

## Jurors v. Judges in Later Stuart England: The Penn/Mead Trial and *Bushell's Case*

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### I. Introduction

Almost two decades ago, John Philipps Kenyon observed one of the most striking changes in the perception of the English legal system in modern times. The jury trial, Kenyon noted, though "now commonly regarded as the singular glory of the Common Law, was [in the seventeenth century] one of its most serious weaknesses."<sup>1</sup> The first part of Kenyon's observation nicely summarizes the deep and abiding admiration that has dominated perceptions of the jury since Blackstone called it the "sacred bulwark" of our liberties two centuries ago.<sup>2</sup> Most students of juries have echoed Blackstone's praise, and their shared perception has profoundly affected their writing. Virtually any action affecting juries has been measured against a standard of "goodness." Actions in the past that apparently supported, defended, or other-

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1. The Stuart Constitution, 1603-1688, at 90 (John Philipps Kenyon ed. 1966). Kenyon points to the successful reform of the law in the 16th and 17th centuries by "the suppression of the jury as far as possible in civil cases," through threats of and actual punishment, and by the introduction of a "breed of forthright and authoritative judges who could cow most juries." *Id.*

2. 4 William Blackstone, *Commentaries on the Laws of England* 350 (5th ed. London 1773). Blackstone uses the word "palladium" to describe the jury, an appellation appropriated by Lloyd Moore as the subtitle for his study of the jury. 3 *id.* at 379; Lloyd Moore, *The Jury: Tool of Kings, Palladium of Liberty* (1973).

wise advanced the cause of juries were "good"; conversely, actions perceived to be contrary to the interests of juries were necessarily "bad."

This moralistic approach vitiates historical accounts of what is arguably the most famous jury trial, that of William Penn and William Mead at the Old Bailey in 1670. In the eyes of virtually all who have written on the subject, the Penn/Mead trial was a "bad thing." Penn and Mead were arrested for preaching to an assembly of Quakers in a London street and brought for trial before the London Sessions of the Peace.<sup>3</sup> During the course of the trial, the judges' distress at the jury's behavior was matched only by their consternation at the jury's repeated failure to bring in a verdict the bench felt proper or legal, even after the bench had applied considerable pressure to obtain a "correct" decision. The jury, after wrestling with the guilt or innocence of Penn and Mead unsuccessfully for two days, finally resolved the impasse on the third day by finding both Penn and Mead "not guilty." This, of course, was a "good thing," but the bench immediately did a "very bad thing" by fining each member of the jury forty marks (approximately twenty-six pounds) for returning a verdict "*contra plenam & manifestam evidentiā, & contra directionem Curiae in materia legis*"<sup>4</sup> and imprisoning them pending payment of the fines. The bench was irritated because the jury ignored its charge, but this could not serve as the basis for fines. Rather, the bench imposed the fines because it believed the jurors had willfully ignored the evidence and had acted against the direction of the law.

A number of the jurors paid their fines and were released, but several refused to pay.<sup>5</sup> Those jurors refusing to pay their

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3. Sessions of the Peace were held on August 29, 1670 and Sessions of Gaol Delivery were held on August 31, 1670. Corporation of London Records Office, Gaol Delivery and Peace, SF203/C/SM34 (Aug. 31, 1670) [hereinafter cited as CLRO]. The Quarter Sessions handled all criminal misdemeanors and relatively minor civil cases. More serious criminal and civil matters were reserved for the central courts (i.e., King's Bench or Common Pleas) or the Assizes. The Penn/Mead trial took place during a Sessions of Gaol Delivery, but the bench held commissions of Oyer and Terminer. Bushell's Case, Vaugh. 135, 124 Eng. Rep. 1006 (C.P. 1670); Samuel Starling, An Answer to the Seditious and Scandalous Pamphlet Entitled, The Trial of W. Penn and W. Mead, at the Sessions Held at the Old Bailey, London 3 (London 1670).

4. Bushell's Case, Vaugh. 135, 135, 124 Eng. Rep. 1006, 1006 (C.P. 1670) (against the full and manifest evidence and against the direction of the court in the matter of law).

5. 1 The Papers of William Penn 179-80 n.3 (Mary Maples Dunn & Richard Dunn eds. 1981). Fantel identifies those other than Bushell who refused to pay the fine as John Hammond, Charles Milson, and John Bailly. Hans Fantel, William Penn: Apostle of Dissent 127 (1974). The others, according to the original panel, were: Thomas Veere, John Brightman, William Leaver, Henry Mitchell, Henry

finer won an "ultimate good" because one of their number, Edward Bushell,<sup>6</sup> succeeded in bringing a writ of habeas corpus heard by Lord Chief Justice Vaughan in the Court of Common Pleas.<sup>7</sup> After hearing the charges against Bushell, Vaughan set aside the fines imposed on Bushell and the other jurors and issued a strongly worded decision effectively eliminating the possibility of any such fines in the future. Grandiose descriptions of *Bushell's Case*<sup>8</sup> abound.<sup>9</sup> More than two centuries ago, Thomas Erskine remarked that "we are almost as much indebted [to Bushell] as to Mr. Hampden, who brought the case of Ship Money."<sup>10</sup> One historian has been content to merely paraphrase Blackstone, calling *Bushell's Case* "one of the impregnable bulwarks of English liberties."<sup>11</sup>

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Henley, William Plomsted, Jacob Damaske, and Gregory Walkelate. CLRO, *supra* note 3, at 1.

6. Aside from the many substantive issues which required resolution in an examination of these cases, small matters arose such as the spelling of Bushell's name. Vaughan spelled it with one *and* with two l's. See *Bushell's Case*, Vaugh. 135, 135, 124 Eng. Rep. 1006, 1006 (C.P. 1670). "Bushell" is the spelling both in the original indictment and on the original panel. CLRO, *supra* note 3, at 1.

7. Few of the errors made by historians are more understandable than the assumption that the case was heard in King's Bench. Noting that Bushell sued for a writ of habeas corpus, some historians have assumed that the case was heard in King's Bench because Common Pleas had no jurisdiction in such cases. J.S. Cockburn, *A History of English Assizes, 1558-1714*, at 114 (1972); William Forsyth, *History of Trial by Jury 186* (London 1852); Kenyon, *supra* note 1, at 420; Goldwin Smith, *A Constitutional and Legal History of England* 359 (1955). The judges of Common Pleas overrode Chief Justice Vaughan's objection to the issuance of a writ of habeas corpus in a criminal cause and issued the writ for Edward Bushell. The entire bench, which included the judges from King's Bench, Common Pleas, and Exchequer, later upheld Vaughan's objection, reserving habeas corpus to King's Bench in the future. 1 William Searle Holdsworth, *A History of English Law* 203 (7th ed. rev. 1956). See also Thomas Green, *Verdict According to Conscience* 239-40 (1985) for an analysis of why Vaughan ruled in this fashion.

8. Vaugh. 135, 124 Eng. Rep. 1006 (C.P. 1670).

9. See *infra* notes 10-11 and accompanying text. The equally standard volume of English legal history, on the other hand, never once mentions Penn and Mead. Moreover, its consideration of *Bushell's Case*, which grew out of the Penn/Mead trial, is restricted to seven words in the middle of a sentence devoted to the discussion of the writ of habeas corpus. J.H. Baker, *An Introduction to English Legal History* 127 (2d ed. 1979). Baker cites *Bushell's Case* only at 127 n.32, and only as an example of the use of habeas corpus by King's Bench (though Bushell actually sued out his writ in Common Pleas). Baker does not, however, mistakenly place Vaughan in King's Bench as have several others. Milsom gives Bushell his own sentence, though only one. S.F.C. Milsom, *Historical Foundations of the Common Law* 412 (2d ed. 1981).

10. Many of the cases pertinent to this article are reprinted in *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783* (T.B. Howell ed. London 1816-1826) [hereinafter cited as *State Trials*]. For Erskine's comment to the jury, see *The Dean of St. Asaph's Case* (1783-84), in 21 *id.* at 847, 926 (also known as *Rex v. Shipley*) [hereinafter cited as *Shipley*].

11. William Braithwaite, *The Second Period of Quakerism* 73 (1921).

The acquittal of Penn and Mead along with Vaughan's decision in *Bushell's Case* permitted a nineteenth-century historian of the Quaker movement to claim Penn had "sustained the inalienable rights of Englishmen," and triumphed over "the iniquitous determination of the Court, to enforce its own will."<sup>12</sup> Only Penn's steadfastness and "the inflexible firmness of the jury in maintaining their own rights, and adhering to their conscientious convictions," allowed England to accomplish "a great stride in the evolution of the jury as a free, judicial body."<sup>13</sup> Not to be outdone, the standard biography of Penn claims that "Penn, Mead, and the jury were the heroes of an historical drama which has had far-reaching effects for the course of justice where it is based on English common law. Penn and Mead . . . turned what might have been a routine trial against conventicles into a *cause célèbre* . . ."<sup>14</sup> Thus, Penn and Mead have been credited with contributing mightily to "goodness" through their efforts that helped establish independent juries. Moreover, Bushell's actions have been celebrated as not just a "good thing" but as one of the "very best things."

After two centuries of such panegyrics, two legal historians have recently written insightful analyses correcting many misperceptions of both the Penn/Mead trial and *Bushell's Case*. John H. Langbein has argued persuasively that "*Bushell's Case* did indeed become a landmark in expanding the province of the jury, but not for about a century after it was decided."<sup>15</sup> Moreover, Thomas A. Green has concluded that Vaughan's decision "by no means crippled the bench, nor even greatly affected the daily administration of the criminal law."<sup>16</sup> While Green and Langbein have clarified the legal significance of these events, reevaluating the Penn/Mead trial illuminates the relationship between the legal establishment, the restored civil authorities, and those who rejected both in the decades following 1660.

The Convention Parliament<sup>17</sup> set in motion far more than the

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12. Charles Evans, *Friends in the Seventeenth Century* 453 (1885).

13. *Id.*

14. Mary Maples Dunn, *William Penn: Politics and Conscience* 17 (1967). As the quote makes clear, Dunn's biography of Penn makes the common mistake of assuming that Penn and Mead were tried for violating the Conventicles Act. Actually, they were tried for unlawful assembly and conspiracy. See *infra* note 58.

15. John Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263, 298 (1978) [hereinafter cited as Langbein, *Before the Lawyers*]. See also John Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 1 (1983) [hereinafter cited as Langbein, *Shaping the Eighteenth-Century Criminal Trial*].

16. Green, *supra* note 7, at 201.

17. David Ogg, *England in the Reign of Charles II*, at 30-33 (2d ed. 1984).

simple restoration of Charles II. The "Cavalier" Parliament,<sup>18</sup> which sat from 1661 until 1679, continued much that the Convention Parliament initiated. The majority of recent research on these decades has focused on the restoration of the social order, or, more ominously, the restoration of social control. Much has been written about the gentry's success in achieving control far greater than that which they had held prior to the struggles of the mid-seventeenth century.<sup>19</sup> At a time when the restoration of political and social stability seemed crucial, the common law might have seemed a reliable foundation upon which to build. After all, the 1640's had witnessed the abolition of King, Lords, and Church. In the midst of such sweeping destruction of established authority, the common law itself stood intact, successfully deflecting all attacks.

Yet, with the restoration of King, Lords, and Church, the common law suddenly encountered serious challenges on a number of fronts, none more persistent than the one instigated by the Quakers. Few, if any, jurors had ever surpassed the determination of some of those hearing the Penn/Mead trial to act as they saw fit, but intransigent juries were hardly rare prior to 1670, particularly in trials involving the prosecution of Quakers and others under the two Conventicles Acts.<sup>20</sup> Indeed, the magistrates in the Penn/Mead trial appear less villainous than equivalently intransigent. Their demeanor in the face of recalcitrant jurors certainly fell short of what might be expected of an "impartial" bench, but

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18. See D.T. Witcombe, *Charles II and the Cavalier House of Commons* (1966) for a history of the Cavalier Parliament.

19. Historians have long recognized the important role of law in establishing and maintaining social control. Recent scholarship characterizes the English legal system as a calculated mystery which revolved around the myth that all men enjoyed equality under the law. While shrinking from overt "conspiracy" theories of law, historians such as Douglas Hay, John Brewer, and E.P. Thompson draw attention to the legal system's ability to contain inter-class conflicts at the same time that it perpetuated social inequality. See *An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth Centuries* (John Brewer & John Styles eds. 1980); Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson, & Cal Winslow, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (1975); E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (1975); Stuart Prall, *The Agitation for Law Reform During the Puritan Revolution, 1640-1660* (1966).

20. The first Act, passed in 1664, penalized Quakers by fines of five pounds or three months imprisonment, 10 pounds or six months imprisonment, or 100 pounds or seven years transportation respectively for first, second, and subsequent offenses. An Act to Prevent and Suppress Seditious Conventicles, 16 Car. 2, ch. 4 (1664). Though nominally in effect until 1669, the Act had fallen into disuse well before its official demise. Its ineffective use, particularly in light of the Plague and Great Fire of London, helped lead to the second Act, which imposed different penalties to make enforcement more successful. 22 Car. 2, ch. 1 (1670). See *infra* text accompanying note 29.

it also fell short of the harsh pattern set by several of England's chief justices both before and after the Penn/Mead trial. This intransigence stemmed from the bench's belief that such jury behavior threatened the social order.<sup>21</sup> The Penn/Mead and Bushell cases are best understood in the context of the bench's determined efforts to restore to England the *status quo ante bellum*. *Bushell's Case* rightly deserves its fame, and the Penn/Mead trial may even warrant being called "a landmark in English legal history," but the simplistic portrayal of both as struggles between good and evil confuses their importance.<sup>22</sup> These events did not pit the forces of light against the forces of darkness. To portray them in such fashion is to misrepresent an extremely important transitional phase in the development of common law trials. This article, by examining the actual proceedings more dispassionately and by placing them in a more accurate context, will explore the roles these two cases played in the transformation of the jury trial.

By the time Penn and Mead were brought to trial, the jury had already changed so as to barely resemble its original version; the legal system, however, had not fully recognized these changes. Moreover, questions about the role of juries, most of them political in nature, had been raised by the trauma of the Civil War and England's short experiment with republicanism. The Penn/Mead trial and *Bushell's Case* helped resolve one of those questions, the freedom of juries to return verdicts with impunity, but this answered a political question, not a legal one. More than a few legal and political questions about the jury remained unresolved through the following century.

