Jury Nullification

The Jurisprudence of Jurors' Privilege

By

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Introduction

Jury nullification in the criminal law refers to that phenomenon whereby a jury returns a not guilty verdict for a defendant it believes to be factually and legally guilty of the crime charged. To put this explicitly, a jury nullifies when, despite believing both a) that the defendant did, beyond a reasonable doubt, commit the act/omission in question, and b) that such behavior is, in fact, prohibited by law, nevertheless returns a verdict of not guilty. That the jury can behave in such manner without fear of punishment, and without having its verdict impeached, overturned, or overruled, is beyond dispute, and case law overwhelmingly confirms as much.[1] The jury's absolute and unconditional power to conscientiously acquit a defendant when the law and facts would otherwise support a guilty verdict has been characterized as a "safety valve"[2] in the legal system, providing jurors with the authority to challenge laws they find objectionable or unjust. This creates an interesting tension in the law. Since jury verdicts of acquittal are, for the most part, binding (save for those cases involving legal or procedural errors), it would appear that built into the very legal system itself is a means for that legal system to be subverted. It is exactly because of this potential for jural self-subversion that jury nullification has been historically, and remains to this day, a highly contentious and controversial issue, both among legal scholars and the

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[1] See, for example, *Horning v. District of Columbia*, 41 S.Ct. 53 (1920), where Holmes, J. stated: "[T]he jury has the power to bring in a verdict in the teeth of both law and facts;" *Morissette v. United States*, 342 U.S. 246, 275 (1952): "But juries are not bound by what seems inescapable logic to judges;" *United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969) (emphasis added): "If the jury feels the law is unjust, we recognize the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by a judge, and contrary to the evidence...If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, *and the courts must abide by that decision*;" *U.S. v. Dougherty*, 473 F.2d 1113, 1130 (D.C. Cir., 1972): "The jury has an "unreviewable and irreversible power... to acquit in disregard of the instructions on the law given by the trial judge..."

[2] *U. S. v. Dougherty*, *supra* note 1, at 1134.

courts. As the Court in *State v. Hooks*[3] so articulately and eloquently explained the problem:

> Jury nullification, also called jury lenity, is the extraordinary power of the jury to issue a not-guilty verdict even if the law as applied to the proven facts establishes that the defendant is guilty. Jury nullification is a curious paradox: it is the jury's prerogative to disregard the law without actually committing an unlawful offense in doing so; its exercise is literally illegitimate (contrary to law) but practically legitimate (allowed by law). It is the physical power to disregard the law that has been laid down to [the jury] by the court. In that sense, the most accurate description of the jury's paradoxical authority to act on its own in disregard of the law even while it is charged with following the law is the raw power to bring in a verdict of acquittal in the teeth of the law and the facts.[4]

At a fundamental level, the nullification debate is in serious conceptual disarray. Even a cursory investigation of the extant literature will reveal that many of the arguments, objections, *ratio decidendi*, *obiter dicta*, perspectives on, and theories of, jury nullification are either predicated on an incomplete understanding of this legal phenomena, or rely on specious logic (or sometimes both) to reach conclusions that are, on deeper analysis, incompatible with sound jurisprudence and legal reasoning. Importantly, there are two central questions that currently surround the jury nullification debate. First, we can ask: "Is jury nullification a *right*?" Much time and energy has been spent discussing, deliberating, and reflecting on this question, and most of it, I contend, is wasted effort. My model of jury nullification as a *privilege* directly addresses this question and should, once and for all, settle the issue – jury nullification is not a *right* (at least not the legal sense). Nevertheless, I still maintain that jury nullification enjoys a legitimate, and *de jure*, status within the legal system. The other question often asked is: "Should juries be informed or instructed about jury nullification?" Again, the debate around this issue is often speculative, imprecise, conceptually unmotivated, and, on occasion, obviously contrary

[3] 752 N.W.2d 79 (Minn. Ct. App. 2008).
[4] *Id.* at 86.

to commonsense. It is my hope that the *bad-faith-juror* objection I put forward will show that the clear, unambiguous, and morally preferable answer to the *nullification instruction* question is that jurors ought *not* be informed of their *privilege* to nullify. Perhaps the biggest problem with the current discourse around jury nullification, however, is that, very often, these two questions, and the separate issues and consequences associated with them, are, in the extant literature, conflated, confused, or casually blended together to the detriment of a clear and lucid understanding of the topic. The focus and goal of this book, therefore, will be to examine each of these questions in turn in order to lend clarity to these two related, yet conceptually distinct, issues surrounding jury nullification. Such disambiguation and clarification is, of course, the purview of the philosopher.

