the trauma of a lengthy trial, might write letters to newspapers, appear on documentaries, etc., and generally offer an alternative to the narrative given by the government regarding their trial.

My contention is that the changes in the jury's role which have undoubtedly taken place during the last half-century need not be regarded as an inexplicable point of rupture: rather, they can be situated within a history of the idea that jury trial is essentially an institution existing 'under the direction of the court'. Seen in this historical setting, it is possible to understand the judicial response to the changing political attitude to trial by jury. The judges have continued governing their juries as they have done for centuries, and major

social changes such as the rise of the internet have therefore been able to be met with a well-established set of tools for shaping the jury's thoughts about the particular issues at stake in a given trial. This causes serious problems for the continuing viability of the exclusionary model of jury independence.

Judicial responses to internet 'evidence' do not undermine the inscrutability of the general verdict, and therefore cannot be regarded as problematic in traditional discussions of jury independence. And yet, as the evidence of an empirically-minded judge has suggested, the effect of the judges' response to internet evidence may be to bring the verdicts of criminal juries into closer conformity with the opinion of the prosecution, thereby undermining the model of jury independence which states that an independent jury is one which acquits (or convicts) against the wishes of the more permanent actors in the criminal trial process. Situating these developments within the history of the general verdict as the courts have understood the institution since the end of the eighteenth century, however, leads to a focus on the possibility that, by moving even more completely towards a system in which the juror's identity is something created within the trial (by excluding internet evidence but also excluding the possibility of a citizenry willing to subvert the demands of the permanent legal system), we might strengthen the possibility of a wholly different kind of jury independence. This model of the independent jury, acting in a political capacity *after*, rather than *during* the trial, is as historically contingent as the ordinary exclusionary model, but it is not entirely new, as the example of the 1850 Illinois jury demonstrates. The situation in which we find ourselves will probably continue to undermine the possibility of jury independence as it has traditionally been understood; but I hope that, by focusing on the history of our present situation, I

have at least raised the possibility that this need not be the end of the jury as a political institution.

CHAPTER 7: CONCLUSIONS

In this thesis, I have attempted to challenge the self-evidence of the connection between jury independence and the general verdict. The fact that it will not usually be possible to get at the reasons for a jury's decision (although official guidance on routes to verdict emphasise their interrogatory potential) does not necessarily mean that a jury can act as it wishes. There is a difference between the inscrutable delivery of a verdict and the uncontrollable formation of a verdict. But my approach in this thesis has not been to subject the terms of the theoretical claim that the general verdict guarantees jury independence to logical scrutiny. Rather, I have sought to challenge its self-evidence by turning to legal history. And the purpose of this challenge has not been to argue that the claim is necessarily wrong; rather, it has been to try to understand how it came to seem such an obvious idea, as well as to understand what work it is that the claim does. In writing this history, I have found it useful to contrast the claim that jury independence is guaranteed by the general verdict with another, almost equally historic, claim: that the free action of jurors can and must be limited by judicial directions. By situating jury trial in the tension between these two perspectives – what I have referred to as the exclusion and inclusion theses – I hope to have presented 'jury independence' as more of a contested issue, and as more of a question of resistance, than would have been possible had I limited my argument to the question: does the jury have the right to deliver a verdict according to conscience?

In pursuing this aim, I have drawn upon – and tried to implement – what Foucault called his 'genealogical' method. This method is suspicious of the claims of all sorts of 'universals', and requires the researcher to self-consciously fragment them, challenging

their purported universality. This means hypothetically denouncing them, asking in effect what would happen if we presumed that the universal did not exist. Hence Foucault's methodological statement near the start of his *Birth of Biopolitics* lectures:

I start from the theoretical and methodological decision that consists in saying: Let's suppose that universals do not exist. And then I put the question to history and historians: How can you write history if you do not accept a priori the existence of things like the state, society, the sovereign, and subjects? It was the same question in the case of madness. My question was not: Does madness exist? My reasoning, my method, was not to examine whether history gives me or refers me to something like madness, and then to conclude, no, it does not, therefore madness does not exist. This was not the argument, the method in fact. The method consisted in saying: Let's suppose that it does not exist, then what can history make of the different events and practices which are apparently organized around something that is supposed to be madness?¹

If we hypothetically presuppose that there is in fact no relationship between jury independence and the general verdict, then how can we account for practices, theoretical statements, etc. which are apparently organized around their connection? This question has two aspects. First, we must ask how the connection came to seem so natural; second, we must ask what it is that these practices and statements presume to be true. Genealogy does not help justify a scepticism regarding universals. Rather, it acts on the *presumption* that they do not exist, in order to limit the possibility of the researcher reading them into the history he or she studies. Genealogy is about opening up the possibilities closed down by an interpretive approach which projects an essential connection between jury independence and the general verdict, for example, back through all eternity as a necessarily true, fundamental postulate.