## II. The Trial of Penn and Mead

The Restoration had started well for the Children of Light, a

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21. Starling's comments in *An Answer to the Seditious and Scandalous Pamphlet* clearly illustrate this fear of what might come of Quaker actions and unrestricted jury actions. "I could heartily wish, That these Libelling, Lying, and Discontented People, were . . . free of the Design of putting this whole Kingdom into a Flame . . ." Starling, *supra* note 3, at 7. Moreover, Penn and the others in this case were guilty, in Starling's opinion, of attempting to "falsely scandalize and reproach the Kings Justices, and revile all Methods of Law." *Id.* at 1. If the jury's behavior were not severely dealt with, "Justices will be but Cyphers, and sit there only to be derided and villified by every saucy and impertinent Fellow." *Id.* at 3. If permitted to do so, the enemies of the established order "will not only do as their Brethren, the late Reformers of Law and Religion, turn the Laws into English, but turn the Judges and Juries also out of Westminster Hall, and set up a High Court of Justice of Saints." *Id.*

22. See, *i.e.*, William Penn and the Founding of Pennsylvania, 1670-1684: A Documentary History 4 (Jean Soderlund ed. 1983). Soderlund's portrayal is typical of the simplistic approach adopted by most historians.

religious group which had formed around the person of George Fox in the late 1640's. They had become sufficiently distinctive by 1650 for a term of derision, "Quakers," to be used collectively against them. As has often been the case, the word used by their enemies soon became an accepted name among themselves.<sup>23</sup> The Quakers had gained sufficient strength to be considered dangerous during the Interregnum and were persecuted by the Commonwealth.

The return of Charles II in 1660 had occasioned the release of some 700 Quakers from prison. Their initial relief, however, proved to be very temporary. Faced with the question of redefining the established Church, England's temporal authorities decided upon a policy of exclusion and persecution in a concerted effort to restore a single faith to the country after years of religious division. The passage of the Quaker Act<sup>24</sup> in 1662 led quickly to the imprisonment of 1,300 Quakers. Even ten years later, at the promulgation of the Declaration of Indulgence,<sup>25</sup> at least 500 Quakers were held in various gaols [jails].<sup>26</sup> The number of Quakers incarcerated seems large in relation to the total membership of the Society, reliably estimated as something less than 40,000.<sup>27</sup> Of those imprisoned during this time, about 450 died, while the value of confiscated Quaker property exceeded one million pounds.<sup>28</sup>

The Conventicles Act of 1664 extended provisions like those of the Quaker Act to all Nonconformists and increased the severity of the punishments administered.<sup>29</sup> Under the terms of this new Act, attendance at any religious meeting which did not follow the Anglican liturgy was punishable by imprisonment for three months on the first offense or the payment of a five-pound fine. Second offenders were gaoled for six months or fined ten pounds. A third and any subsequent offense meant banishment for seven

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23. William Penn, a relatively early convert and publicist, rejected the term "Quaker" in 1668, saying "by us (contemptibly called Quakers) against the World." William Penn, *The Sandy Foundation Shaken* 3 (London 1668). By 1669, however, he accepted the term well enough to use it without comment. See William Penn, *A Letter of Love to the Young-Convinced* 1 (London 1669).

24. 13 & 14 Car. 2, ch. 1, § 2 (1662). The Quaker Act provided for fines of five and 10 pounds for first and second offenses. Non-payment of the fines resulted in prison terms of three and six months respectively. Punishment for a third offense was banishment for an unspecified period.

25. Ogg, *supra* note 17, at 354-55. The Declaration suspended all laws discriminating against Nonconformists and Catholics.

26. G.N. Clark, *The Later Stuarts, 1660-1714*, at 21 (1934).

27. William Braithwaite, *The Beginnings of Quakerism* 512 (1912).

28. C.E. Whiting, *Studies in English Puritanism from the Restoration to the Revolution, 1660-1688*, at 218 (1931).

29. 14 Car. 2, ch. 1 (1664).

years or a hundred-pound fine. Moreover, two justices could convict and imprison those accused of first and second offenses, completely bypassing jury trials.

The Conventicles Act of 1664 expired in 1668,<sup>30</sup> but a new, revised version was passed in 1670.<sup>31</sup> The second Conventicles Act was not merely a continuation of the old; it was designed with specific circumstances in mind. The renewed Conventicles Act was likely to evoke very little confidence in its effectiveness among those called upon to carry out its provisions. Andrew Marvell called this Act "the quintessence of arbitrary malice,"<sup>32</sup> yet in place of fines up to £100 and extended terms of imprisonment or transportation imposed by the original Act for attending a conventicle, the 1670 Act prescribed fines of only five to ten shillings, respectively, for the first and any subsequent offenses.<sup>33</sup> Inconvenient though the Quakers' obstreperousness had always been, their continued resistance to authority and apparent growing popularity had given them an even more dangerous mien by 1669. George Fox's travels throughout England in 1668-69 had created a Quaker network of Church, Monthly, and Quarterly Meetings. The network's activities culminated in 1669 with the first Yearly Meeting of the Society of Friends in London.<sup>34</sup> Under this provocation, the constituted authorities cracked down.

On August 14, 1670, acting in what was becoming a very familiar role, constables ejected a group of Quakers, including Penn and Mead, from their meeting house in Gracechurch Street in London and took up posts around the house to ensure that the meeting remained outside.<sup>35</sup> At this point, as well as at various times during the previous month, the Quakers present could have been arrested under the terms of the second Conventicles Act and carted off to the nearest magistrate for summary conviction and punishment.<sup>36</sup> They undoubtedly would have been found guilty of

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30. Braithwaite, *supra* note 11, at 40.

31. 22 Car. 2, ch. 1 (1670).

32. The Complete Works of Andrew Marvell 316 (Alexander B. Grosart ed. 1875); Braithwaite, *supra* note 11, at 67.

33. The Act did create two new offenses: preaching at a conventicle, with 20- and 40-pound fines respectively for first and subsequent offenses, and harboring a conventicle, with similar fines. 22 Car. 2, ch. 1, §§ 3, 4 (1670).

34. Whiting, *supra* note 28, at 219-20.

35. *The People's Ancient and Just Liberties Asserted* (1670), in 6 State Trials, *supra* note 10, at 951, 963 [hereinafter cited as *Liberties*]. The reference to Gracechurch Street is confused somewhat by witnesses and jurors occasionally speaking of Gracious Street. *Id.* at 970; Starling, *supra* note 3, at 15.

36. The Act provided that attendance at a conventicle could be punished by one or more justices of the peace upon proof of "such offence either by confession of the party or oath of two witnesses." 22 Car. 2, ch. 1 (1670).



constituting a conventicle and fined, but such actions did little to suppress Quaker activities. Five or ten shilling fines were economically onerous but usually not disastrous.

When the Quakers moved out of their meeting house into Gracechurch Street, a large crowd gathered to hear William Penn speak. By speaking at the assemblage, William Penn became liable to prosecution for preaching to a conventicle, an offense which carried a twenty-pound fine. James Cook attempted to arrest Penn for this offense, but testified that he could not do so "for the crowd of people."<sup>37</sup> Many people had thronged into the street, increasing the crowd's size and composition far beyond the original Quakers at the meeting. Cook placed the number at three to four hundred; Richard Read, another witness, thought perhaps four or five hundred had gathered in the street.<sup>38</sup> One of the Quakers, John Rous, estimated the assembly at several thousand, composed chiefly of "rude people," so that "it was more like a tumult than a solid assembly."<sup>39</sup> Read, a watchman, also attempted to apprehend Penn but could not, "the people kicking my Watchmen and my self on the shins."<sup>40</sup> By preventing the officers from doing their duty and attacking them, the actions of the mob could have been interpreted as not merely rout, but as a much more serious offense, riot.<sup>41</sup> Though the officers probably could not have quelled the disturbance or made the arrests in the face of the mob, Mead

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37. Starling, *supra* note 3, at 15.

38. *Id.* at 15-16.

39. Braithwaite, *supra* note 11, at 69.

40. Starling, *supra* note 3, at 15.

41. "Routously" does not simply mean "disorderly," as claimed by the editors of *The Papers of William Penn*, *supra* note 5, at 173 n.2. The law distinguished three stages of unlawful behavior: unlawful assembly, rout, and riot. According to Dalton, when three or more persons assemble to perform an unlawful act, but do not perform it, they are liable to a charge of "unlawful assembly." If, after meeting, they do not disperse but move from their initial meeting place in a body, they may then be charged with "rout." As yet, however, they have not performed the unlawful act. Only if they execute the deed are they guilty of "riot." All three charges are contingent upon "intent precedent," thus the importance of the conspiracy charge against Penn and Mead. Michael Dalton, *The Countrey Justice* 218 (London 1630). When Penn, Mead, and "divers persons unknown" met, intending to go to Gracechurch Street and to violate the Conventicles Act, they constituted an unlawful assembly. By moving to Gracechurch Street with the intention of holding a service, they constituted a rout. Their actions became a riot when Penn preached and when the Quakers resisted the officers who attempted to halt the proceedings. If between three and 11 persons were involved, punishment would have been fine or imprisonment. Had 12 or more persons rioted, the offense could have become capital depending on the circumstances. 4 Blackstone, *supra* note 2, at 146-47. The Quakers themselves seemed to have been aware that charges of riot were being used successfully to permit more severe punishments. The Second Part of the People's Ancient and Just Liberties Asserted 26 (London 1670) [hereinafter cited as *Second Part*].

nonetheless approached Cook and told him that if the officers would but wait, he and Penn would surrender themselves when they finished speaking.<sup>42</sup> Penn and Mead accordingly surrendered, were arrested, and because Newgate Prison was too crowded, found themselves in the Black Dog Inn near Newgate awaiting trial.<sup>43</sup>

A fortnight later, on September 1, Penn and Mead appeared at the London Sessions of the Peace accompanied by fifteen other Quakers, many of whom had been arrested for a similar disturbance in Gracechurch Street the previous June.<sup>44</sup> Four accounts published in 1670 describe these proceedings. Thomas Rudyard, a Quaker attorney who witnessed the Penn/Mead trial as he awaited his own trial by the London Court, probably wrote the first account,<sup>45</sup> *The People's Ancient and Just Liberties Asserted*, though it has been attributed almost invariably to William Penn himself.<sup>46</sup> Rudyard's account is no less partisan than one which Penn might have written; it vehemently attacks the government and the judiciary. *State Trials* adopted this initial Quaker account verbatim, complete with commentary and an *Appendix by way of Defen[s]e*, making it by far the best known version of the trial.<sup>47</sup>

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42. *Liberties*, *supra* note 35, at 957.

43. The Papers of William Penn, *supra* note 5, at 173. Simple overcrowding at Newgate rather than judicial viciousness probably explains Penn's sojourn at the Black Dog. Evans, *supra* note 13, at 458.

44. CLRO, *supra* note 3, at 43-45, 47.

45. The sequence of publications of the four works is recreated in the textual account. See *infra* text accompanying notes 44-49. All of the accounts carry publication dates of 1670; Penn actually wrote *Truth Rescued* in February 1671 (New Style).

46. Even Donald Wing's Short-Title Catalogue of Books Printed in England, Scotland, Ireland, Wales, and British America and of English Books Printed in Other Countries, 1641-1700 (2d ed. 1972) credits Penn with having written the original report of the trial. Mary Maples Dunn notes that Rudyard may have contributed to the piece, while the editors of The Papers of William Penn simply refer to "several other Quaker leaders" as authors of the account. Dunn, *supra* note 14, at 18 n.18; The Papers of William Penn, *supra* note 5, at 171. The *State Trials* version says only "Written By Themselves," and Sir Samuel Starling assumed that Penn wrote it. *Liberties*, *supra* note 35, at 951; Starling, *supra* note 3, at 1. Penn indirectly denied authorship of *The People's Ancient and Just Liberties Asserted*, in *Truth Rescued*, and the piece does not conform to the pattern of his other work. Penn signed virtually every piece he published and almost always wrote in the first person. See William Penn, *Truth Rescued from Imposture, or a Brief Reply to a Mere Rhapsody of Lies, Folly, and Slander; But a Pretended Answer, to the Tryal of W. Penn and W. Mead, etc.* 39 (London 1671). *The People's Ancient and Just Liberties Asserted* was neither signed nor written in the first person. See *Liberties*, *supra* note 35, at 951. Only Wildes states categorically that Rudyard had a hand in writing the piece. Harry Emerson Wildes, William Penn 68 (1974).

47. First published in 1719 in four folio volumes, by 1816 *State Trials* occupied 21 octavo volumes and covered trials from the reign of Henry II to George III. These cases focused on crimes such as treason, heresy, and murder, but also at

London's Lord Mayor, Sir Samuel Starling, wrote the second report of the trial, entitled *An Answer to the Seditious and Scandalous Pamphlet Entitled, The Trial of W. Penn and W. Mead, at the Sessions held at the Old Baily, London*.<sup>48</sup> Having sat on the bench during the trial, Starling cannot be accused of impartiality. He defended the government's position, defended the actions of the judiciary, and engaged in an *ad hominem* attack on William Penn's father, who was in disgrace over his handling of the navy during the Dutch war. Nevertheless, Starling's arguments were buttressed with references to previous legal decisions and statutory law rather than mere rhetoric.

Starling's account prompted William Penn to write a response (with an appendix by Rudyard) called *Truth Rescued from Imposture, or A Brief Reply to a Mere Rhapsody of Lies, Folly, and Slander; But a Pretended Answer, to the Tryal of W. Penn and W. Mead, etc.*<sup>49</sup> This third account energetically defended the elder William Penn<sup>50</sup> against Starling's attack in *An Answer* and contradicted many of Starling's claims about the trial itself. Yet another account appeared soon after in a treatise concerned primarily with the trial of those Quakers held *after* the Penn/Mead jury had been sent off to prison. Despite its extreme bias and its focus on the subsequent trial that was heard by a new jury, much to the dismay of the Quakers on trial, the fourth version, entitled *The Second Part of the Peoples Ancient and Just Liberties Asserted*, provides extremely valuable information about the Penn/Mead trial as well.<sup>51</sup> Fortunately, all of these accounts differ less in factual detail than in their respective interpretations of the events in question. By comparing the four accounts with the surviving primary

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times addressed other issues, such as libel. See State Trials, *supra* note 10. T.B. Howell, who collected the material in the 1816 edition, included not only official reports of the various trials but also partisan pamphlets containing accounts of the trials, such as Thomas Rudyard's version of the Penn/Mead trial. See *Liberties*, *supra* note 35, at 951.