Before we address and answer these central questions and associated controversies surrounding jury nullification, it is important to first identify as precisely as possible what exactly jury nullification actually is. As already mentioned, jury nullification occurs when a jury acquits a defendant it believes to be legally and factually guilty of the crime charged. In finding the defendant not guilty, the jury is refusing to be bound by the facts of the case or by the judge's instructions regarding the law. Thomas Green, in *Verdict According to Conscience*,[5] describes three ways in which a jury may nullify:

> Jury nullification in its strongest sense occurs when the jury recognizes that the defendant's act is proscribed by law but acquits because it does not believe that the act should be proscribed. The behavior, in other words, is not criminal in the eyes of the jury, and the jury is willing to assert its view in the face of what it is told by the judge [i.e., the jury is "judging the law"]. An intermediate form of nullification reflects the jury's view that although the act proved is properly classified as criminal, it is within a class of acts that do not deserve the punishment prescribed for them. Such nullification serves to protect defendants from punishments that are regarded as

[5] Green, Thomas A., *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (University of Chicago Press, 1985).

> excessive. A relatively weak form of nullification reflects the jury's view that although the act proved is criminal and falls in a class of acts that may well deserve the prescribed punishment, such punishment is inappropriate in the case at hand. When nullification is in this way ad hoc, a defendant, because of personal characteristics or the particular features of the case at hand, will escape the generally fair sanctions that a concededly just law prescribes.[6]

We can rephrase this as such: jury nullification occurs when the jury is of the opinion that, despite the law and evidence, it would be wrong to (and thus refuses to) sentence person *P* to punishment *y* for action *z*. The loci of *P*, *y*, and *z* map onto, respectively, Green's idea of weak, intermediate, and strong jury nullification. Green's analysis is generally considered the starting point for any discussion of nullification, and thus, will inform my investigation into this phenomenon as well.

One thing worth noting from the start, however, is that, despite the concerns voiced by some scholars and courts, there is no such thing as *reverse nullification*.[7] Jury nullification properly so-called, I contend, always, and can only, result in a verdict of *not guilty*. Simply put, it is not jury nullification otherwise. Consider the type of case referred to above where the jury returns a not guilty verdict for a defendant it believes to be both legally and factually guilty. Both case and statute law confirm that in such an instance, not only was the relevant law *not* put into effect, more importantly, the relevant law no longer *can* be put into effect, *vis-à-vis* that particular defendant, for that particular offense. Absent some independent legal error or some other form of juror malfeasance, the verdict must stand. In other words, we might say that in the situation so described, the effect and power of that law on that individual was nullified. However, *all* guilty verdicts are, in principle at least, open to review.[8] A jury who convicts a defendant it believes to be innocent has not thereby succeeded in

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[6] *Id. at* xviii.

[7] See, for instance, *People v. Boyd*, 31 N.Y.3d 953 (N.Y. 2018); Eisen, Mitchell; Dotson, Brenna; and Olaguez, Alma, *Exploring the Prejudicial Effect of Gang Evidence: Under What Conditions Will Jurors Ignore Reasonable Doubt*, 2 Crim. L. Prac. 41 (2014); Finkel, Norman, *Common Sense Justice: Jurors' Notions of the Law* (Harvard University Press, 1995), where he discusses his worries regarding so-called "vengeful nullification."

