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Book Review. Societal Versus Official Law

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This splendid book is remarkable in so many important ways that it seems appropriate to begin with a list of them. First is its format: It consists of eight free-standing essays concerning the history of the criminal jury that are unified by a number of complex themes. Second, it covers an enormous time span, namely the twelfth through the nineteenth centuries. (Many of us find a century or two daunting enough.) Third, Green brings an uncommon amount of sophistication to his task, and he is able to provide material that gives coherence to disparate earlier work on the machinery of criminal justice and the nature of medieval kingship. Fourth, and most important for some, Green provides us with a believable picture of criminal jurors struggling with moral problems in their efforts to decide cases. Giving focus to this picture is a difficult business, especially where the medieval period is concerned, since English legal texts and treatises are for the most part inhabited by shadowy stick figures wholly devoid of personality. To most investigators, the documents are intractable and lifeless. Ironically, this is partly explainable by the fact that jurors in criminal cases had so much power: They were frequently so unguided in their efforts that their deliberations escaped scrutiny and thereby went unrecorded. Thus it is almost impossible to say anything reliable about how jurors went about
their work. Notwithstanding these obstacles, Green presents a credible picture of the role and deliberative processes of juries.

The main business of this book is to describe and explain the jury's role in finding the law during the seven hundred years preceding the present century. The phenomenon of giving a verdict of acquittal in the face of contrary law has come to be called "jury nullification," but that denomination is itself freighted with modern ideas about how juries ought to behave. Since their beginnings, common-law juries in criminal cases have in fact frequently applied their own version of law in opposition to the official law. Most contemporary Americans would usually regard such activity as illegal and dishonest. But commonly held social assumptions about how a moral world ought to be ordered can count as much for law as anything else, and the even-handed application of these principles to actual situations need not be seen as an act of lawlessness, even when such assumptions are not shared by officialdom. When official law and social assumptions clash in our positivistic world, we assume that the contest ought of necessity to be decided in favor of the former. But that is because we have lost the habit of thinking of law as something internal and organic; today we usually think of it as coming from an external source, in the form of a sovereign command. To medieval Englishmen, however, the contest was not between the sovereign and illegal resistors, but between what judges thought the law was and what jurors thought it was. Sometimes, in this view, the judges were wrong.

Such an explanation of the role of the jury comports with evidence that Green has uncovered from the thirteenth and fourteenth centuries. Green musters evidence showing that juries very often ignored the official version of the law in favor of their own version. In the twelfth century, for example, the central authorities decided that all culpable homicides were capital offenses; but this represented a change in the preexisting law, and it was stoutly resisted by juries who sought to establish and enforce a juridical category roughly equivalent to manslaughter. Green shows that juries often returned verdicts of self-defense where such verdicts were not warranted, in order to make the accused eligible for a pardon. Judges may have sometimes connived in this, but they certainly did not always do so; they were in any case powerless to stop it.

This kind of behavior raises the question of how jurors
squared this disobedience to the law with their consciences. We have seen why they might not consider their behavior illegal, but one may still wonder why they did not see it as dishonest. They had taken an oath to tell the truth (*verum dicere*, hence "verdict"), but they constantly engaged in what amounted to lying. We cannot begin to fathom jurors' self-perceptions by examining the sources, for they are their usual silent selves. It is one thing to return a verdict of "Not Guilty," for then one can have a mental reservation, about which the divines wrote a great deal, concerning what the accused was not guilty of. But to bring in a special, factual verdict of self-defense is altogether different. Why would such jurors not stand perjured before God? It is true that perjury required a *mens rea* element, but that was apparently satisfied by the swearer’s knowledge that his statement was untruthful. Perhaps jurors convinced themselves that God would forgive, if not require, adherence to the higher law of mercy. Perhaps, on the other hand, jurors had no regard at all for their oath, though this seems entirely counterintuitive. We simply do not know the basis on which jurors rationalized their duplicity. We do know that some civil juries were sworn to "do as God would give you grace and according to the evidence and your conscience."¹ "Conscience" is one of those words that has a life on many levels. On one, it simply means "knowledge"; and so the oath may be particularly well-suited to the world of the self-informing jury. But on another, more specialized level, it means knowledge of a moral sort—revealed knowledge, in other words, of the difference between right and wrong. The medieval oath may have been shaped by this deeper conception of the meaning of conscience, fashioned for and by a world in which fact and law were merged in a way that the modern mind can only dimly comprehend. There are conversations between prospective jurors and their pastors that we would gain much from hearing.

Whatever may have been in the mind of individual jurors when they returned their verdicts, Green quite rightly sees the general understanding of the powers of the medieval jury as a product of "social and institutional circumstances."² Simply put, the jury’s behavior was tolerated by central authorities because those authorities were overextended and weak, and because an

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¹. See, e.g., Y.B. 5 Edw. IV (Long Quinto), f. 58 at f. 61 (1465). The law French reads: "... faits en cest matter sicome Dieu vous voit doner grace, et solonques evidence et votre conscience."