48. Starling, *supra* note 3.

49. Penn, *supra* note 46.

50. Penn's father, Sir William Penn, had achieved considerable eminence as a sailor under both the Commonwealth and the restored monarchy. In 1655 he was general and commander-in-chief of the fleet in the West Indian campaign against Spain. He became captain of the fleet under the Duke of York after the Restoration. The elder Penn was relieved of his command in 1665 as a result of England's losses in the wars with the Dutch. Though officially held to be guiltless when relieved by the Duke of York, Penn nevertheless suffered much public opprobrium for his conduct of the war. At his death in 1670, his reputation had not been restored. See generally Fantel, *supra* note 5, at 16-25 (brief biography of Sir William Penn).

51. Second Part, *supra* note 41. Although published anonymously, this account has been attributed to Thomas Rudyard. Alfred Braithwaite, Thomas Rudyard: Early Friends' "Oracle of Law" 5 n.3 (1956).

evidence, a relatively clear narrative can be constructed, although uncertainties regarding some of the events cannot be resolved completely.

The second Conventicles Act prompted the government's actions against the Quakers in Gracechurch Street, and a trial under the terms of the Act should have led easily to a conviction of both Penn and Mead.<sup>52</sup> The two Quakers were obviously guilty of far worse conduct in the eyes of the bench, however, so the Recorder, Sir John Howell,<sup>53</sup> chose to indict both men on what seems to have been charges of "tumultuous assembly," conspiracy to incite this unlawful behavior,<sup>54</sup> and possibly even riot,<sup>55</sup> all common law crimes unrelated to Parliament's repressive legislation. The indictment against Penn and Mead alleged:

[Penn and Mead] with force and arms . . . unlawfully and tumultuously did assemble and congregate themselves together, . . . [and that] Penn, by agreement between him and William Mead before made, . . . did take upon himself to preach and speak, . . . by reason whereof a great concourse and tumult of people . . . a long 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.<sup>56</sup>

The stock phrases in the indictment such as "with force and

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52. Penn and Mead still could have insisted on a jury trial under the terms of the Conventicles Act because their fines, if convicted, would have exceeded 10 shillings. As noted, proof consisting of either a confession or oath of two witnesses was sufficient for a justice of the peace to impose a five-shilling fine for the first offense or to impose a 10-shilling fine for subsequent offenses. 22 Car. 2, ch. 1, § 1 (1670).

53. The Recorder of London was the permanent judge of the Old Bailey. He was assisted in the conduct of the Sessions by the Lord Mayor and at least one other Justice of the Peace. For a fuller description of the nature of the London Sessions, see Langbein, *Shaping the Eighteenth-Century Criminal Trial*, *supra* note 15, at 8. The London Sessions functioned more or less like any other quarter sessions in England.

54. As Thomas Green has pointed out, except for conspiracy to accuse falsely of a crime, until 1641, conspiracy had been the purview of the prerogative courts. Green, *supra* note 7, at 25 n.93. Those courts, like Star Chamber and Chancery, operated outside the boundaries of the common law and derived their authority directly from the royal prerogative. Baker, *supra* note 9, at 51. In the Penn/Mead trial, conspiracy was mentioned when the Recorder stated, "[Y]ou [both] were indicted for a conspiracy, and one being found Not Guilty, and not the other, it could not be a verdict." *Liberties*, *supra* note 35, at 964. Its appearance at common law in this instance, however, seems to have been handled without any real difficulty.

55. The Quaker John Rous believed that Penn and Mead had been "committed for riot." Braithwaite, *supra* note 27, at 69. Whether or not this was actually an indictment for riot is not completely clear. See *supra* note 41; Green, *supra* note 7, at 222.

56. *Liberties*, *supra* note 35, at 955.

arms," and "to the great terror and disturbance," which were used in all such indictments, often have been misunderstood by historians; they have tended to believe Mead's argument that since Quakers were well known for their pacifism, such allegations were ludicrous.<sup>57</sup> On the other hand, some reporters of the trial have labored under the mistaken impression that Penn and Mead were simply tried under the provisions of the Conventicles Act, resulting in a number of virulent attacks on the government's policies.<sup>58</sup>

No doubt Howell's decision to use this form of indictment rather than the Conventicles Act was based in part on the ineffectiveness of the first Act and the relative leniency of the second Act. Riot charges, however, had the additional attraction of having served the bench well before the prosecution of Penn and Mead. The bench had used riot charges successfully against Quakers in the preceding June and July.<sup>59</sup> Howell, no doubt, had no reason to assume that the reduced penalties of the 1670 Act would be any more effective against Quakers than the notoriously unsuccessful

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57. Mead said, "[T]ime was when I had freedom to use a carnal weapon, . . . but now I fear the living God, and dare not make use thereof nor hurt any man." *Liber-ties*, *supra* note 35, at 960.

58. An astonishing number of errors have been made along the way by historians who have looked at these cases to prove a moral. The nature of the charges against Penn and Mead is often wrongly reported, and, as is explained in the text, the charge is confusing. The standard biography of Penn claims that they were prosecuted under the Conventicles Act. Dunn, *supra* note 14, at 13. Green's recent study argues at one point in a very similar vein, but immediately reverses course and makes clear the nature of the charges. Green, *supra* note 7, at 222. The exact category of the charge is not clear. When King's Bench reviewed the granting of habeas corpus by the Common Pleas, the judge reporting the case (T. Jones) wrote that the jury in the Penn/Mead case had been hearing an "indictment against several persons for conventicling against the form of the statute lately made." *Bushell's Case*, Jones, T. 13, 13, 84 Eng. Rep. 1123, 1123, (K.B. 1670). Most other historians have overlooked the conspiracy aspect of the charge (signified by the clause "before met") even though Penn discoursed upon the conspiracy charge during the trial. The charge most often reported is merely one of "unlawful assembly." Anthony Babington, *The Rule of Law in Britain from the Roman Occupation to the Present Day* 164 (1978); Patrick Devlin, *Trial by Jury* 69 (1956); Forsyth, *supra* note 7, at 186; 2 Luke Pike, *A History of Crime in England* 205 (1876); Theodore Plucknett, *A Concise History of the Common Law* 134 n.2 (5th ed. 1956); Smith, *supra* note 7, at 359; James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 166 (1898). See also Kenyon, *supra* note 1, at 428 (Penn and Mead convicted for holding an unlawful conventicle). All four primary accounts of the trial state clearly that Thomas Veere, not Bushell, was the foreman, yet historians have persisted in identifying Bushell as the foreman of the jury. Babington, *supra*, at 164; Dunn, *supra* note 14, at 17 n.24; Fantel, *supra* note 5, at 120; *A Guide to English Juries* 37 (London 1682) (published anonymously but authorship attributed to Baron John Somers); 1 James Stephen, *A History of the Criminal Law of England* 374 (1883).

59. For allegations of riot charges being used against Quakers before the Penn/Mead trial, see Second Part, *supra* note 41, at 11, 26 and Evans, *supra* note 12, at 452.

original Act. The Act was intended to replace ineffectual legislation with more effective punishment, but rank-and-file Quakers, if not all Quakers, enjoyed a much better position legally under the second Act.

Penn, relatively ignorant of the law and possibly confused by the length of the indictment, adopted the standard Quaker tactic of demanding a copy of it at his first appearance in court. Howell explained that only after Penn entered a plea could he have a copy.<sup>60</sup> Accordingly, Penn entered a plea of not guilty, as did Mead. Court was then adjourned until the afternoon, when the press of business forced a further adjournment until the third of September.<sup>61</sup> Nothing in this first meeting between Penn, Mead, and the bench foreshadowed the struggle to come.

On September 3, a regular London Session of Oyer and Terminer began, and as on most occasions, a small crowd of defendants (Penn, Mead, and nineteen others) were brought in to be charged with a variety of misdemeanors.<sup>62</sup> The Sessions Court was comprised as usual of Lord Mayor Sir Samuel Starling, Sir John Robinson (Lieutenant of the Tower), Sir Thomas Howell (the Recorder of the City and thus principal justice for the Sessions), and four Aldermen.<sup>63</sup> Court opened that day on a note of conflict com-

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60. *Liberties*, *supra* note 35, at 955; Starling, *supra* note 3, at 12. According to the Quakers, the defendant was usually allowed a copy of the indictment if the case was put forward to the next session, but was not allowed a copy if the trial was beginning, which it was in this instance. Second Part, *supra* note 41, at 12. Quakers had been demanding copies of indictments for some time. See *The Examination and Trial of Margaret Fell and George Fox, (At the several Assizes held at Lancaster, . . . 1663-4*, in 7 *The Harleian Miscellany* 296 (London 1810) [hereinafter cited as *Fell and Fox*].

61. *Liberties*, *supra* note 35, at 955-56.

62. For a discussion of the functioning of the Quarter Sessions, including the London Sessions, see John Langbein, *Prosecuting Crime in the Renaissance* 66-75 (1974).

63. *Liberties*, *supra* note 35, at 953-54. Sheriffs Sir John Smith and Sir James Edwards also attended, as well as that "old and inveterate enemy of Friends," Sir Richard Browne. *Evans*, *supra* note 12, at 454. Browne is something of a mystery. Though not an alderman, as claimed by most accounts, he does seem to have been a justice of the peace. See Starling, *supra* note 3, at 17. Browne appeared, according to Quakers, "to second the Recorder," since he "pretend[ed] himself to be something learned in the Law." Second Part, *supra* note 41, at 13. Although Richard and Mary Maples Dunn described Browne as a sheriff, Rudyard makes it clear he was not. The Papers of William Penn, *supra* note 5, at 177 n.1; *Liberties*, *supra* note 35, at 954. Mead attacked Browne during the trial, alleging that Browne was not a justice and should not have been sitting on the bench. Starling, *supra* note 3, at 17. Browne seems to have been a justice of the peace but not for London. Penn, *supra* note 46, at 44. Browne was not an alderman, though his father, who had died just before the trial, had been. 2 Alfred Beaven, *The Aldermen of the City of London* 69 (1908). The Court of Magistrates vested 100 pounds as a gift to Browne for his "valuable services" at the session, an act which lends support to Mead's condemnation of his participation in the trial. Evans's attack on Browne may, how-

mon to trials involving Quakers. Penn and Mead approached the bar with their hats on, in accordance with the well-known Quaker habit of rejecting what they called "Cap Reverence" or "Hat Honour" and symbolizing their rejection of earthly authority.<sup>64</sup> A bailiff at some point took the hats from the Quakers' heads so as to uncover them in the presence of the bench.

At this point, accounts of the trial differ somewhat, with Penn accusing virtually everyone involved of malevolence and Starling asserting, a bit too ingenuously, the innocence of the court. None deny that Starling ordered the hats returned to their owners or that the hats were put back on the prisoners' heads. The question is *where* the removal and replacement of the hats took place. *The Peoples Ancient and Just Liberties* admitted freely enough the Quaker intention not to doff their hats, but argued that the removal of the hats *outside* the bar and replacement *within* the bar absolved the prisoners from responsibility for this particular episode.<sup>65</sup> Starling insisted that the hats were replaced *outside* the bar, thus giving the Quakers the opportunity to remove them before entering the court.<sup>66</sup> In either case, their refusal to remove their hats constituted contempt. The bench responded as it had so often before with contempt fines of forty marks each for Penn and Mead.<sup>67</sup> The outcome of the trial now could not alter the remand of Penn and Mead to gaol upon the trial's conclusion—unless they were willing to pay the contempt fine over the hats, which they were not.<sup>68</sup>

Penn and Mead still seemed unaware of the nature of the charges against them as the trial began. As Quakers, they might well have anticipated prosecution under the Conventicles Act. Penn's discourse during the trial upon the right to congregate for the purpose of worship suggests his belief that the trial hinged on

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ever, have been directed mistakenly at Browne's father. Evans, *supra* note 12, at 458.

64. Second Part, *supra* note 41, at 13. Hats were taken off by others in some trials, but not put back. See *Fell and Fox*, *supra* note 60, at 300. Starling may have been prompted to say in response to the Quaker refusal to remove their hats, "Pox on them, knock them all down." Second Part, *supra* note 41, at 13.

65. *Liberties*, *supra* note 35, at 956.

66. Starling, *supra* note 3, at 13.

67. *Liberties*, *supra* note 35, at 956; Starling, *supra* note 3, at 14.

68. The bench's right to *fine* Penn and Mead is clear. Judges could fine summarily by statute for contempt if committed in view of judges sitting in open court and for misdemeanor by jurors. Baker, *supra* note 9, at 419; Starling, *supra* note 3, at 13-14. But see Second Part, *supra* note 41, at 12-14 (author argued that Recorder "illegally fined" prisoners for their refusal to remove their hats). The fines for the Quakers accompanying Penn and Mead ranged from 20 marks (one mark equivalent to 13 shillings fourpence) to 20 nobles (one noble equivalent to six shillings eightpence). *Id.* at 14.

the relationship between sedition and religion. Sir Richard Browne enlightened both Penn and Mead, explaining that Penn was not there for "worshipping God, but for breaking the law."<sup>69</sup> Penn then demanded to know the basis for the charge. Howell answered that the indictment fell under common law, not statutory law, as Penn assumed. Thus stripped of the overtly religious character of his defense, Penn fell back on the Quaker practice of questioning the meaning of "common law," arguing, "[I]f it be common, it should not be so hard to produce."<sup>70</sup> When Howell answered that "[l]ex non scripta" [unwritten law] required "30 or 40 years to know," Penn accused him of evasion and argued that the Magna Carta contained the common law.<sup>71</sup>

Penn, "the great opinionist,"<sup>72</sup> and a "man of many words and much vanity in his discourse"<sup>73</sup> continued his aggressive questioning, finally prompting Howell to say, "If I should suffer you to ask questions till tomorrow morning, you would be never the wiser."<sup>74</sup> Defendants were expected to speak, even if rudely, to the point. In this instance, however, Penn's discourse did not address the charges against him. Howell and Starling, frustrated by Penn's apparent determination not to address the matter at hand and equally upset by the favorable hearing Penn apparently obtained from some members of the jury, committed Penn to the bail-dock.<sup>75</sup>

69. *Liberties*, *supra* note 35, at 958.

70. *Id.*

71. *Id.* at 959. Penn's claim of legal expertise rested on a very sandy foundation; he had been at Lincoln's Inn for only a short period in 1665 and could boast only the most rudimentary legal training. Penn missed all but eight days of Hilary Term, all but two weeks of Easter Term, and was deprived of Trinity Term by the outbreak of the Plague. Wildes, *supra* note 46, at 34-35. His opponent, on the other hand, was rather well-trained. Starling, after three years at Cambridge, spent four years at Grey's Inn. His admission to the bar at that point proved impossible for political reasons, but he was called to the bar soon after the Restoration. Starling, *supra* note 3, at 5. Augmenting Penn's minimal formal training at common law was "an effective program of legal education within [the Quakers'] ranks." Green, *supra* note 7, at 203. The effectiveness of this program is demonstrated by both Penn and Mead as well as many other Quakers tried during this period.