[8] Though to be fair, such review is relatively rare.

necessarily nullifying the effect of the law on the defendant; the law still may be justly applied to the defendant at a later date after review by an appellate tribunal – an option not available when the jury returns a not guilty verdict. Thus, the law in such cases is not really nullified, though it may still be consciously misapplied by the jury deliberating upon a verdict. Moreover, we already have a name for so-called *reverse nullification*: an unjust conviction.[9]

It would be appropriate at this point to say a few words about the structure of this book before we begin our formal investigation into the jurisprudence of jury nullification and the *nullification instruction*. Chapter 1 traces the history and development of the criminal jury trial in Anglo-American law and the concomitant development of the doctrine of jury nullification until the late nineteenth century, by which point the jury pretty much resembles its modern counterpart. I also look at the doctrine, procedures, and law (both case and statute) surrounding the current right to a jury trial in criminal cases in American jurisprudence. In Chapter 2, I investigate why jury nullification is both derided but tolerated by the justice system. If it is such a pernicious element of the criminal jury trial, as its detractors suggest, why not try to rid the jury system of the ability to so behave altogether? The answer, I will show, turns out to be that there are overwhelming principled, practical, and policy considerations that recommend against any such move. Chapter 3, then, is the first place I really focus on the issue of whether jurors ought to receive the *nullification instruction*. In this chapter I look at the attempts to answer this question through analyzing the intrinsic legal nature or jural status of jury nullification. This method of resolving the question simply will not work, as I demonstrate through recourse to my *privilege*-based account of jury nullification, and so I turn, in Chapters 4 and 5, to an investigation of the *policy-based*, consequence-oriented arguments both for and against, respectively, giving the instruction. It is by looking to these consequences, and balancing them against the broader and more fundamental values we wish to see

[9] And the law has a long, rich history of (admittedly imperfect) procedures, doctrine, and legislation designed to prevent, ameliorate, and correct for, occurrences of such.

instantiated in the criminal justice system, that lead me to conclude that, all things being equal, the *nullification instruction* ought not to be given.

Finally, a note about the general focus of my research for this book. Jury nullification is an issue that has confronted the courts, legislatures, and jurists in nearly every legal regime and jurisdiction with a common law criminal jury tradition, particularly those whose legal systems were inherited from the British. These countries include Australia, Canada, Ireland, Jamaica, the United Kingdom, the United States, and New Zealand, to name but a few.[10] The keen reader will no doubt notice, however, that I confine my investigation of this widespread phenomenon to almost exclusively American cases and research. This was not done capriciously or accidentally, however. I am, after all, situated as a researcher and scholar within the American jural system. It has been my primary focus of study for over two decades; American jurisprudence and philosophy of law are my areas of expertise, specifically as regards jury nullification.

However, and significantly – and this is a point that should not be overlooked or lightly discounted – much of my analysis and critique regarding the nature of the contemporary jury nullification debate will, for the most part, transfer with little conceptual maneuvering to these other jural regimes. Certainly, some of my arguments and conclusions might very well be 'lost in translation,' as it were, or at least altered somewhat, due to differing jurisdictional specificities, including such things as constitutional law, legislation, case law, legal doctrine, and jural norms, traditions, and customs. But the overall texture of much of my analysis will be preserved for those jurisdictions and regimes whose criminal jury systems reflect, to a greater or lesser degree, the broader contours of the American experience in confronting jury nullification. In particular, I believe that my *bad-faith-juror* objection to the *nullification instruction* is jurisdictionally neutral, as is my *privilege* account of jury nullification. Whether these insights will prove useful in any practicable manner for resolving the debates and controversies around jury nullification in these other juridical systems is beyond the scope of this monograph; but I am

[10] This is a representative, but by no means exhaustive, list.

confident that the research and conclusions presented in these following pages will, in fact, be a valuable resource for everyone – including those members of the larger international community of legal scholars – interested in the jurisprudence and philosophy of jury nullification.

Part 1: Jury Nullification

Chapter 1
The Historical Development and Contemporary Law of Jury Nullification

The focus of this chapter is the history and development of the jury system, and the concomitant development of jury nullification, in Anglo-American criminal law. While such historical investigations may not be, in and of themselves, of the most important philosophical interest, they are nevertheless a valuable tool for understanding the context within which subsequent philosophical issues occur and have developed. Accordingly, we will begin this investigation in England, starting in the eleventh century, where the jury as we know it today first began to take shape and form.