¹ M Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979* (F Ewald, A Fontana and AI Davidson eds, G Burchell trans, Palgrave 2008) [1979], 3.

By hypothetically denouncing the universality of the connection between jury independence and the general verdict, I have found two things. First, that the argument which states that the inscrutability of the verdict of ‘guilty’ or ‘not guilty’ is an essential guarantor of English (and, later, American) liberty emerged at a specific point in time, and under specific conditions. Second, that the theoretical statements and practices relevant to the connection seem after this emergence to coalesce around two perspectives, each of which presume that they alone describe the true connection, and which therefore consistently talk past each other. These perspectives I have referred to as the exclusion and inclusion theses.

The exclusion thesis presumes that the juror comes into court with an understanding of his or her duties as a citizen, with an identity which is sufficiently developed as to give them a clear sense of what it is that their duty as a juror requires them to do. The juror’s duty is strictly derivative of the duty of the conscientious citizen. This means that the juror already knows what is to be done before he or she ever encounters the courts system, and that the judge only has the task of advising the citizen-juror on legal technicalities.

The inclusion thesis absolutely distinguishes between the citizen and the juror, and the juror’s duty is explained to him or her during the trial, by the judge: the juror is constructed within the trial. This means that the judge must give the jury a brief (but nonetheless formative) legal education, framing the actions which the jurors may choose to take within parameters identified by the judge.

Jury independence, on the exclusionary model, is about disregarding the opinion of the judge, effectively stepping outside legal space; on the inclusionary model, it means taking

the forms of thought presented by the judge and developing them in subversive ways which, nonetheless, still speak to the primary legal forms. Each model of jury independence consists of a resistance to the way in which the particular model says that a jury trial should be (and must be) conducted. In this sense, each model of the juror's conduct opens up the possibility of particular forms of counter-conduct.

I started this thesis by looking at the medieval understanding of jury trial, briefly exploring: the ways the institution was understood at the time it was promoted as a replacement of the ordeals; the connection between the medieval jury verdict and the medieval juror's conscience; and the role given to the general verdict during this period. My discussions in this chapter were necessarily very rapid, concerning as they did almost half a millennium of the trial jury's history. This is a choice which reflects my overall genealogical methodology. A genealogy is not a total history but, like a family history, it is preoccupied with the position (if not the perspective) of its author. Because my concern is with the relationship between jury independence and the general verdict, and because my contention is that this relationship first received something like its modern formulation in the late seventeenth century, I have been able to treat the history of jury trial prior to this period as a prelude to the later chapters, rather than attempt to exhaustively catalogue everything which was said about juries before the seventeenth century. What I found in this chapter was that the idea of the general verdict placing the jury outside the legal system is very old, but that this idea of independence had a completely different meaning prior to the late seventeenth century from the one it would later acquire. While the modern exclusionary perspectives presume that juries will want to act against the wishes of the legal system, and therefore imagine jury independence as

something which carries with it some emancipatory potential, the possibility of an independent medieval judge (which included an independent medieval jury) was a terrifying prospect for those who were called upon to judge. This does not mean that there was no concept of the 'verdict according to conscience' at this time; but we should be careful about what we mean by the word 'conscience'. As late as the mid-sixteenth century, a disobedient jury could justify its actions by reference to a conscience of true knowledge, closer to the modern word 'consciousness' than anything else. The medieval verdict according to conscience was a verdict reached truthfully, not in the sense of following a morality at odds with the law but, rather, in the sense of judging according to the evidence. This was how the medieval juror's spiritual obligations required him to act.

The modern exclusion thesis, I contend, was invented during the second half of the seventeenth century. *Bushell's Case*, decided in 1670, has traditionally been put forward as one of the most important moments in the story of the jury's increasing independence. Recently, certain legal historians have pointed to the continued control of juries even after 1670, suggesting that it is a mistake to attach much practical significance to the case. Seen in this context, my argument that the case is in fact of great importance is very traditional. But my claim is not that it actually did guarantee the jury an inescapable independence from the trial judge: I agree with critics who point out that juries continued to be dominated long after Chief Justice Vaughan's celebrated decision to ban the fining of jurors for delivering the 'wrong' verdict. My argument is that, whatever its broader practical significance, *Bushell's Case* is nonetheless part of a wider event in which jury trial started to be seen in a new way. It is a decision taken in the point in the jury's history where we can see the modern exclusion thesis being clearly articulated for the first time.