². P. 105.
alliance with the "gentlemen" (no mere honorific) of the jury was important to their governance of the realm. With the growth of the power and prestige of the state in early modern England, trial procedures underwent a transformation that somewhat weakened the authority of the criminal jury, but not before a great deal of what had been "unofficial" social custom had passed into the books as law. The "invention" of the law of manslaughter is the best, but not the only, example of this kind of evolution. This period was characterized by the decline of the self-informing jury and the development of a state prosecutorial function. These changes did not happen suddenly, but some time during the sixteenth century justices of the peace became investigators, gatherers of evidence, and informers of juries. As juries routinely began to depend more heavily on officials for facts, the old excuse for "false" verdicts—namely that the jurors may have known facts not formally presented to them—began to ring hollow. During the sixteenth century, it was probably a routine practice for judges to make summations to the jury, and no doubt the judges gave their views of how a case ought to turn out. This practice, however, might already have been entrenched by the sixteenth century. In the mid-fifteenth century, we can clearly see it in some civil cases.\textsuperscript{3}

Some of the most interesting material in Green's book appears in his very detailed and deeply analytical discussion of the jury tract literature of the sixteenth and seventeenth centuries. Much of this quite voluminous literature was produced by defendants in sensational criminal cases in an effort to sway prospective jurors before trial. A review of this material would be inappropriate here, but some of it is interesting for its quite radical claim that a jury had the power to ignore the law as it was propounded by judges on the ground, for instance, that the indictment failed to state an offense. Like most radicals, the authors of these works defended their positions with clever and simple reductiones. One author gave the example of an indictment of a man for "\textit{vi et armis} eating meat at his own table."\textsuperscript{4} The author asked whether anyone could be so callous as to suggest that moral, upright jurors ought blindly to convict for such a "crime," a rhetorical question that suggests its own answer. Another of

\textsuperscript{3} See, e.g., Y.B. 5 Edw. IV (Long Quinto), f. 58 at f. 61 (1465) (a case of novel disseisin).

\textsuperscript{4} P. 231 (quoting T. RUDYARD, An Appendix, By way of Dialogue, in a Plain and Friendly Discourse between a Student in the Laws and Liberties of England, and a true Citizen of London 399–400 (London 1670)).
the jury tracts accused judges who instructed jurors contrary to commonly accepted norms of intruding "pestiferous pretended learning" into the judicial process. Such polemicists did not regard law as inherently complex; it was a fact discoverable by any moral man who made an honest effort to think clearly about the case before him.

As Green points out, however, a great deal of the tract literature made much more modest claims for jurors' powers. Because it became plain after Bushel's Case, which Green admirably analyzes and explains, that jurors in criminal cases had the power to decide contrary to both law and fact, many writers often describe criminal juries as "judges of law and fact" without approving necessarily of juries that do not take their law from the judges. Power is not authority, and "unwarranted power" is not an oxymoron. Readers of this literature should take care not to overlook this fact.

Green also does an excellent job of describing and analyzing the circumstances that ultimately led to the famous Fox's libel act of 1792. One of those circumstances was that judges had vastly expanded the definition of matters of law to reduce the scope of the jury's discretion. It is here that the real nature of the struggle described so ably by this book is laid bare: It was often not so much a contest between law and fact as it was one between the state and the individual, between judge and jury, between authority and community, between positive and natural law, and finally, between competing world views.

Green pays a great deal of attention to one strand of the power of nullification, the power to render merciful verdicts even when judge and jury agreed completely on the applicable law. By the eighteenth century, this power had become an undisputed right, so commonly had courts and others acquiesced in it. Indeed, the jurors had become virtual partners with the government in determining which offenders deserved mercy. Today we would typically think of this as a kind of corruption, but that is because our criminal jury has fallen into relatively degraded status. For centuries, such behavior was not just tolerated; it was expected, especially in mitigation of the notoriously huge number of offenses that came to be defined as capital. In the

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5. P. 182 (quoting J. Jones, Judges Judged Out of Their Own Mouthes 27 (London 1650)).
eighteenth century, however, a curious thing happened. What had long been considered an opportunity for obtaining a community's judgement of just deserts came to be seen by many reformers as the exercise of arbitrary, unprincipled, and unpredictable power. Suddenly, moreover, jurors were sympathetically portrayed as being forced to perjure themselves, although for centuries they had appeared cheerfully willing to do so. These kinds of transformations in public perception are among the most interesting phenomena available to legal historians, for they provide us opportunities to be comparative lawyers in time, so to speak, rather than in space. No doubt, as Green suggests, the theories of Beccaria and other eighteenth and nineteenth century reformers regarding the necessity for certainty of punishment increased the pressures for the regularization of application of the law. One wonders, too, whether the general professionalization of law and the legal system did not also play a part as lawyers sought to establish their monopolistic right to determine the law.

In describing and briefly analyzing Green's fine contribution to our knowledge of the common law's single most important institution, I have not been able to do justice, in these few pages, to the richness of Green's interpretation or the depth of his skill in using the widest possible range of legal sources. This task is left to the reader. The reader need not be a specialist in legal history. There is a great deal of value in this book for all legal scholars, as well as for political theorists and practicing lawyers. The usefulness of legal history for this broad audience lies in its liberating power. Most of us have grown up in a tradition that regards the jury as a tool of a legal system external to it. Legal scholars continually reinforce this notion. The legal profession—consisting of both lawyers and judges—has so cartelized justice, its administration, and its execution, that we cannot even dimly recall the day when law belonged in a much less restrictive sense to all of us. For many of us, the jury, far from being a local agency of self-government, is simply a passive instrumentality. We may well ponder how this came to be in a society which we characterize as democratic, but unless we know where we have come from, we cannot even formulate such a question, much less begin to answer it.