1.1 The Early Development and Rise of the Jury System

It must be acknowledged from the start that any attempt to investigate the origin and growth of trial by jury in English jurisprudence is somewhat constrained by the fact that no record exists of its acceptance into English Law. No such records exist, of course, because trial by jury does not owe its existence to any positive law or legislation; it is not the creature of an act of Parliament or official decree. Instead, the jury trial arose gradually from forms and practices of justice whose own origins can only be guessed at. Those records that do exist of pre-Norman jurisprudence[1] do very little to clarify the situation. This has led one legal historian to state that the origin of the trial by jury "may be proved with as much certainty as that of the river whose well-head is a spring oozing out of a grassy bed, and which swells into a broad expanse of waters before it loses itself in the ocean."[2] The rise of the jury system is best seen, thus, as a gradual and natural

[1] Only gradually after the Norman conquest of 1066 did legal record keeping begin to become standardized and archived.

[2] William Forsyth, *History of Trial by Jury*, 5 (2nd ed., Frederick D. Linn, 1875).

sequence from the modes of trial in use amongst the Anglo-Saxons and Anglo-Normans.[3]

The jury as it is today – that is, as a body of persons apart from the court, but summoned to attend it in order to determine conclusively the facts of the case in dispute – was an institution unknown to the Anglo-Saxons.[4] Changes in the legal-political structure of England started to occur in earnest after the Conquest of 1066, and while by no means abrupt, these changes were significant as the Normans made their influence felt upon the laws and governance of England. Some of the more important changes made to the English judicial system by the Normans included the separation of the spiritual and temporal courts; the introduction, and addition of, the combat, or duel, to decide cases; and the appointment of justiciars (judges) to administer justice in the King's name throughout the realm. And, of course, the gradual introduction of the trial by jury. But perhaps the most significant influence on the English system of justice by the Normans was the establishment of a strong central court whose authority gradually began to be felt throughout the land. By the time of the reign of Henry II (1154-89), we can see the beginnings of a centralized judicial system which administered a law common to the whole country. It was this centralized judicial system which gradually reduced the local courts to insignificance and substituted one single common law system for the confused mass of local customs which the law of England had heretofore been.[5] By far, however, the two most important of these changes as regards the development of the criminal jury trial were the Assize of Clarendon in 1166, and the abolition of the ordeal by edict of the Roman church in 1215.[6] The later event removed the most common method of

[3] That is, both before and after the Conquest.

[4] Forsyth, *History of Trial by Jury, supra* note 2, at 4.

[5] *Id.* at 4-5.

[6] The two most common forms of ordeal at the time were the *ordeal of cold water*, and the *ordeal of hot iron*. The former required the accused to be plunged into water. Those who sank were considered guiltless and set free; those who floated were deemed guilty and punished according to their offense. The *ordeal of hot iron* required the accused to hold a hot iron in their hand while walking a number of paces. If after three days the resulting wound was clean, the accused was deemed innocent; otherwise, the verdict was guilty. For a more thorough account of the ordeal in early English criminal law, see Kerr, Margaret H.; Forsyth, Richard D.; and Plyley, Michael J., *Cold Water and Hot*

proof from the English criminal process and necessitated a search for its successor. The former event set up the institutional structures that ultimately led to the jury trial being settled upon as that successor.

Let us begin with the Assize of Clarendon. In the mid twelfth century, most criminal prosecutions were still privately initiated. In their simplest form, these prosecutions, called appeals, began with a formal complaint by the injured party. The accused – the appellee – denied the accusation, and the case was decided by combat. The form of publicly initiated prosecutions at this time is still a matter of some debate.[7] In 1166, Henry II reformed the public prosecution system with the Assize of Clarendon which ordained that twelve lawful men of each *hundred*, and four of each *vill*,[8] should report to the royal justices of the *eyre*,[9] or the local sheriff, those persons reputed to have committed certain serious crimes. This reporting body was called the *presenting jury*. When the justices arrived the *hundred* jurors were appraised of the articles of the *eyre* (the list of matters about which they were required to report to the justices). Felonies were always included. Thus, private actions began to be replaced by public prosecutions. This effectively eliminated combat as a method of proof for criminal cases, as private citizens were not permitted to engage in combat with the crown. This would be treason.