Unlike the perspective frequently taken earlier in the century, which defined the jury by reference either to the judge or to the sovereign, and which therefore conceded the jury at best a derivative existence, the Restoration reformulation insisted on stating that the juror had a soul, and that it was only by understanding the implications of this fact that one could understand the true nature of the juryman's duty. The difference between this perspective and the earlier model of the juror on his soul to find according to his conscience lies in the early-modern shift in the meaning of the word 'conscience'. Because conscience was now more about moral laws than accurate fact-finding, the verdict according to conscience necessarily became a verdict delivered by a jury which could only listen to the judge as an advisor regarding legal interpretation, rather than as someone with the power to compel obedience. And because conscience of this sort required personal conviction, achieved through the individual's use of their own reason, the jury's verdict had to be accepted, rather than challenged: as Vaughan emphasised, agreement on the word 'guilty' or the words 'not guilty' is not the same thing as agreement regarding the proper route to that verdict.

The modern inclusion thesis, I argue, was created a century later, in eighteenth-century England. Those critics who have recently downplayed the significance of *Bushell's Case*, pointing to the continued judicial control of trial juries, effectively posit a dichotomy between the ideology of independence and the material reality of control. My approach is somewhat different: I do not think that the Restoration pamphleteers failed to properly describe reality so much as reformulated the conditions of possibility of what they considered to be a true jury trial. Practices of control were put on a solid theoretical footing a century later when, faced with the challenge of enlightenment penology, English

jurists attempted to bring into reality their ideal of legal certainty. Legal certainty was justified, particularly by Beccaria, on the basis that people would be less likely to commit crimes the more certain it was that they would be punished for their transgressions. Certainty in the administration of the criminal law was valued less as a guarantor of individual liberty and more as a possible technique for governing rational populations away from the temptation to behave in a socially damaging way. Beccaria wanted to simply prohibit judges from acting mercifully; but in England it was felt that juries, as members of the population, had to be guided and governed away from destructive acts of mercy. It was therefore essential for the judge to become an important figure in the jurors' deliberative processes, and so the general verdict was redefined as a verdict reached 'under direction of the court'. The aim was not to make jury independence impossible but, rather, to make sure that errant verdicts were always reached in full cognisance of the law's position on the case in hand. The inclusion thesis has at its core the idea that jurors should not be punished for disobedience, but should instead be governed in such a way as would minimise such disobedience and ensure that, when it does inevitably happen, it happens in as non-damaging a way as possible.

The exclusion and inclusion theses, while conceptual rivals, have never exactly been enemies. They define jury trial in fundamentally different ways, and therefore they often talk past one another. When the inclusion thesis was defended in the context of seditious libel, during the 1780s and 1790s, its protagonists were systematically misunderstood both by those who thought that the trial jury did and those who thought that it did not have the right to deliver a 'verdict according to conscience'. And in nineteenth century America the picture was no less confused. The American revolutionary project greatly

valued the jury system, with Jefferson going so far as to describe the jury as the greatest constitutional check known to man: if unconstitutional legislation is passed then juries, acting according to their consciences, can be trusted to nullify. But over the century after the revolution, exclusionary and inclusionary perspectives on jury trial each seemed to be held up as offering the only logical definition of trial by jury; and on closer analysis many of those who at first sight seem to have advocated a doctrine of total jury independence were in fact calling for jury trial to be understood in inclusionary terms. In the case which finally established that an American jury may not be told it had the power to nullify, the dissent which is commonly taken as a defence of the older view is actually a statement of the judicial duty to direct trial juries, so that verdicts will be reached ‘under the direction of the court’. The jury was by this point imagined by much judicial practice in inclusionary, governable terms; but a popular American tradition persists to this day which states that the jury should act on the basis of its civic duty whenever this duty conflicts with the law. In contemporary England, this basic incompatibility between the two positions means that proponents of the exclusion thesis seem unable to engage with questions of the governance of the jury.