72. Silas Taylor to Williamson, 26 October, 1671, in 11 Calendar of State Papers, Domestic 541 (Kraus Reprint 1968) [hereinafter cited as Calendar].

73. A Supplement to Burnet's History of My Own Time 227 (H.C. Foxcroft ed. 1902).

74. *Liberties*, *supra* note 35, at 959.

75. *Id.* at 958-59. For a discussion of the bail-dock, see *infra* notes 80-82 and accompanying text. On a number of other occasions, judges evinced remarkable patience in dealing with Quaker intransigence. For example, during the trial of George Fox at the Lancaster Assizes in 1663, the judge asked Fox seven times to take the Oath of Allegiance before despairing of compliance. *Fell and Fox*, *supra* note 60, at 300-01. This patience seems to have stemmed from a general expectation that the magistracy would perform its duties acceptably well. Certainly many jus-



Mead, left alone before the bench, acquitted himself nicely as Penn's partner in antagonistic behavior. He insisted, for example, on defining riot under common law for the benefit of the court. Mead, citing Coke, stated, "A riot is when three or more, are met together to beat a man, or to enter forcibly into another man's land, to cut down his grass, his wood or break down his pales."<sup>76</sup> Recorder Howell, pulling off his hat in mock respect, amended Mead's definition with the crucial phrase from Coke: "Yes, and to do any other Unlawful Act," saying further, "I thank you, Mr. Mead, That you will tell me what the Law is."<sup>77</sup> His design frustrated, Mead could only retort, "Thou mayest put on thy hat, I have never a fee for thee now."<sup>78</sup> Mead also strenuously objected to the standard phrase "force and arms" in the indictment, claiming that the Quaker doctrines of passivity and nonviolence to which he subscribed demonstrated the invalidity of the indictment.

The patience of these "overbearing magistrates," never great when it came to Quakers, wore exceedingly thin as they witnessed Mead's repetition of Penn's performance. Finally, Mead so insulted the bench that Starling responded that Mead deserved to have his "Tongue cut out for affronting the Court, as well as the Prisoner had his Hand cut off that threw a Stone at the Court."<sup>79</sup> He also ordered Mead placed with Penn in the bail-dock while Howell delivered the charge to the jury.

Penn and Mead stressed the Court's use of the bail-dock to portray their martyrdom, and historians have echoed the indignation expressed in the *State Trials*' version when recounting the episode. The bail-dock's most important characteristic was its location inside the courtroom. Penn and Mead strenuously objected during the trial to their incarceration in the bail-dock because they were entitled to be present at the proceedings. The

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tices fell prey to impatience and genuine alarm from the threat to the established order of the Quakers who rejected all worldly authority. The number of trials of Quakers, however, in which justices made at least passable efforts to deal reasonably with religious zealots who refused to be reasonable themselves is remarkable.

76. *Liberties*, *supra* note 35, at 960; Starling, *supra* note 3, at 20.

77. Starling, *supra* note 3, at 20.

78. *Liberties*, *supra* note 35, at 960; Starling, *supra* note 3, at 20.

79. Starling, *supra* note 3, at 20. The incident which Starling referred to took place at the Salisbury summer assizes in 1631, before Chief Justice Richardson: "[I] Ject un Brickbat a le dit Justice que narrowly mist, & pur ceo immediately fuit Indictment drawn per Noy envers le prisoner, & son dexter manus ampute & fix al Gibbet sur que mesme immediatement hange in presence de Court." [He threw a brickbat at the said Justice [Noy], which narrowly missed, and for this an indictment was immediately drawn by Noy against the prisoner, and his right hand amputated and fixed on the gibbet and the same immediately hung in the presence of the court.] R.J. Walker & M.G. Walker, *The English Legal System* 195 (3rd ed. 1972).

confrontation between the accused and the community's representatives, the jury, did constitute an important part of the trial. Because the jury was expected to observe the demeanor of the accused, the defendant's presence was indispensable in reaching a verdict. Starling insisted, however, that to put a man in the bail-dock for misbehavior did *not* remove him from the proceedings. The bail-dock was not, as one historian has claimed, "a portable cage into which Penn was to be locked like a giant bird" and "carried to a distant corner where he and his cage were dumped behind a high partition."<sup>80</sup> Instead, a prisoner in the bail-dock remained in the courtroom. Even the Quakers admitted that Penn could both hear the proceedings and be heard by the bench and the jury while he and Mead were confined;<sup>81</sup> indeed, Penn made the second of his oft-repeated claims that the jury was the sole judge of his case from the bail-dock after Howell's charge to the jury.<sup>82</sup> Besides, Penn had no "right" to be present for the entire process despite his claims to such a right.<sup>83</sup>

With Penn and Mead in the bail-dock, the Recorder delivered his summation of the case, explaining to the jurors that they had heard proof that Penn preached before a tumultuous company and that Mead "did allow of it." Howell's words fell short of Baron Martin's famous charge—"Gentlemen of the jury, the prisoner stole the boots. Consider your verdict"<sup>84</sup>—but not by far. Based upon the testimony heard in court, the bench expected a verdict of guilty, but seemed sufficiently uneasy about the jurors to warn them that they were "upon the matter of fact, which [they were] to keep to, and observe, as what hath been fully sworn at [their] peril."<sup>85</sup> The jury retired and Penn and Mead were placed in the

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80. Fantel, *supra* note 5, at 118-19. Though some distance from the bench, the front of the dock was even with the bar and prisoners were often kept there during trials. Starling, *supra* note 3, at 21; see also *The Papers of William Penn, supra* note 5, at 177 n.11 (bail-dock was a cage-like structure in the courtroom where prisoners were placed on the day of trial before their cases were heard).

81. *Liberties, supra* note 35, at 961.

82. *Id.*

83. See generally Cynthia Herrup, *Law and Morality in Seventeenth-Century England*, 106 *Past & Present* 102 (1985). For the text of Penn's argument of his right to be present at the proceedings, see *Liberties, supra* note 35, at 961. Stephen explains that prisoners had no right to hear the proceedings and also points out that the specific right to hear witnesses against oneself was not granted until the reign of Victoria. Stephen, *supra* note 58, at 221. Jurors, however, apparently questioned defendants and judges routinely asked the accused to reply to the charges. Langbein, *Before the Lawyers, supra* note 15, at 283, 288.

84. *Notes*, 77 *Law Q. Rev.* 457, 475 (1961). The reference is probably to Baron Samuel Martin of the Exchequer (1850).

85. *Liberties, supra* note 35, at 961.

"stinking hole"<sup>86</sup> to await the return of the jury.

Seventeenth-century juries seldom undertook lengthy deliberations in reaching verdicts, even in trials involving Quakers.<sup>87</sup> The jury impanelled on August 29 for the Sessions of the Peace disposed of twelve cases in a day. The jury hearing the Penn/Mead case already had dispatched nineteen other cases.<sup>88</sup> In the Penn/Mead trial, however, following an unusually long delay of one and one-half hours, only a portion of the jury returned agreed. Eight jurors reentered the courtroom; four remained in the jury room. After summoning these four jurors, the judges berated Edward Bushell and the other three recalcitrants for their behavior,<sup>89</sup> though Howell stopped short of the kind of dire threats Chief Justice Hyde used in 1665 to coerce a verdict.<sup>90</sup> Bushell led the opposition, though he was not, as many have assumed, the foreman of the jury.<sup>91</sup> Neither were he and his compatriots Quakers since the Quaker proscription against oath-taking disqualified them from sitting on juries. While we cannot be sure of their motivation, Bushell and the three other jurors were quite possibly Dissenters,<sup>92</sup> and at the least seem to have been sympathetic with

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86. *Id.* Contrary to the most recent explanation, the "hole" seems not to have been a cell in Newgate Prison. The Papers of William Penn, *supra* note 5, at 177 n.12. Logically, it would have made little sense to return the prisoners to the prison adjoining the court building when the jury was expected to return after a short deliberation. Aside from the unnecessary delay, a mittimus was required to commit and release prisoners each time they were so moved. From the evidence supplied by Penn himself, it seems much more likely that the "hole" was merely "a special place of detention on the premises of Old Bailey." Penn, *supra* note 43, at 39; Fantel, *supra* note 5, at 120.

87. Cases involving Quakers had caused delays in the past, but not on this scale. One trial in 1661 resulted in a jury being sent back for a different verdict, upon which "they stayed long, insomuch, that the Court adjourned until the third hour." Returning a second time, the jury required more testimony before bringing in a guilty verdict. John Chandler, A True Relation of the Unjust Proceedings, Verdict (So Called) & Sentence of the Court of Sessions, at Margarets Hill in Southwark, Against Divers of the Lord's People called Quakers 9-11 (London 1662) (available in Quaker Collection, Haverford College).

88. CLRO, *supra* note 3, at 1. Baker states that the practice of one jury hearing multiple trials ended only in the early 19th century. Baker, *supra* note 9, at 417.

89. *Liberties*, *supra* note 35, at 962.

90. Prior to the Penn/Mead trial, the most famous case of a judge browbeating a jury was the *Trial of Benjamin Keach* in 1665. After a jury had returned a verdict of "guilty in part" in a trial for libel, Hyde insisted that they find the accused simply guilty: "You must go out again, and agree; and as for you, that say you cannot in conscience find him guilty, if you say so again, . . . I shall take an order with you." *Trial of Benjamin Keach* (1665), 6 State Trials, *supra* note 10, at 702, 709 [hereinafter cited as *Keach*]. With this encouragement, the jury dutifully returned a verdict of "Guilty of the Indictment." *Id.*

91. Accounts of the trial identify Thomas Veere as the foreman of the jury. See *supra* note 58.

92. Those Protestants who refused to follow the liturgy of the Anglican Church were known as Nonconformists or Dissenters.

those who refused to accept the newly imposed dictates of the Anglican liturgy. Howell accused Bushell directly of being "the Cause of this Disturbance" by "manifestly shew[ing] your self an Abettor of Faction."<sup>93</sup> Several of the justices, including Robinson and Bludworth, had been apprehensive even before the jury retired that Bushell might cause trouble; he confirmed their worst suspicions.<sup>94</sup>

After being ordered by Howell to retire again and reach a verdict, the jury deliberated for "some considerable time" and returned agreed.<sup>95</sup> Upon being asked, "Is William Penn Guilty of the matter whereof he stands indicted in matter and form, or Not Guilty?" the jury foreman, Thomas Veere, replied, "Guilty of speaking in Gracechurch-street."<sup>96</sup> Of William Mead, the jurors said nothing, or for that matter, did they seem to have been asked anything. While this answer from the jury may have adhered to Sir Thomas Smith's dictum that the jury "returne and in so fewe wordes as may be they give their determination: fewe I call vi or vii or viii wordes at the most,"<sup>97</sup> it did not speak to the charges against Penn, much less address all the issues raised in the indictment. A less than happy group of magistrates thereupon "villified" the jurors "with most opprobrious language."<sup>98</sup> Howell advised the jury, "You have not given in your Verdict, and you had as good say nothing."<sup>99</sup> From Howell's (or Starling's) perspective, the jury failed to address the indictment in "manner and form" as their words did not constitute a verdict.<sup>100</sup> After pointed question-

93. Starling, *supra* note 3, at 22. See *supra* text accompanying note 29; see also Fantel, *supra* note 5, at 120 (Starling berated Bushell and threatened to have him branded); Wildes, *supra* note 46, at 67 (Howell called Bushell a "scheming, canting fellow"). Green notes that the Penn/Mead jury was only one in a "widespread campaign to render an Act of Parliament (the Conventicles Act) ineffective." Green, *supra* note 7, at 215-16. See also *id.* at 203 (Quaker tracts urged prospective jurors to require proof of sedition when applying Conventicles Act).

94. *Liberties*, *supra* note 35, at 961-62; Starling, *supra* note 3, at 14, 22. Bushell may have been familiar to the judges because of previous service on juries. Langbein notes that "most of the dozen jurors who sat at any one sessions were veterans of other sessions." Langbein, *Before the Lawyers*, *supra* note 15, at 276.

95. This same phrase, "some considerable time," was used in both *Liberties*, *supra* note 35, at 962, and Starling, *supra* note 3, at 22.

96. *Liberties*, *supra* note 35, at 962; Starling, *supra* note 3, at 23. See also Green, *supra* note 7, at 231 n.130 ("In many Quaker cases, . . . the jury merely stated the facts it had found, omitting any finding whatsoever on what it knew to be the crucial facts."). This phrase is not a partial verdict as described by Langbein, or (as later discussion between the Recorder and clerk proves) is it a special verdict. Langbein, *Shaping the Eighteenth-Century Criminal Trial*, *supra* note 15, at 52-53; Langbein, *Before the Lawyers*, *supra* note 15, at 291-95.

97. Thomas Smith, *De Republica Anglorum* 80 (London 1583).

98. *Liberties*, *supra* note 35, at 962.

99. *Id.*

100. "But . . . if the proof and words in the Indictment, etc. differ either in the

ing from Starling, six or seven of the jurors agreed to include the words "unlawful assembly" in their verdict, but the four obstructionists refused to allow any verdict other than the one already returned. Bushell spoke to Penn directly from the jury box and promised never to permit any other verdict.<sup>101</sup> Without a "verdict in law," Howell and Starling had little alternative but to continue the jury's deliberations despite the desire of almost all concerned to "make an end to this troublesome business."<sup>102</sup> Finally, the jury retired to try and reach an acceptable verdict, this time equipped with pen, ink, and paper.