The *hundred* jurors reported felonies in their *hundred* by delivering to the justices their *veridicta*, their responses to the articles of the *eyre*. The *veridicta* reported felonies in two ways, either by a report of the crime itself (a presentment) or by a report that an appeal (a private prosecution) had been

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Iron: Trial by Ordeal in England, Vol. 22, No. 4 The Journal of Interdisciplinary History 573 (Spring, 1992).

[7] See, for example, Groot, Roger D., *The Early-Thirteenth Century Criminal Jury*, 4 (Princeton University Press, 1988).

[8] In English history, the terms *hundred* and *vill* referred to administrative divisions or geographic units. A *hundred* was supposed to contain approximately 100 households or families, although the actual number could vary. Each *hundred* had its own local court, known as the *hundred court*, which dealt with local legal matters. A *vill* was a smaller area, usually a settlement or village, and was part of a *hundred*. Additionally, a *vill* sometimes could refer to a lord's *demesne* (manor and land holdings) and the lands worked by the *villeins* (serfs or peasants).

[9] An *eyre* was a periodic (or circuit) tour made by royal justices to various regions of the country to hear and decide legal cases.

made. Where the named defendant was actually present during a presentment, the trial could proceed directly to condemnation (sentencing) if the suspect had confessed or was manifestly guilty.[10] In all other cases, the defendant would deny the charge and proof would be sought by some form of the ordeal (excluding, of course, combat). In fact, not all presented defendants were awarded the ordeal. The *hundred* jury had the option of presenting someone and then stating that the person was "not suspected." There was no ordeal in such cases.[11] Thus, only when a *hundred* jury suspected and either produced evidence (or was joined in suspicion by the four *vills*), did the defendant go to the ordeal. By 1215, however, presenting juries had begun to evolve into more than just simply accusing juries. After accusing, the jurors decided which defendants should make proof by ordeal and which should not.

> This screening of defendants, ostensibly a statement about guilt or innocence, was just that when the hundredors produced evidence. When they did not, but were joined in suspicion by the vills, the verdict was probably as much a statement about the defendant's character…as about factual guilt or innocence. Nonetheless, an adverse verdict was medial only; it sent the defendant to the ordeal but it did not convict.[12]

Thus, between 1166 and 1215, the law in England developed such that every person who's liberty or life was put on peril by the justice system was spared the necessity of physical proof until a jury had first examined the case and found against him.

In 1215, the Church, at the Fourth Lateran Council, issued an edict forbidding any clerical participation in the ordeal. Given the central role the church played in all aspects of daily life at that time, this order effectively eliminated the ordeal as a method of proof in criminal cases. In

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[10] Groot, *The Early-Thirteenth Century Criminal Jury*, *supra* note 7, at 6.

[11] For example, Groot offers the following account from the Lincolnshire Assize Rolls, 1202-1209: "Gilbert of Sausthorpe, accused of burglary, offers himself and is not suspected by the jurors and therefore let him be under pledge." *id*.

[12] As Groot points out, however, since a jury decision to send a defendant to ordeal almost always lead to either punishment or abjuration, such a decision did have a sort of convicting – a sanction imposing – quality. *id.* at 8, n.15.

1218 a major nationwide *eyre* commenced and soon after instructions were sent to the justices noting that, since the ordeal had been abolished, new methods of dealing with criminal cases had to be sought. Specifically, those accused of major crimes about which there was strong suspicion of guilt were to be committed to prison for safekeeping. Those defendants accused of less serious crimes, for which the ordeal would have been appropriate, were permitted to abjure the realm. And those accused of minor crimes about which there was no strong suspicion were to be placed under good-conduct pledges. This order was quite significant from the point of view of the development of the jury trial. In that it spoke of persons accused about whom there was or was not suspicion, it recognized and assumed the central adjudicative role that the jury was beginning to play in the administration of criminal justice. In effect, this type of jury was quasi-convicting; its verdicts had increasing effect on the lives of those accused of crimes.