By writing this thesis as a genealogy, and therefore in largely historical terms, I have written it in a way which might make my comments on contemporary jury trial in England and Wales seem a little detached from the thesis as a whole. For four chapters I attempted to draw out the presumptions inherent in certain historical statements regarding jury trial, and then suddenly in the final substantive chapter my focus became not only contemporary but also critical: not only suggesting for example that judges employ an inclusionary perspective on jury trial but also that the ways in which they are currently

developing their judicial practices tends towards a general undermining of the ‘verdict according to conscience’. In fact these comments are an important part of the overall project. I have attempted throughout to write what Foucault called a “history of the present”,² by which he meant a history which tries to understand our present situation and the limits within which we find ourselves. And the purpose of my historical research in this thesis has been to try to gain a better understanding of the various practices – both of judges and of juries themselves – which seem to illuminate the present meaning and possibility of ‘jury independence’. In this way, the more strictly historical aspects of my genealogy of jury independence feed directly into my comments on the possibility of jury independence in the contemporary English criminal trial.

My initial concern in this thesis was that the way we think about juries presumes that they have it in their power to simply step outside the law and decide a case however they see fit. My contention is that this is only one of two possible ways of understanding the relationship between jury independence and the general verdict; and that the other way of looking at things – that the inscrutable verdict is in fact delivered by a jury subjected to judicial techniques of governance – is too often overlooked in discussions of jury independence. But in taking a Foucauldian approach to this problem, I have attempted not only to fragment the relationship between the general-verdict-giving jury and the idea of ‘jury independence’; more than this, I have sought to identify what possibilities there are, under both the exclusion and the inclusion theses, for a jury to subvert the wider legal and political processes in which it exists. Matravers has suggested that nullification offers

² M Foucault, *Discipline and Punish: The birth of the prison* (A Sheridan trans, Penguin 1991) [1975], 31.

a valuable “means of resistance”;³ but if strategies of resistance are always resistances against particular strategies of power, then the identification of an alternative means of framing jury trial should be followed by the question: what ‘means of resistance’ does this perspective offer?

Jury service is increasingly presented as a difficult task; and whether we think that this means putting an unacceptable strain on non-lawyers or whether, on the contrary, we think that challenging ordinary people in this way is to be applauded, this transformative quality of jury service is a recurring theme in recent legislative proposals and, indeed, in some empirical academic research. If, as I have argued, the inclusion thesis has been consistently challenging the dominance of the exclusion thesis since the late eighteenth century, then many people have argued over the past 250 years that ‘the juror’ is something qualitatively different to ‘the citizen’. What I have suggested is that this significantly transformative element of the long, complex trial opens up the possibility of a person who has served on a particular trial carrying the status of ‘juror’ with them out of the court, and therefore being able to speak authoritatively about that particular trial. The 2004 ricin terror trial jurors exemplify this possibility: their actions are clearly the exercise of a sort of jury power, and yet they do not fit easily into accepted ideas either of jury equity or of jury nullification. What the jurors did was to claim the status ‘juror’ years after the end of their trial in order to contest the government’s characterisation of the acquitted men as terrorists. This, I would argue, is a good example of a ‘means of

³ M Matravers, “‘More Than Just Illogical’: Truth and jury nullification” in A Duff, L Farmer, S Marshall and V Tadros eds, *The Trial on Trial*, Vol 1: Truth and due process (Hart 2004), 83.

resistance' which can only be adequately accounted for by an inclusionary model of jury trial.

My argument is not that exclusionary perspectives offer an incorrect description of jury trial, but simply that they miss the particular range of problems which exist concerning the governance of the jury and the construction of the juror as a juror. As a result, they miss the possibility of a former juror acting on the basis of their capacity as such. I have found no academic references to the actions of the ricin trial jurors, and it seems to me that this oversight in the academic literature on jury independence is indicative of a broader fact: that too often we insist on seeing the possibility of jury independence in *nothing other than* exclusionary terms. Again, the exclusion thesis no doubt offers a defensible political goal; but I am sceptical about the extent to which it describes something which is actually attainable according to the way we currently generate our juries. But my argument should not be taken as a lament for something which has passed: essentially it is little more than the observation that it has passed, coupled with the observation that the very precise model of jury independence frequently represented in the phrase 'verdict according to conscience' does not represent the only way in which a trial jury might take its legal position as a licence to act politically. What originality there is in this thesis lies primarily in the opening up of this range of problems as problems of jury independence, problems which are missed by accounts which simply presume that the independent action of jurors is guaranteed by the inscrutability of the general verdict.

I do not mean to say that jurors should abandon whatever might be left of the practice of jury equity, placing the legal rules as set out by the judge before their own sense of justice; and neither do I mean to insist that juries must take up their role as experts in order to

speaking about every trial. All I mean to do is to comment upon the practical range of actions which seem to be open to today's Anglo-Welsh juries. Ultimately, it is for the jurors themselves to act; and their actions might take either exclusionary or inclusionary forms, depending on the ways in which they conceive of their own duties as jurors. But that is the whole problem.

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