After half an hour, the jury returned with its verdict written down. They found William Penn to be "Guilty of speaking or preaching to an assembly, met together in Gracechurch-street" and Mead "Not Guilty of the said Indictment."<sup>103</sup> Weary of the case, some members of the Court were in favor of abandoning legal niceties and accepting this verdict as finding Penn guilty of riot and Mead innocent. The verdict, however, remained unacceptable to the Mayor and the Recorder. Penn and Mead had been indicted together. Therefore, the guilt of both men on the charges against them seemed inextricably linked. The alleged conspiracy of Penn and Mead with the objective of provoking the mob's behavior constituted proof of unlawful assembly, and the bench objected to this effort to separate the charges. The jury's verdict addressed these issues imperfectly, at least in the opinion of Starling and Howell, the two men with the longest legal training and experience;

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*matter, or the form, or manner inconsiderably, . . . such is indeed no difference in Law . . . . But if the Allegation and Proof materially differ, otherwise."* A Guide to English Jurors, *supra* note 58, at 100. Even a century later, a bench of considerably greater eminence and power refused to accept a similarly evasive verdict; the jury in *Rex v. Shipley* (1784) returned a verdict of "[g]uilty of publishing *only*," which Justice Buller refused to accept, saying "[i]f you say guilty of publishing *only*, there must be another trial, because the verdict will be imperfect." *Shipley*, *supra* note 10, at 954 (emphasis in original). In *Rex v. Shipley*, Justice Buller managed to get an acceptable verdict, in his opinion, by refusing the proffered verdict. The jury was coerced into agreeing to the verdict, "Guilty of publishing, but whether a libel or not [the jury] do not find." *Id.* at 955. After the trial, however, the full bench agreed that the formal words left out of the verdict tying it to the indictment could be added since this was a mere technical slip on the jury's part. The word *only*, however, had to remain in the verdict. Judges were not to be allowed to "infer" meaning, but had to take verdicts exactly as given. *Shipley*, *supra* note 10, at 950-54. The *Woodfall* decision restricted libel to a legal question only, thus removing it from purview of the jury. For reports of the case, see *Case of Henry Sampson Woodfall* (1770), in 20 State Trials, *supra* note 10, at 895 [hereinafter cited as *Woodfall*]; *Rex v. Woodfall*, 5 Burr. 2661, 97 Eng. Rep. 398 (K.B. 1770). Statutory action ("Fox's Libel Act") was required to restore the power of returning a general verdict to the jury. 32 Geo. 3, ch. 60 (1762).

101. *Liberties*, *supra* note 35, at 964.

102. Starling, *supra* note 3, at 23.

103. *Liberties*, *supra* note 35, at 963.

neither would accept this altered verdict. Howell warned the jurors that the law required they be locked up overnight "without meat, drink, fire, and tobacco" if they did not reach a verdict before the court was forced to adjourn.<sup>104</sup> Penn objected vehemently to the austere conditions under which *every* jury deliberated; yet these conditions remained a standard part of trial procedure until 1870. With no existing legal mechanism for dealing with a "hung" jury, rare occasions like this one required such extreme measures to insure the return of a verdict.<sup>105</sup>

The Quaker author of *The Second Part of the People's Ancient and Just Liberties* found no reason to complain about this treatment of the jury other than to argue the original verdict should have been sufficient.<sup>106</sup> Most historians have taken Penn at his word, however, and castigated the bench for behavior both completely unremarkable and completely in accordance with established procedure for another two hundred years.<sup>107</sup> According to Starling, some of the jury complained to the bench that Bushell, Hammond, and the two other Quaker sympathizers had planned ahead for just such an eventuality, having brought "strong-water

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104. *Liberties*, *supra* note 35, at 963; Starling, *supra* note 3, at 24. For an appraisal of how seriously misconduct of this sort was regarded, see Devlin, *supra* note 58, at 50; Penn, *supra* note 46, at 49. Thayer mentions another case of a three-day jury deliberation. Thayer, *supra* note 58, at 123 n.2.

105. Exactly two hundred years *after* the Penn/Mead trial, in 1870, juries were allowed sustenance and heat, although only at their own expense. 33 & 34 Vict., ch. 77, § 23 (1870). They had at times been allowed candles prior to 1870. Devlin, *supra* note 58, at 50. A hung jury was not possible until Winsor v. Regina [1866] L.R.1 Q.B. 289. Instances of keeping a jury overnight were extremely rare but had happened. For example, in an Assize trial for murder under Lord Chief Justice Anderson, after keeping the jury overnight because one man refused to agree with the other 11 on a verdict of guilty, the defendant was acquitted. A Guide to English Jurors, *supra* note 58, at 144-45. Burn, writing in the 18th century, still advised the justices that if a jury refused to reach a verdict before the end of the Quarter Session, the jurors should be carried along with the criminals in carts when the Session was over, and should continue to be subjected to this indignity and inconvenience until they brought in their verdict properly. 2 Richard Burn, *The Justice of the Peace, and Parish Officer* 499 (11th ed. London 1769). Hale, citing Coke, also ruled out the possibility of a hung jury, though it might be discharged without reaching a verdict. 2 Matthew Hale, *The History of the Pleas of the Crown* 294 (1st Amer. ed. Philadelphia 1847). Hawkins believed that it had been possible in the reign of Charles II (1660-1685) for juries to be discharged without a verdict, but also believed that since the reign of James II (1685-1688), juries could not be so discharged. 2 William Hawkins, *A Treatise of the Pleas of the Crown* 439 (London 1721).

106. *Second Part*, *supra* note 41, at 15.

107. Babington, *supra* note 58, at 164; Dunn, *supra* note 14, at 14-15; Evans, *supra* note 12 at 455; Fantel, *supra* note 5, at 121-22; Forsyth, *supra* note 7, at 186; Bernard O'Donnell, *The Old Bailey and Its Trials* 99 (1950); Wildes, *supra* note 46, at 67.

bottles" with them to the trial.<sup>108</sup> Penn half-heartedly denied these charges. At any rate, whether or not the jury had food and drink, the Mayor and Recorder exhorted the majority to hold fast to their principles and not allow Bushell to coerce their verdict. Out of consideration for the jurors, Starling then adjourned the court until 7:00 a.m. Sunday morning, both an unusually early time and an unusual day for the Sessions to meet.

After reconvening on Sunday, the Court heard a repetition of the previous evening's "verdict" from the foreman of the jury. The case had by now far exceeded the bounds of reasonable time. Penn asked Howell if the verdict of "not guilty" for Mead was acceptable.<sup>109</sup> Howell replied that because the charge involved conspiracy the jury could not find one man guilty and the other innocent. Penn asserted that because Mead had been found "not guilty" he himself must be "not guilty" as well.<sup>110</sup> Howell's position in this instance was a difficult one. The verdict for Mead of "not guilty" logically carried with it the implication that Penn was "not guilty" of conspiracy, just as Penn argued. Logic, though, had little to do with the issue at hand. The judges believed, correctly, that no alternative existed to a complete consideration of *all* the charges in the indictment. The bench could not infer from an imprecise verdict. For example, at a trial of Quakers during the Sessions at Southwark in 1662, Richard Onzlow refused to accept a jury's verdict of "guilty in part, and not guilty in part," by explaining "they [the Quakers] must either be guilty of the whole Indictment, or else not guilty."<sup>111</sup> Howell and Starling adopted a similar attitude, refusing to accept what they considered an incomplete (as well as unjustifiable) verdict.<sup>112</sup>

An exchange ensued among bench, jury, and defendants. The bench adamantly refused to accept the "verdict" offered by the jury; the jury adamantly refused to render another verdict. Following an increasingly popular custom in cases of all types during this period, Penn appealed to Magna Carta, rambling on about it

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108. Penn, *supra* note 46, at 46, 49; Starling, *supra* note 3, at 26.

109. *Liberties*, *supra* note 35, at 964.

110. *Id.* at 965.

111. Chandler, *supra* note 87, at 9. The jury's initial verdict of "guilty in part and not guilty in part" was rejected by Judge Richard Onzlow. The jury at last bringing in a verdict of guilty, Onzlow even then asked the foreman, "[A]re they guilty according to the form of the said indictment?" *Id.* at 11. The foreman's "yes" in answer to this question satisfied him finally.

112. For "at Common Law, if the proof and words in the Indictment differ either in the *matter*, or the *form*, or *manner* inconsiderably, . . . such is indeed no difference in Law . . . . But if the Allegation and Proof materially differ, otherwise . . . ." A Guide to the English Jury, *supra* note 58, at 100.

being reduced to a "mere nose of wax" if the judges succeeded in rejecting the existing verdict.<sup>113</sup> The bench, ignoring Penn, forced the jury to retire once more with a fresh charge to bring in a verdict.

Returning for the fourth time as a body (with some jurors returning for the fifth time), the jury delivered the same "verdict." The jury foreman, Veere, could offer only that to which all twelve would agree. The jurors have been praised time and again for exhibiting their "inflexible firmness . . . in maintaining their own rights, and adhering to their conscientious convictions."<sup>114</sup> In truth, however, an obstreperous and determined minority blocked the actions of the rest.<sup>115</sup>

After hearing the jury deliver the same verdict, Penn resumed his oration by denying that his jury should be menaced, calling again on Magna Carta, advising the court on points of law, insulting members of the bench, and demanding that the jury be allowed to record its verdict of conscience.<sup>116</sup> Penn made so much noise that Starling threatened to "[s]top his mouth" and "stake him to the ground."<sup>117</sup> With Starling's threat, Penn finally fell silent, though he claimed the Mayor's threats were not the reason for his sudden silence. Rather, he maintained, "[T]here was no occasion for much discourse."<sup>118</sup> Arguing that "Papists were better subjects of the King than [Quakers] were," Howell at this point delivered his infamous remark: "Till now I never understood the reason of the policy and prudence of the Spaniards, in suffering the [I]nquisition among them: And certainly it will never be well with us, till something like unto the Spanish [I]nquisition be in England."<sup>119</sup> The Quakers were "a turbulent and inhumane sort of people," and "those that will not conform to the Law, shall not have the protection of the Law."<sup>120</sup> Howell then actually left the bench, determined not to participate any longer in what he perceived as a travesty. Starling only with great difficulty persuaded Howell to retake his seat.<sup>121</sup>

Trying a different tack to coerce a guilty verdict, Howell or-

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113. *Liberties*, *supra* note 35, at 964.

114. Evans, *supra* note 12, at 453; *see also* Dunn, *supra* note 14, at 17 (jury "adamant[ly] refus[ed] to be coerced into a decision they could not in good conscience give").

115. Green, *supra* note 7, at 224.

116. *Liberties*, *supra* note 35, at 965.

117. *Liberties*, *supra* note 35, at 965; Starling, *supra* note 3, at 28.

118. Penn, *supra* note 46, at 48.

119. *Liberties*, *supra* note 35, at 965; Starling, *supra* note 3, at 9.

120. Starling, *supra* note 3, at 8-9.

121. *Liberties*, *supra* note 35, at 965.



dered the drawing up of a special verdict to assist the jury. The idea was abandoned when the clerk, John Lee, objected, "I cannot tell how to do it."<sup>122</sup> With few options available, the bench commanded the jury to retire yet again, which the jurors were understandably loathe to do. Several jurors pleaded with the court to accept their verdict, refusing to retire again until forced to do so by the sheriff. Starling and Howell had no alternative but another adjournment until the following morning because hung juries were not possible until well into Victoria's reign.<sup>123</sup>

By the morning of September 5, with both justices and jurors heartily sick of the case, the jury delivered to an incredulous bench a legally acceptable verdict. All the "severe Menaces, scurrilous Invectives, and hard Usage"<sup>124</sup> notwithstanding, the jury declared both Penn and Mead "Not Guilty" of the charges in the indictment. The jury had finally reached the verdict forced upon it by the perseverance of the four determined jurors. Howell accepted the verdict after having each juror verify it as read, his disgust upon doing so evoking his prayer directed at the jury: "God keep my life out of your hands."<sup>125</sup> Penn demanded his liberty, having been "freed by the jury," but Howell explained that Penn and Mead were to be imprisoned until they paid their fines for their "contempt of court" over the hats at the beginning of the trial.<sup>126</sup> Penn objected, as usual, claiming that no freeman could be fined "but by the judgment of his peers or jury." Starling replied that "by the laws of England this Court hath power to Fine for Contempts."<sup>127</sup> On this point, Starling was undeniably correct;

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122. *Id.* at 966. Lord Chief Justice Kelyng called Lee "a very good clerk, who hath attended the sessions at the Old Baily above forty years." *Ravin's Case*, Kel. J. 24, 48, 84 Eng. Rep. 1065, 1076 (K.B. 1662). Nevertheless, this was the path taken by the bench in the future. If faced with a difficult jury, the judge allowed (or forced) them to bring in a special verdict in which the jury stated the facts and the bench "determined whether criminal liability attached." Langbein, *Before the Lawyers*, *supra* note 15, at 296. The power to order special verdicts, at least in the most common area of conflict, was not taken away from the bench until Fox's Libel Act of 1792. 32 Geo. 3, ch. 60 (1792).

123. *Liberties*, *supra* note 35, at 966. Even after this trial the bench still insisted on having a specific verdict, though Howell amended his position and was willing to let "speaking" equal guilty. On the possibility of a hung jury, see *supra* note 105. Babington argues that juries could be discharged without reaching a verdict beginning in the early 18th century, but this clearly is not true. Babington, *supra* note 58, at 164.

124. Second Part, *supra* note 41, at 15. The Quakers were not alone in perceiving the jury's treatment as harsh. Marvell's report of the jury kept "till almost starved," prompted Holdsworth's judgment that the Bench had meted out "very brutal treatment." 1 Holdsworth, *supra* note 7, at 345.

125. *Liberties*, *supra* note 35, at 967.

126. *Id.* at 967-68.

127. Starling, *supra* note 3, at 31.

judges possessed statutory powers to fine jurors summarily under certain circumstances.<sup>128</sup> At any rate, Penn and Mead remained in prison for a very brief time. Penn refused to pay his fine for contempt over the hats or have it paid, but his dying father seems to have had both fines paid over his son's objections, freeing the younger Penn and Mead very soon after the trial.<sup>129</sup>

While Howell fined Penn and Mead for contempt, he also fined the jurors forty marks each for following their "own judgments and opinions, rather than the good and wholesome advice which was given [them]," and also for bringing in a contradictory verdict, sent them all off into imprisonment until the fines were paid.<sup>130</sup> Howell's imposition of a fine on the jurors for bringing in a contradictory verdict violated both practice and reason. Juries frequently found themselves sent back to reconsider a verdict that a judge found unacceptable. Because a verdict was not binding until recorded, instances of contradictory verdicts were far from rare. A "not guilty" verdict from a jury in 1665 caused Chief Justice Hyde to send the jury back to reconsider with the threat that if they *again* expressed their inability "in conscience to find him [the accused] guilty," he would deal with them severely.<sup>131</sup> Hyde's threat, like many others before and after, worked. Judges retained this power to ask juries to reconsider verdicts "any number of times" for more than two centuries. The judge hearing the Jameson Raid case in 1896 may have been the last to use his power "high-handedly," but twentieth-century juries have been sent back on occasion to reconsider.<sup>132</sup>

Howell wanted it both ways. Though he himself had demanded the jury's reconsideration of their verdict, he now punished the jurors for changing their minds. The real issue, however, was not the altered verdict, but the more general reason for the fine. No one denied that judges could fine juries for misconduct,

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128. Starling cited 11 Hen. 7, ch. 21 (1494) and 23 Hen. 8, ch. 3 (1531) to support fining the jury in the Penn/Mead case. Starling, *supra* note 3, at 36-37. Both Mainard and Powis, *pro rege*, argued in Bushell's hearing that the judges held commissions of Oyer and Terminer only, and not Gaol Delivery as in *Wagstaff's Case*, which meant in their opinion that Howell and Starling had no power to fine. Bushell's Case, 1 Freeman 2, 3-5, 89 Eng. Rep. 2, 3-5 (K.B. 1670). For discussion of *Wagstaff's Case*, see *infra* notes 151-154 and accompanying text.