With no other formal method of proof available, the judicial *eyres* of the thirteenth and early fourteenth centuries began to almost exclusively depend upon the jury to try criminal cases. It is not exactly clear why this is so, but it appears to be, at least in part, a matter of expedience; the institution of the presenting jury was already well entrenched, with its quasi-convicting role, and the people were by now familiar and comfortable with the convicting function of the jury. Most of those persons who were tried at the *eyre* in the thirteenth and early fourteenth centuries were brought forward after they had been named by the presenting jury and were asked how they pleaded. Virtually all pleaded not guilty and "put themselves on the country."[13] To go on the country meant, at least at first, to be tried by a body of persons that included some or all of the *hundredmen* who had comprised the jury of presentment. There were exceptions to this, with some defendants requesting an entirely different jury, or challenging some of the trial jurors who had been part of the presenting jury, but until

[13] A few refused to plead, exercising their right to do so. However, this right came at considerable cost; such defendants were subject to the *peine forte et dure*, wherein weights were laid upon them until they pleaded or expired. The reticent perished, but not having been convicted, they avoided forfeiture.

the end of the thirteenth century these two types of juries were not readily distinguishable.

This slowly began to change, and by the early Tudor period, the criminal jury trial had transformed in a few important respects. The trial jury, by this point, was a separate institution from the jury of presentment (the latter having come to resemble something akin to the modern grand jury). Having been selected and sworn, jurors heard the indictment against the accused. From the jury's perspective, the trial was a contest in which accuser and accused exchanged their stories in a heated give-and-take. The accuser might be prompted by the bench, which had in hand a written record of the charges he had laid before the justices or, in pretrial sessions, before assize clerks. The accuser's statement was supposed to correspond closely with the actual indictment upon which it had been based, lest the indictment be quashed for variance. Other witnesses for the Crown then spoke. It is not clear whether the jurors always heard the pre-trial examination of the accused; where it supported the Crown's case they almost certainly did, but probably in other cases they did not.[14] The case for the defense was put forth by the accused themselves. No one interceded on his or her behalf to influence the impression made upon the jurors. In rare cases, the accused had the assistance of counsel at the outset of the proceedings in order to make objections on matters of law as they arose from the indictment; but at trial, upon indictment, the accused was not allowed counsel (a rule that persisted in treason until 1696 and in all other capital cases until the eighteenth century). The defendant was forced to rebut evidence he had not seen beforehand. Moreover, the Crown employed sworn witnesses to aid private prosecutors, while only grudgingly allowing any witnesses, and never sworn ones, for the accused.[15]

By the late sixteenth century, we have the embryonic form of the jury as we now know it: a group of twelve persons assembled to hear evidence and render a verdict according to the evidence presented at trial. Of course, since that time the criminal jury trial has seen radical transformation, due

[14] Green, Thomas A., *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800*, 134-35 (University of Chicago Press, 1985).
[15] *Id.* at 135-36.

to such things as the increasing professionalization of the roles of the prosecution and the police, the introduction of defense counsel, the formalization of the rules of evidence, and a plethora of other such developments in the administration of the criminal law. However, I will mention these changes and transformations in subsequent chapters only insofar as they relate to the specific issue of jury nullification.

1.2 The Jury as Moral Arbiter

Jurors have always, to some degree or another, been concerned with some extra-legal notion of *desert*, and have not necessarily confined their deliberations to issues of legislative conformity. Their focus, we might say, is often with the *moral* nature of the verdict, and not necessarily the factual questions of the defendant's guilt. Seen as a predominantly moral investigation then, the history of the jury trial in many respects can be traced back to use of the ordeal in early English criminal justice. The ordeal, argues Robert Palmer, while ostensibly concerned with the factual question of the defendant's culpability, was probably viewed as an essentially moral device.[16] The issue addressed by the ordeal was not whether the accused had committed the act in question, but whether the prescribed punishment for such acts would be appropriate in a particular case. To be sure, such questions were often hard to distinguish; an affirmative answer to the former would often as a matter of course imply an affirmative answer to the latter. But, according to Palmer, the relationship between the defendant's actions and his failure at the ordeal was not that of antecedent to consequent, but rather the opposite. That is, a defendant who failed the ordeal was clearly guilty of the act in question; the failure of the ordeal was understood to mean that God wished the accused to be punished, and God would not punish the innocent. But God is merciful, and one who passed the ordeal might truly have been innocent of the crime charged, but might also have passed simply because of God's mercy; in either case, the passing of the ordeal simply meant that punishment would be inappropriate.