129. The Papers of William Penn, *supra* note 5, at 180.

130. *Liberties*, *supra* note 35, at 967-68.

131. Keach, *supra* note 90, at 709.

132. "The judge is not bound to record the first verdict unless the jury insist on it being recorded." Glanville Williams, *The Proof of Guilt* 200 n.14 (1955) (citations omitted). Lord Chief Justice Jeffries sent a jury back twice in 1685, threatened them in the process, and obtained the "guilty" verdict he wanted. See *infra* note 191.

corruption, and the like, but no consensus existed regarding fines imposed for a verdict "*contra plenam & manifestam evidentiam & contra directionem Curiae in materia legis*."<sup>133</sup> Howell's actions were, according to the Quakers, "Innovations in the tryal of men for their Lives and Liberties; and . . . of dangerous consequence."<sup>134</sup> Conversely, Starling alleged, "[I]t plainly appears, The Fining of Jurors that find contrary to their Evidence, is no Innovation, but always practiced."<sup>135</sup> Howell stood in good company on this issue; more than once within the five years prior to the Penn/Mead trial two chief justices of the King's Bench had fined juries for just such behavior.<sup>136</sup>

### III. *Bushell's Case*: The Issue of Fining Juries

If all of the jurors had merely regained their freedom by paying their fines, the issue of fining juries would not have arisen. Edward Bushell, however, refused to pay.<sup>137</sup> Bushell believed that judges could not, or should not, fine juries for their verdicts and managed to have his position heard through a writ of habeas corpus brought in the Court of Common Pleas.<sup>138</sup> After hearing the arguments in the case, Chief Justice Vaughan set aside the fines, freed Bushell, and set a precedent by prohibiting judicial fining of jurors in the future. In doing so, Vaughan threatened to enhance vastly the powers of English juries. No matter how much in

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133. *Bushell's Case*, Vaugh. 135, 135, 125 Eng. Rep. 1006, 1006 (C.P. 1670) (against the full and manifest evidence and against the direction of the court in this matter of law).

134. Second Part, *supra* note 41, at 15 (citing *Kelyng's Case* before the High Court of Parliament of England, Dec. 13, 1667).

135. Starling, *supra* note 3, at 33.

136. Maitland argued that during this time period judges occasionally fined juries for acquitting against the evidence. Frederic Maitland & Francis Montague, *A Sketch of English Legal History* 133 (1915).

137. Wildes claims that all twelve jurors refused to pay, but at least eight paid immediately and were released. Wildes, *supra* note 46, at 67. Whether or not Bushell's three supporters paid their fines cannot be determined from the existing records.

138. Bushell did not file a suit against the Bench at this point as indicated by the editors of *The Papers of William Penn*, *supra* note 5, at 172. Rather, he tried to have the writ issued in Common Pleas. 1 Holdsworth, *supra* note 7, at 345. He did indeed "bring suit" against the Bench, but not until *after* the habeas corpus action. Both Bushell and another juror, John Hammond, sued Starling and Howell for their actions. For the cases and results, see *Bushell*[l] v. Starling, 3 Keb. 322, 84 Eng. Rep. 744 (K.B. 1674) (action for false imprisonment fails because writ of error must be delivered by certiorari or habeas corpus); *Bushell*[l] v. Howell[l], 3 Keb. 358, 84 Eng. Rep. 765 (K.B. 1674) (action does not lie against a judge); *Bushell's Case*, 1 Mod. 119, 86 Eng. Rep. 777 (K.B. 1674) (action for false imprisonment); *Hammond* v. Howell, 2 Mod. 218, 86 Eng. Rep. 1035 (K.B. 1677) (false imprisonment action does not lie for error in judges' judgment).

opposition to the "manifest evidence" the bench might find a jury's verdict, and no matter how much against the direction of the court a jury might choose to behave, jurors could not be punished for their verdict.

Vaughan's ruling in *Bushell's Case* actually amounted to judicial sleight-of-hand. Vaughan's ruling, however, was not "dishonest nonsense" as it has been characterized by Langbein.<sup>139</sup> Rather, Vaughan's reasoning was "wilfully anachronistic."<sup>140</sup> Nevertheless, Thomas Green has shown recently that powerful arguments existed both for *and* against the judicial punishment of juries for verdicts (1) against the direction of the court and (2) against the evidence.<sup>141</sup> Legal precedents could be found for both sides of the argument, though Vaughan's opinion rested upon certain dubious and specious arguments.<sup>142</sup> Vaughan, in his extraordinarily long opinion,<sup>143</sup> argued that the court's inability to fine a jury was "the clearest position that ever I consider'd, either for authority or reason of law."<sup>144</sup> Considered strictly in terms of precedent, however, the practice of fining juries was neither illegal nor even uncommon.<sup>145</sup> Vaughan had to ignore a significant body of opinion on the bench favoring the very practice he was striking down. John Kelyng's immediate predecessor as Chief Justice of King's Bench,

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139. Langbein, *Before the Lawyers*, *supra* note 15, at 298. The decision of the entire bench settled the matter of the issuance of habeas corpus until the redefinitions resulting from the Habeas Corpus Amendment Act. 31 Car. 2, ch. 2 (1679). On November 3, 1670, H. Muddiman reported that the jurors who refused to pay their fines in the Penn/Mead case "moved the Court of Common Pleas for a habeas corpus." The judges asked for precedents for their issuance of such a writ "which . . . were held not to apply, as being in criminal matters." 10 Calendar, *supra* note 72, at 513; 11 Calendar, *supra* note 72, at 385-86. See also Anonymus, Cart. 221, 124 Eng. Rep. 928 (C.P. 1671); Jones' report contains the best description. *Bushel[']s Case*, Jones, T. 13, 84 Eng. Rep. 1123 (K.B. 1670).

140. Langbein, *Before the Lawyers*, *supra* note 15, at 299 n.105.

141. Green, *supra* note 7 at 208-15.

142. Confusing matters even more, Vaughan's authority to issue his influential opinion was not undisputed because he presided over the Common Pleas, not King's Bench. Vaughan himself had denied the ability of Common Pleas to issue a writ of habeas corpus in a criminal matter, but the other justices of Common Pleas overrode Vaughan's objections and allowed the return of the writ. On July 18, 1671, Sir John Robinson reported that the entire bench, by an eight to four vote, supported Vaughan's original view against issuing the writ in Common Pleas by concluding, "the case, being a criminal case, was not cognizable by Common Pleas." 1 Holdsworth, *supra* note 7, at 345. Nevertheless, Vaughan's decision became "accepted as good law." *Id.*

143. Vaughan's original report runs to twenty-four pages. See Vaugh. at 135, 124 Eng. Rep. at 1006.

144. *Id.* at 146, 124 Eng. Rep. at 1011.

145. An example of fining which provoked little response includes *Rex v. Selby*, 1 Keb. 769, 83 Eng. Rep. 1233 (K.B. 1664). See also *Rex v. Leech*, Raym. T. 98, 83 Eng. Rep. 53 (1664) and *Rex v. Wagstaff*, 1 Sid. 273, 82 Eng. Rep. 1101 (K.B. 1665); 1 Keb. 934, 83 Eng. Rep. 1328 (K.B. 1665); *Hardres* 409, 145 Eng. Rep. 522 (Ex. 1665).

Robert Hyde, favored fining juries. Hyde "conceived jurors ought to be fined if they would go against the [Court's] . . . direction, take bit in mouth and go headstrong against the Court."<sup>146</sup>

Chief Justice Kelyng himself freely admitted coercing petit juries and fining both petit and grand juries, the former for "wrong" verdicts and the latter for refusing to perform their duties properly.<sup>147</sup> One grand jury insisted on bringing in a bill *per infortunium* instead of bringing in either a *billa vera* or an *ignoramus*, their only two legal choices.<sup>148</sup> For refusing to comply with the law despite his explanation of their mistake, Kelyng fined some members of the grand jury twenty pounds each and bound them over to appear in King's Bench at the following session. Kelyng also fined trial juries for improper verdicts, though he preferred to coerce a "correct" verdict if possible. In one such case, Kelyng's threats against a jury for refusing to bring in a guilty verdict after a murder trial resulted in the jury changing its decision. Although the accused obtained a pardon from the King and escaped execution, the entire bench supported Kelyng's action; "the Judges in Westminster Hall gave their opinion that it was murder," and let stand the coerced verdict in the case.<sup>149</sup> A less lucky defendant was hanged after Kelyng forced a jury to change its verdict of guilty of manslaughter with no malice prepense to guilty of murder.<sup>150</sup>

*Rex v. Wagstaff*,<sup>151</sup> decided in 1665, also raised the issue of punishing juries for finding against the direction of the court and against "the manifest evidence." Starling cited *Wagstaff's Case* confidently as justification for fining Bushell because it seemed to

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146. 1 Keb. 864, 83 Eng. Rep. 1288 (K.B. 1665).

147. The Diary of John Milward 166-69 (Caroline Robbins ed. 1938).

148. At common law, a grand jury can only return one of two verdicts. It can find a true bill (*billa vera*) against the defendant which results in the defendant's trial by petty jury, or it can return an *ignoramus* which effectively ends the matter and exonerates the defendant. Baker, *supra* note 9, at 415. The returned verdict in this instance, *per infortunium*, meant the jury was actually deciding the merits of the case and trying to exonerate the defendant by its determination that the death occurred through accidental circumstances. Only a trial jury (petty jury) could return murder, manslaughter, *per infortunium*, or *se defendo* in deciding a case of homicide. Kelyng tried to force the jury to behave legally and fined them when they refused to do so. Green, *supra* note 7, at 218.

149. The Diary of John Milward, *supra* note 147, at 167-68. See also *Rex v. Windham*, 2 Keb. 180, 84 Eng. Rep. 113 (K.B. 1667). Also, in the 19th century, Jardine argued that juries could be fined for obstinately persisting in a verdict contrary to the direction of the court *in matters of law*. 1 David Jardine, *Criminal Trials* 118 (London 1832).

150. Kenyon, *supra* note 1, at 426-27.

151. 1 Keb. 934, 83 Eng. Rep. 1328 (K.B. 1665); 1 Keb. 938, 83 Eng. Rep. 1331 (K.B. 1665); Hardres 409, 145 Eng. Rep. 522 (Ex. 1665).

support his position "in all points."<sup>152</sup> In *Wagstaff's Case*, the jury refused to bring in a verdict of guilty in a trial of three Quakers charged with holding a conventicle. Kelyng questioned the jurors closely to make sure that they were fully aware of the facts before them. Upon questioning, the jurors conceded all three Quakers had been found guilty twice before, they were "above the age of sixteen years," they were gathered in a place where Quakers usually met, they had met on a Sunday, and the accused admitted they met "to seek God in spirit." Having thus ascertained that the jurors fully recognized the nature of the evidence, Kelyng fined some of them 100 marks each for finding the Quakers not guilty for want of full evidence. In Kelyng's opinion, the evidence presented in court had proven the guilt of the accused beyond all doubt, justifying the stiff fines imposed upon the jurors.<sup>153</sup> Starling believed that Kelyng's fines, which the entire bench upheld (i.e., the judges of the King's Bench, Common Pleas, and the Exchequer meeting in plenary session), proved that judges could fine jurors for finding against the direction of the court. Some of the reports of *Wagstaff's Case* seem to support Starling's conclusion, but others either do not support it, or are too ambiguous to provide much support.<sup>154</sup>

Vaughan actually cited *Wagstaff's Case* to support the opposite position in *Bushell's Case*. He argued that the *Wagstaff* decision proved "finding against the evidence in Court, or direction of the Court barely, is no sufficient cause to fine" a jury.<sup>155</sup> He admitted the fining but believed the jurors hearing *Wagstaff's Case* who refused to convict Quakers must have committed some *other* offense; they must have been fined for their actual misconduct rather than for finding against the evidence or the direction of the court. Some reports of the case, although not completely reliable, seem to support Vaughan's conclusion.<sup>156</sup>

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152. Starling, *supra* note 3, at 31.

153. Hardres 409, 145 Eng. Rep. 522 (Ex. 1665). See also The Diary of John Milward, *supra* note 147, at 166-69 (justification Kelyng used for fining juries when before the High Court of Parliament of England, Dec. 13, 1667).

154. Thomas Green has detailed the reports on *Wagstaff's Case* and eliminated much former confusion. See Green, *supra* note 7, at 210-45. Keble seems to have believed that "if the Court cannot fine, the law would be very defective." 1 Keb. 938, 83 Eng. Rep. 1331 (K.B. 1665). Keble implied that the jury's misconduct was that of "going contrary to the direction of . . . the Court," as does Hardres. *Id.*; Hardres 409, 145 Eng. Rep. 522 (Ex. 1665).

155. Vaughan at 153, 124 Eng. Rep. at 1015.

156. See 1 Sid. 272, 82 Eng. Rep. 1101 (K.B. 1665). See also 2 Hale, *supra* note 105, at 312-13. Hale's *History*, for example, remained unpublished until 60 years after his death; this delay, along with the published report's failure to explain why the bench failed to remove the fines diminishes its credibility.

Instead of fining Bushell and other jurors, another method Starling could have chosen to punish the jury was the attaint process.<sup>157</sup> The use, however, of the attaint process, which constituted one of the arguments against fining in Vaughan's published opinion, was as implausible in 1670 as it would have been if a justice had tried to use it in 1770 or 1870.<sup>158</sup> Vaughan argued that the possibility of an attaint jury convicting and fining a petit jury for bringing in a false verdict restricted a trial judge from punishing a jury for defying his directions. A judge could not force jurors to render a verdict under threat of fine, imprisonment, or both if an attaint jury could then fine them for delivering their coerced verdict. Such a practice would entail double jeopardy, a principle long prohibited.<sup>159</sup> Yet Hyde believed fines were necessary in 1665 precisely because attaints had been "fruitless" for at least a century.<sup>160</sup> Attaints were "a mere sound" in all civil matters by 1670.<sup>161</sup> Moreover, attaints did not apply in criminal actions or in London in any event as a result of statutory exclusion.<sup>162</sup> Vaughan remained undaunted, however, by the rather complex mental gymnastics needed to apply the attaint principle to the Penn/Mead

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157. The issue of attaint is far too complicated to address in the confines of this article. Basically, the only ancient method of punishing a jury for its verdict was the attaint, in which a jury of 24 was assembled to try the trial jury for perjury. In the process, the facts of the original dispute were again considered. Plucknett, *supra* note 58, at 131-34. Attaints were formally abolished by Parliament in the 19th century. 6 Geo. 4, ch. 50 (1825).