Palmer finds support for this interpretation of how the ordeal was understood in literary accounts, particularly in *La Mort le Roi Artu*, from the

[16] Palmer, Robert C., *Review - Conscience and the Law: The English Criminal Jury - Green's Verdict According to Conscience*, 84 Michigan Law Review 787 (1986).

early thirteenth century. At one point in this tale, Sir Lancelot kills Sir Gawain's brother, and Gawain is overcome with the desire to avenge his brother's death. Lancelot offers to make reparations: he abases himself; he offers to do homage to Gawain and to go on a pilgrimage alone. Gawain refuses this offer and demands instead to do battle. This refusal to accept Lancelot's offer was viewed with disapproval, and indeed, at battle Lancelot prevailed, proving his innocence.

> "Innocence" here, however, only concerned the present appropriateness of punishment. An offer of reparation, refused, reversed the appropriate result. This account of a trial by battle suggests strongly a similar conclusion about the ordeal. The question asked was not factual but moral, not about a past event but about present standing before God.[17]

In other words, Lancelot prevailed in battle, not because he was innocent of the crime he was charged with, but because of his genuine willingness to make reparations and accept responsibility for his wrongdoing. Gawain's desire for vengeance, in light of Lancelot's prostration, was therefore the greater wrong in God's eyes. If Palmer is correct about this, then it is hardly surprising that when the jury eventually replaced the ordeal this concern with the moral appropriateness of punishment would also be transferred. While Palmer's account of the ordeal is somewhat speculative, that the early juries were concerned with the moral appropriateness of punishment for felons is beyond doubt, and it is here that Thomas Green's scholarship is especially informative.

Green concerns himself primarily with early medieval jury behavior in homicide cases, and makes the following claim about the early English criminal jury: in homicide cases, juries systematically imposed the communities' concepts of liability upon the courts, drawing a distinction between cases of simple homicide and more malicious, stealthy homicide – a distinction that the formal legal rules of the time did not draw.[18] Because jurors of that era were both gatherers, as well as weighers of evidence, Green claims they used this gathering role to produce and present evidence

[17] *Id.* at 793.

[18] Green, *Verdict According to Conscience*, *supra* note 14, at 28-9.

to influence the outcome of trials in cases where strict adherence to the legal rules would have resulted in a verdict at odds with the community's sense of justice.

> [F]rom late Anglo-Saxon times to the end of the Middle Ages there existed a widespread societal distinction between "murder," i.e., homicide perpetrated through stealth, and "simple" homicide, roughly what a later legal age termed "manslaughter." This distinction, which was imposed upon the courts through the instrument of the trial jury, was fundamentally at odds with the letter of the law.[19]

In order to fully understand Green's reasons for this claim, it is necessary to first understand the law of homicide during this period. By the thirteenth century, all felonious homicides were capital offences. However, this had not always been the case. The distinction between slaying by stealth and slaying openly and of a sudden had been part of Anglo-Saxon law. The crown took interest only in the former, for which capital punishment awaited those found guilty. *Wergild*[20] was the remedy for the latter, and allegations of homicide of this type were prosecuted privately. This legal distinction survived the Conquest, and then was removed in the course of the legal reforms of Henry II. By the end of the twelfth century, the Crown took exclusive jurisdiction over all homicides and defined them as either: i) culpable and thus capital; ii) excusable and thereby pardonable; or iii) justifiable and therefore deserving of acquittal. Into this third category fell such things as the slaying of manifest felons and outlaws who resisted capture. Pardonable homicides were those committed by the insane, those done unintentionally, and those committed in self-defense. The rest, from deliberate, but sudden, homicides, to those homicides planned and stealthily perpetrated, were considered culpable. According to the law,

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[19] *Id. at* 30.