158. Green has shown the attaint argument, relied upon so heavily by the Quakers and rejected so forcefully in Starling's defense of the bench's actions, did not appear in the draft of Vaughan's opinion, but it occupies nearly three pages of the published decision. Bushell's Case, Vaugh. 135, 145-47, 124 Eng. Rep. 1006, 1011-12 (C.P. 1670); Green, *supra* note 7, at 243 n.172. When Vaughan added this argument is not clear, nor is the reason for his decision to append another argument.

159. Bushell's Case, Vaugh. 135, 145, 124 Eng. Rep. 1006, 1011 (C.P. 1670). See generally 2 Hawkins, *supra* note 105, at 368-74 (discussion of procedure for using previous acquittal to avoid being tried for the same offense). Devlin cited a nameless case of 1602 in which Chief Justice Popham did not allow the prisoner to be charged again although the bench committed and fined the jurors. Devlin, *supra* note 56, at 76. Friedland notes the later 17th century practice of discharging juries before their verdict had been rendered if an acquittal seemed likely in order to allow prosecution with better evidence at a later date. See Martin Friedland, Double Jeopardy 13 (1969).

160. 1 Keb. 864, 83 Eng. Rep. 1288 (K.B. 1665). Blackstone points to the lack of any evidence of an attaint after the 16th century. 3 Blackstone, *supra* note 2, at 404. See also Baker, *supra* note 9, at 117 (attaint virtually obsolete by Tudor era). The last known attaint occurred in Regina v. Ingersall, Cro. Eliz. 309, 78 Eng. Rep. 560 (K.B. 1593). Despite this widespread conviction that attaints had died out, Lord Chief Justice Jeffries successfully threatened the Lisle jury with attaint in 1685. Forsyth, *supra* note 7, at 406-07.

161. For Mansfield's comment, not actually made until some 75 years after the Penn/Mead trial, see Bright v. Eynon, 1 Burr. 391, 393, 97 Eng. Rep. 365, 366 (K.B. 1757).

162. Starling, *supra* note 3, at 37.

trial. He conceded that attaints did not apply in criminal trials, but nonetheless argued: "If [the judge] could not [fine the jury] in civil causes . . . he could not in criminal causes upon indictment . . . for the fault in both was the same, [namely], finding against evidence and direction of the Court, and by the common law; the reason being the same in both cases, the law is the same. . . . [T]herefore they could not fine . . ." <sup>163</sup>

Vaughan's most compelling reason for the rejection of fines rested on the ancient but increasingly questionable assumption that jurors could (even should) possess private knowledge of the matter being heard. Originally, a juror served as both witness and judge, and the juror's dual role survived at this late date.<sup>164</sup> The law continued to require jurors to be selected "of the vicinage" precisely for this reason; the law demanded a verdict from the jury even in the complete absence of evidence at the trial. Only jurors from the region could know enough to render a verdict without evidence. The judge, theoretically a stranger without access to this local knowledge, could not know as much as the jury and also would be in a less favorable position to weigh the evidence presented during the trial.<sup>165</sup> Though something of a "survival" by 1670,<sup>166</sup> the possibility of the jurors' private knowledge continued into the reign of Anne and beyond.<sup>167</sup> Langbein has described this

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163. Vaugh. at 146, 124 Eng. Rep. at 1012. See Devlin for a discussion of the reasons why no attaints were allowed in criminal matters. Briefly, the reasons were these: (1) convictions were not allowed to be disputed, (2) there was no double jeopardy, and (3) the accused had formally agreed to a jury trial with the alternative of "peine forte ed dure" [punishment hard and long]. Devlin, *supra* note 58, at 75-76. See also 1 Hawkins, *supra* note 105, at 191 (discussion of reasons for not applying attaints in criminal cases).

164. Langbein has noted: "[T]he transformation of active medieval juries into passive courtroom triers, is not well understood either in its timing or its causes. Probably in the later fifteenth century, but certainly by the sixteenth, it had become expectable that jurors would be ignorant of the crimes that they tried." Langbein, *Before the Lawyers*, *supra* note 15, at 299 n.105.

165. Lord Somers noted a case in the reign of Elizabeth of a lone juror refusing to convict for murder at a trial during the Assizes. Brought before Lord Chief Justice Anderson after the acquittal of the accused, the determined juror admitted that *he* had committed the murder and thus knew the accused to be innocent. A Guide to the English Jury, *supra* note 58 at 143-46.

166. 1 Holdsworth, *supra* note 7, at 336.

167. It may well be true that by the Tudor era "juries had largely completed their evolution from active knowers of local events to passive receivers of evidence made available to them only in court." John Murrin, *Magistrates, Sinners, and a Precarious Liberty: Trial by Jury in Seventeenth-Century New England*, in *Saints and Revolutionaries* 152, 155 (David Hall, John Murrin, & Thad Tate eds. 1984). The juries' right to decide on the basis of personal knowledge, however, was not challenged at all prior to *Powys v. Gould* in 1702. 1 Salkeld 405, 91 Eng. Rep. 352 (1702).



part of Vaughan's decision as "wilfully anachronistic,"<sup>168</sup> which while true, makes Vaughan's reasoning no less legitimate. However anachronistic the idea of a juror's private knowledge of a case might have been by 1670, it constituted accepted legal theory at the time and continued to be a part of the law well into the next century. A juridical decision reached in 1702 expressed the view that jurors should not keep personal evidence private; those of the jury who knew anything about the case were expected to identify themselves and give their evidence in open court.<sup>169</sup> Nevertheless, juries *could* reach a verdict in the complete absence of any courtroom evidence even after 1702:

The jury may give a verdict without testimony, when they themselves have conusance of the fact. . . . But if they give a verdict on their own knowledge, they ought to tell the court so; but they may be sworn as witnesses; and the fair way is to tell the court before they are sworn that they have evidence to give.<sup>170</sup>

Private knowledge may have been a thing of the past, but it provided an acceptable basis for Vaughan's argument.

#### IV. Law v. Fact

Vaughan also addressed the basis of the jury's knowledge, disregarding whether that knowledge was gained during the trial or before. While the line separating a juror's judgmental function from a witness's evidential function had yet to be drawn, the line separating the functions of judge and jury had, if anything, been drawn too sharply by 1670. An ancient notion, which Coke transformed into the famous decantatum, "*ad quaestionem facti non respondent Judices; ita ad quaestionem juris non respondent juratores*" ["matters in fact shall be tried by jurors, and matters in law by the Judges,"]<sup>171</sup> seemed to insist on a complete separation

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168. Langbein, *Before the Lawyers*, *supra* note 15, at 299.

169. *Powys v. Gould*, 1 Salkeld 405, 91 Eng. Rep. 352 (1702); Langbein, *Before the Lawyers*, *supra* note 15, at 299 n.105. *Reading's Case* provides a good example of the position on private knowledge of jurors prior to the 1792 decision. Lord Chief Justice North told Reading that he could have the evidence of Sir John Cutler "though he be sworn" on the jury and denied Reading's challenge accordingly. *Trial of Nathaniel Reading* (1679), 7 State Trials, *supra* note 10, at 259, 267. Also in 1702 defense witnesses were allowed by statute to be sworn. 1 Anne, ch. 9, § 3 (1701). This approach to a juror's private knowledge was not acceptable by the 19th century. In 1816 a judge who merely referred the jury to their own knowledge of general conditions was accused of misdirection. His actions were later upheld because he did not refer to any particular fact or matter of evidence, but referred to the jurors' knowledge for illustration purposes only. *Rex v. Sutton*, 4 M. & S. 532, 105 Eng. Rep. 931 (K.B. 1816).

170. 2 Burn, *supra* note 105, at 499 (citations omitted).

171. 9 Edward Coke, *The Reports of Sir Edward Coke* 22 (London 1826); 8 *id.* at

in all jury trials of those who found law from those who found fact. Nothing could be clearer, it seemed, than the division between the jury's fact-finding mission and the judge's law-finding role. Coke's statement of the maxim quickly became accepted as one of those rare, inviolable principles of the common law by virtually all who discussed the matter either before or after Vaughan's decision.<sup>172</sup> Lord Mansfield's absolute conviction that law limited the jury's role to finding the facts led him to misquote a popular ditty of the 1750's. According to Mansfield:

For twelve honest men have decided the cause,  
Who are judges of fact, though not judges of laws.

In fact, the refrain averred:

For twelve honest men have determin'd the cause,  
Who are judges alike of the facts, and the laws.<sup>173</sup>

Coke's maxim actually erected an artificial distinction that could not be maintained in many trials, and Vaughan's decision may have subtly recognized this artificiality. Vaughan repeated Coke's maxim in *Bushell's Case*: "*Ad quaestionem facti non respondent iudices, ad quaestionem legis non respondent juratores*,"<sup>174</sup> but as Vaughan well knew, the principle was not completely true. Juries were not to answer purely legal questions nor were judges to consider purely factual issues. Yet when finding *general* verdicts, Vaughan acknowledged that jurors "resolve both law and fact complicately."<sup>175</sup> Thus, jurors could, according to Vaughan, either *apply* law, or, according to Hawles's gloss of Vaughan's decision, *decide* law in some instances, though not in others. Of course, judges could, and did, continue their involvement with the facts of a case by commenting on them both during the trial and in their summations. Not infrequently, judges even argued with jurors over interpretation of the facts of a case. After the decision in *Bushell's Case*, however, judges were not allowed to punish juries for finding facts judges found objectionable.

Before 1641 there had been no question of jurisdiction over a jury's misbehavior; the Crown automatically undertook to resolve

450. This maxim, one of Coke's great favorites, seems to have been of his own invention rather than based upon Bracton as Coke claimed. Thayer explains its origins in some detail. Thayer, *supra* note 58, at 185-89.

172. Mansfield said of Vaughan's restatement of Coke: "Though a definition or maxim in law, without an exception, it is said, is hardly to be found, yet this I take to be a maxim without an exception." Shipley, *supra* note 10, at 1039.

173. *Id.* at 1037-38 (emphasis omitted).

174. Vaughan, at 149, 124 Eng. Rep. at 1013.

175. *Id.* at 150, 124 Eng. Rep. at 1013. See also John Hawles, *The English-Man's Right* 14 (London 1680) ("The Jury also apply Matter of Fact and Law together . . .").

any problems arising from a jury's behavior through Star Chamber.<sup>176</sup> This remedy was lost with the beginning of the Civil War, however, due to the Parliamentarians' zeal to expunge all remnants of an arbitrary royal government. During the Interregnum from 1649 to 1660, the problem of jury misbehavior either did not arise, or did not seem sufficiently important to occupy the government's attention given many more pressing matters. The same sense of priorities prevented the issue from being addressed immediately after the Restoration of Charles II in 1660. The early years of Charles II's resumption of the Crown focused entirely upon the need to establish social control. Jury behavior as an issue did not emerge formally until 1667, but at that point action by the House of Commons made clear both the intractable nature of the problem *and* the Commons's determination to resolve it by granting more power to juries. The Commons's actions were nevertheless inconclusive. The issue remained until Vaughan seemed to resolve it in 1670.

Vaughan, however, far from *settled* the issue of fact versus law, despite his clever handling of the point in the *Bushell* decision. The actual limits within which juries operated remained almost as vague after Vaughan's decision as it had been before. For example, before Vaughan's decision, in the trial of the Quakers that immediately followed the Penn/Mead trial, Howell declared that in future, if necessary, he would accept the verdict, "guilty of speaking," as the equivalent of guilty of the indictment.<sup>177</sup> Taken literally, Coke's maxim would seem to support Howell's action. After a jury decided that an event had taken place, a judge could decide whether or not the event contravened the law. Howell did not need to resort to any extraordinary means, however, to convict the next set of Quakers at the Old Bailey; he resorted to jury packing instead. After despatching the Penn/Mead jury to Newgate Prison, Howell and the other judges used great care in selecting a replacement jury.<sup>178</sup> The disposition of the remaining Quakers, therefore, posed no difficulties. Thus, the possibility of being found "guilty" via a "guilty of speaking" verdict became moot.<sup>179</sup>

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176. 1 Hawkins, *supra* note 105, at 191; William Hudson, *A Treatise of the Court of Star Chamber* in 2 *Collectanea Juridica* 1, 153 (Francis Hargrave ed. London 1792). The royal prerogative court of Star Chamber punished at least 40 juries in the 50 years between 1550 and 1600. *Id.* Star Chamber was abolished along with all of the other prerogative courts in 1641. 16 Car. 1, ch. 11 (1641). See also Cockburn, *supra* note 7, at 123 (judicial autocracy became more pronounced with the abolition of Star Chamber).

177. Second Part, *supra* note 41, at 30.

178. *Id.* at 18.

179. Confusion and disagreement over the limits of a jury's power persisted for

## V. Jurors v. Judges: Inequality Confronted

Vaughan's decision to permit the jury to reach a verdict without fear of punishment rested far more heavily on political than on legal considerations; the law simply left too many questions unanswered. Vaughan ultimately considered the question of public trust. In which legal entity would the right to decide the outcome of trials be vested, bench or jury? Would or could that right be shared? Did not a formal confrontation of the issue of who ultimately had the right to decide a verdict *require* a decision placing either judges or jurors in a position of legal inferiority? A number of commentators assumed that such would be the case. Any decision recognizing a jury's absolute right to return *any* verdict it decided appeared to free the jury from all restraint and raise the spectre of lawlessness. One eighteenth-century authority asserted that when a jury took it upon itself "to disregard the advice of the judge; and find a general verdict in opposition to it; . . . who will say there is a remedy? [Y]our lordships know there is none . . . ."180

Lord Mansfield made a rare admission of the potential for injustice raised by Vaughan's decision. In *Rex v. Shipley*, Mansfield acknowledged that the jury "have it in their power to do wrong, which is a matter entirely between God and their own consciences."<sup>181</sup> During the same trial, Justice Willes also conceded that "the jury have the power of finding a verdict against the law or . . . of finding a verdict against the evidence," though he denied their "*right* to do so."<sup>182</sup> Willes's ethics aside, however, juries were given a permanent, absolute power in potentially the most political area of law, criminal trials. They could, with impunity, acquit whom they chose to acquit. Given the option of placing

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more than a century, at least in certain kinds of cases. A judge refused in 1770 to allow a jury to bring in a general verdict during a seditious libel trial, in effect reserving to the bench the power to decide guilt or innocence. Parliamentary action was finally required to give juries the undisputed right to return general verdicts in trials involving libel. In 1770, as in 1667, the House of Commons took action because of its fear of the judiciary as a potential tool of tyranny rather than because of any real desire to resolve the legal conflict between judge and jury. Just as the English gentry traditionally opposed standing armies or police forces, they opposed judges if forced to do so, as they were in this case. *Shipley*, *supra* note 10, at 950-54. Fox's Libel Act (An Act to Remove Doubts Respecting the Functions of Juries in Cases of Libel) finally resolved the issue by specifically giving juries the power to bring in general verdicts in libel cases. 32 Geo. 3, ch. 60 (1792).

180. *Shipley*, *supra* note 10, at 1030.

181. *Shipley*, *supra* note 10, at 1040 (emphasis omitted).

182. *Rex v. Shipley*, 4 Doug. 73, 178, 99 Eng. Rep. 828 (K.B. 1784) (emphasis added).

greater trust in and giving greater power to the bench or the jury, Vaughan chose (or was forced to choose) the jury.

The House of Commons had already confronted the issue of judges versus jurors and had decided overwhelmingly in favor of jurors. The English Civil War had failed to resolve the fundamental question of political authority which had incited it. The King's arbitrary power still seemed a threat to the members of the House of Commons, and the potential role of judges in abetting that power had not escaped their attention. Though the terms of judicial tenure had not been established at the restoration of the monarchy, it quickly looked as if Charles I's promise on January 15, 1641 to make all future appointments to the bench during "good behavior" would not be kept by his son Charles II. Charles II's original appointments did not specify the tenure under which office was held, but in April 1668, the Chief Justice of King's Bench was appointed *durante bene placito* [during pleasure], leaving the office much more open, at least potentially, to royal "abuse."<sup>183</sup>

Just before this first appointment "at pleasure," and some three years before the Penn/Mead trial, the Commons had the opportunity to debate the matter of judicial behavior, particularly vis-a-vis juries. Lord Chief Justice Kelyng of King's Bench had been summoned to the bar of the House of Commons to answer for his behavior. He was accused of bullying and fining juries and also of disparaging the Magna Carta by saying in response to yet another appeal to the Magna Carta during the course of a trial: "Magna Carta? What ado with this have we?"<sup>184</sup> Kelyng refused to apologize for his conduct, arguing that (1) he had no recourse but to fine juries who behaved illegally and (2) the Magna Carta was so "often and ignorantly pressed upon him" that he might have said anything under such provocation.<sup>185</sup> The Commons flirted uncomfortably with a bill of attainder against Kelyng for his behavior, of which the fining of juries was by far the greater offense; their feelings on this issue could not have been made much clearer. Though stopping short of attainting Kelyng, the Commons resolved that "fining and imprisoning juries for giving in their verdict was illegal, and that a bill be brought in to prevent

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183. A judge appointed "during good behavior" was much less easily removed from office for overtly political reasons than one appointed "at pleasure." Judicial opposition to the King's efforts over a Declaration of Indulgence in 1672, for example, led to a number of dismissals in 1673 that was possible because the judges in question had been appointed *durante bene placito*. For a full discussion of the tenure issue, see Alfred F. Havighurst, *The Judiciary and Politics in the Reign of Charles II*, 66 Law Q. Rev. 62, 63-69 (1950).

184. Kenyon, *supra* note 1, at 427.

185. The Diary of John Milward, *supra* note 147, at 167.

the like for the future."<sup>186</sup> Such judicial power might well prove politically dangerous; therefore, the Commons believed more constraints should be placed on the judges.

The Commons's resolution was not law, but the bench could ignore it only at great peril. Despite the initial failure of the Commons to pass a bill against practices like Kelyng's, the Commons could at any time take action against other judges who behaved as Kelyng had done. Vaughan may not have been motivated more by "fear of Parliament than by devotion to principle,"<sup>187</sup> but without doubt Havighurst argued correctly that "in times of constitutional crisis, administration of law is inevitably and profoundly affected by political considerations";<sup>188</sup> the jury is as much a political institution as a legal one. *Vox populi* had not yet become *Vox Dei*, but Vaughan shrewdly perceived the need to recognize the power of the jury in order to prevent a potentially disastrous rift in the legal system. His action, while incomplete, succeeded admirably in smoothing the matter over because it provided a politically acceptable solution. The government's efforts to penalize nonconformists, particularly Quakers, had resulted in an increase in both the number and seriousness of these kinds of disputes; without some firm resolution, the legal system itself would have suffered.

The Commons's stand against fining was clear enough, and Vaughan's attitude was less than surprising since he had played a substantial role in the Commons's actions against Kelyng. The entire bench's unanimous support for Vaughan's ruling, however, is curious since only half of the twelve judgeships in King's Bench, Common Pleas, and the Exchequer changed hands between the *Wagstaff* decision in 1665 and the *Bushell* decision in 1670. The other six seats, therefore, remained in the hands of those who had decided in favor of fining, including Kelyng himself and another definite supporter of fining, Thomas Twisden.<sup>189</sup> John Archer and Thomas Tyrrell sat in Common Pleas for both cases as did Matthew Hale and Christopher Turnor in the Exchequer. These changes of heart can perhaps best be explained by the bench's

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186. *Id.* at 170. If Kelyng had not appeared for trial, the House resolved "to proceed to a bill of attainder." The Commons chose not to press further with the charges against Kelyng, though they did pass a resolution after four hours of debate. *Id.* at 166-70. See also 11 Calendar, *supra* note 72, at 594; 9 Journal of the House of Commons 35-37 (London 1803).

187. Havighurst, *supra* note 183, at 250.

188. *Id.*

189. Trials documenting Twisden's support of fining include Leech's Case, Raym. T. 138, 83 Eng. Rep. 75 (K.B. 1665) and Rex v. Wagstaff, 1 Sid. 273, 82 Eng. Rep. 1101 (K.B. 1665). For a biographical sketch of Thomas Twisden, see 7 Edward Foss, The Judges of England 179-84 (London 1864).

awareness of the attitude favoring juries expressed so unequivocally in Parliament, an awareness that would have been heightened by Vaughan's participation in the actions against Kelyng.

#### VI. Inequality Perpetuated but Equilibrium Restored

Of course, jurors still might be fined for overt misbehavior as serious as casting lots for their verdict, or as relatively minor as eating before reaching their verdict. Nevertheless they now possessed the absolute freedom to reach any verdict they desired. In essence, Vaughan's "ingenious . . . combination of antiquarianism and logic . . . amounted to a declaration of the irresponsibility of the jury."<sup>190</sup> Few powers have been as unreservedly celebrated.

In practice, the bench proved far less willing to relinquish power than Vaughan's ruling implied. Having viewed the jury with profound suspicion since its very inception, the legal establishment resisted freeing the jury completely; juries were not to be trusted to carry out the law. Judges still could, and did, *threaten* juries with punishment.<sup>191</sup> Threats without power, however, could hardly be satisfactory; such a reversal in the powers of juries and judges, as an apparently total subjugation of the bench, was unacceptable to the practitioners of the law, whatever Vaughan's position. The bench quickly turned to a new and far less overt means of exercising control over the actions of jurors in civil trials in the form of the motion for a new trial. Within a few years of Vaughan's decision, if a jury abused its trust, such misconduct might not "have its effect, because there is a power (and I thank God there is) to correct such extravagancies, and set aside the verdict."<sup>192</sup>

Deprived of their ability to fine juries by Vaughan's decision, judges presiding over civil trials substituted the motion for a new trial as a means of imposing "a rational control on jury trial."<sup>193</sup> In all civil matters, and in misdemeanor *convictions*, a judge could subvert a jury's verdict through this motion. In some instances, moreover, the failure of a motion for a new trial could be overcome with a motion for an arrest of judgment.<sup>194</sup> A jury might

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190. Plucknett, *supra* note 58, at 134.

191. After the 1670 trial, Judge Jeffries's actions in the Lisle case in 1685 became celebrated for their harshness. See Forsyth, *supra* note 7, at 406-07. Cockburn mentions a case in which Judge Holloway, as late as 1687, was "menacing and threatening" to a trial jury. Cockburn, *supra* note 7, at 115 n.2.

192. Shipley, *supra* note 10, at 936.

193. Baker, *supra* note 9, at 74.

194. Post argued that new trials were common by the 17th century and popular even before attaints fell into disuse. Forsyth claimed that the first use of such a motion occurred in 1665, but The Complete Juryman cited a 1552 motion for a new

well disregard evidence, law, or even the direction of the trial judge, but after Vaughan's decision the consequences of such disregard could often be eliminated.

Lord Mansfield voiced a truth of considerable importance in acknowledging, "Trials by jury, in civil cases, could not subsist now without a power somewhere to grant new trials."<sup>195</sup> Thus, the potential for irresponsible action which Vaughan had granted to the jury in 1670 had been severely curtailed within a few years. Jurors might be free to behave or misbehave as they saw fit without undue harm since their actions could be nullified in many cases. Conversely, criminal juries remained free to reach any verdict they desired: in *all* felony trials and in misdemeanor trials resulting in *acquittals*, their verdicts could not be invalidated through a new trial. Nevertheless, this ability to grant new trials, coupled with the bench's continued willingness to threaten, preserved for quite some time the bench's power to oversee juries. In many criminal matters judges could not subvert a determined jury, but

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trial. Forsyth, *supra* note 7, at 186. Most sources point to *Wood v. Gunston*, Sty. 462, 466, 82 Eng. Rep. 864, 867 (K.B. 1665) as the first known use, but Mansfield argued that such motions pre-dated 1655. *Bright v. Eynon*, 1 Burr 391, 394, 97 Eng. Rep. 365, 366 (K.B. 1757). No new trials could result from capital cases or could new trial motions be made in misdemeanor acquittals, leaving only problems in misdemeanor convictions and civil matters remediable through this new device. The Penn/Mead trial, therefore, could not have led to such a motion. See *Rex v. Parish of Silverton*, 1 Wils. K.B. 298, 95 Eng. Rep. 628 (1751); *Rex v. Latham*, 3 Keb. 143, 84 Eng. Rep. 642 (K.B. 1672). Interestingly, one ruling held specifically that "if the jury find a verdict upon a point of law contrary to the direction of the court . . . a new trial may be granted even after a trial at bar." *Rex v. Poole*, Cas. t. Hard. 24, 25, 95 Eng. Rep. 15, 15 (K.B. 1734) (citing *Regina v. Mayor and Burgesses of Bewdley*, P. Will 212). See also *Rex v. Poole*, Cas. t. Hard. 24, 95 Eng. Rep. 15 (K.B. 1734) (finding contrary to court's direction is sufficient grounds for a new trial); *Rex v. Huggins*, 2 Raym. Ld. 1585, 92 Eng. Rep. 525 (K.B. 1729); *Rex v. Jones*, 8 Mod. 201, 88 Eng. Rep. 146 (K.B. 1723) (verdict based on information *quo warranto* may be set aside); *Rex v. Davis*, 1 Shower, K.B., 336, 89 Eng. Rep. 609 (1691) (motion for new trial denied when criminal defendant acquitted); *Rex v. Smith, Jones, T.* 163, 84 Eng. Rep. 1197 (K.B. 1672) (new trial granted after verdict if based on perjured information). For an example of the use of a motion for arrest in judgment after a motion for a new trial succeeded but yielded identical results, see *Shipley*, *supra* note 10, at 1041. See also Alan Harding, *A Social History of English Law* 275 (1973) (greater use of re-trials arose as safeguard against juries' mistaken verdicts). Modern scholars may be confused over the difference between a motion for an arrest of judgment and a motion for a judgment *non obstante veredicto* [notwithstanding the verdict]. Holdsworth compares the two:

[I]f an error appeared on the face of the record which vitiated the proceedings, a motion might be made in arrest of judgment. . . . Or if, on examination of the record, it appeared that a plea of the defendant was bad in substance; so that, even though the jury had found the facts to be as he pleaded them, he was not entitled to judgment, the plaintiff might move for judgment *non obstante veredicto*.

9 Holdsworth, *supra* note 7, at 278.

195. *Bright v. Eynon*, 1 Burr 391, 393, 97 Eng. Rep. 365, 366 (K.B. 1757).



many juries continued to be manipulated if not completely managed from the bench. Though political considerations occasionally dictated that the jury be free to ignore the law, the law could not be regularly ignored if it was to survive. The wishes of civil juries, at least, could be thwarted if they ran contrary to the wishes of the bench.

Thus a rough equilibrium was restored, augmented by the perpetuation of the fictional division of labor between judges finding law and juries finding fact. This law/fact dichotomy served to camouflage the potential for conflict; judges and juries need not confront the issue of inequality if they labored under the illusion that they were separate but equal. On occasion, the potential which remained for confrontation between judges and juries flared into reality, as in the eighteenth-century trials for libel.<sup>196</sup> More significantly, at several critical junctures during the later eighteenth and early nineteenth centuries, the jury's newly defined freedom from punishment left judges unable to impede verdicts which the government found politically repugnant. Ironically, the bench's very inability to achieve verdicts that it desired in some extremely important political cases helped maintain the status quo in England in the midst of revolutionary fervor far more dangerous than that felt in 1640 or 1688.

In perhaps the most famous example of this, London juries acquitted Thomas Hardy, John Horne Tooke, and John Thelwall on charges of treason in 1794-95 despite the government's determined efforts to secure their convictions. The Lord Chief Justice's *pre-trial* decision that "the parties were guilty of high treason" had no bearing on the outcome of the trials, and English justice appeared to have triumphed.<sup>197</sup> These "not guilty" verdicts could not be rejected or altered by the bench, and the resulting euphoria among the working orders helped perpetuate the very potent counter-revolutionary myth that English law was the guarantor of Englishmen's rights. Why would Englishmen need a revolution to set them free? The mob could be convinced that the law, of which it understood very little, made all Englishmen free and equal. In reality, of course, it did no such thing, but what chance has truth against myth? Myths, like that generated by the Penn/Mead trial itself, have frequently proven politically omnipotent. Could the law survive otherwise?

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196. See *supra* note 100.

197. 1 Horace Twiss, *The Public and Private Life of Lord Chancellor Eldon* 195 (London 3d ed. 1846) (emphasis omitted); Edward Royle & James Walvin, *English Radicals and Reformers, 1760-1848*, at 72 (1982).