[20] The *Wergild* system placed a monetary value on people according to rank, with categories ranging from king to freeman, and established a personal injury tariff schedule regulating payment by a perpetrator to a victim for injuries suffered through wrongdoing. See, Bothe, L.; Esders, S.; and Nijdam, J. A. (Eds.), *Wergild, Compensation and Penance. The Monetary Logic of Early Medieval Conflict Resolution*, 113 (Medieval Law and Its Practice; Vol. 31) (2021).

there were to be no distinctions made among them. All felonious homicide was thus considered capital.[21]

It is this second class of homicide, pardonable homicide, and in particular, the associated rules of self-defense, that is particularly relevant *vis-à-vis* nullification, according to Green. The rules of self-defense at this time were, from a modern point of view, incredibly strict. The slayer must have made every attempt to escape his attacker; he must have reached a point beyond which he could no longer retreat; and he must have retaliated out of vital necessity. Moreover, this test was objective; it was not enough for the jury to find only that the defendant genuinely *believed* that they had no other recourse. The jury must additionally find that there was, indeed, *actually* no other recourse.[22]

Green claims that the early English jury distinguished between those who committed simple homicide (roughly what we now refer to as manslaughter) and those who committed murder (homicide stealthily committed) when determining the fate of defendants brought before it – a distinction not recognized by the formal legal rules of the day. How does Green suggest that juries instantiated this distinction? Through the use of verdicts of self-defense. Up until the sixteenth century, claims Green, many who committed what we now refer to as manslaughter (a capital offense at that time), received unwarranted pardons, based on a jury finding of self-defense. Juries, it seems, if Green is to be believed, were loath to send to the gallows those whose crime was that of simple homicide.

> [M]any of those who received pardons for self-defense had in fact committed a felonious, simple homicide. The area of pardonable

[21] This tripartite classification of homicide remained intact until the late sixteenth century, when the legal distinction between murder and manslaughter finally emerged.

[22] Green, Thomas A., *The Jury and the English Law of Homicide, 1200-1600*, 74 Michigan Law Review 413, 428 (1976). Note that not only were pardons for self-defense formally very narrowly defined, they were also sanction imposing. A finding of excusable homicide resulted in the defendant's remand to gaol until he obtained a pardon from the king, a procedure that could take several months. Furthermore, originally, of those meriting pardons for excusable homicide, only persons who had tried to flee upon becoming a suspect suffered forfeiture of goods. After 1343, forfeiture of goods became automatic in all cases of excusable homicide.

> homicide, it appears, served as a possible way out in cases where the community did not believe the defendant deserved to be hanged.[23]

Green supports this claim through a detailed comparison of the trial roll with the corresponding coroner's rolls in those cases ending in a verdict of self-defense. In all homicide cases, the coroner, a Crown official at the county level, was required to hold an inquest as soon as possible, usually within a day or two of the discovery of the body.[24] There the coroner assembled an inquest jury, composed of representatives of the *vill* in which the slaying occurred and of several neighboring *vills*. At this inquest the coroner noted the cause of death, took down the names of suspects mentioned by the jurors, and ordered the arrest of those named suspects by the sheriff or *hundred* bailiff. A record of the coroner's inquest was available to the court at trial. However, such inquests were not conclusive, and the jurors took no oath when stating the facts of the deceased's death and those suspected. The coroner's enrollment was often far less formalistic than the trial rolls, according to Green, and represented a more candid reflection of the community's view as to who the assailant was, and how the homicide took place.

As we have seen, the rules of self-defense were quite strict, and since, at this time, the jury was the primary source of evidence in criminal trials, any verdict of self-defense had to be accompanied by a detailed accounting of the defendant's attempts to escape his alleged assailant. If juries used the category of excusable homicide to exculpate manslaughterers, as Green contends, they would have had to fabricate stories of retreat and last resort where in fact there had been neither. Such fabrications, continues Green, would be visible to us only by comparing the trial enrollments with the corresponding coroner's enrollments in those cases where the jury returned a finding of self-defense. Green did just such a comparison. In a number of cases in which the coroner reported sudden arguments that then escalated to violence, or attacks that could have been avoided without resort to deadly force, the jury at trial set forth a verdict that met the strict rules of self-defense.[25] By the end of the thirteenth century, the jury's statement in

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[23] Green, *Verdict According to Conscience*, *supra* note 14, at 31.
[24] Green, *The Jury and the English Law of Homicide*, *supra* note 22, at 422.
[25] *Id. at* 430.