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Juror Purgators: The Evolution of Compurgation and Jury Nullification Notes

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Note

Juror *Purgators*: The Evolution of Compurgation and Jury Nullification

JOSH PERLDEINER

The ancient and medieval custom of compurgation, the clearing of one's name by producing oath-helpers, has a long and colored past in Anglo-American law. Also known as the Wager of Law after the late-11th century and the Norman Conquest, this process made considerable concession to the knowledge and power of local communities; oath-helpers were generally peers, and were considered to know intimate details concerning the case for which they were called. This Note will show that, once compurgation had substantially vanished (whether before or after the Assize of Clarendon), the importance of locality did not simply cease, but rather carried on, taken up through the formal inquest procedure in England. From there, it made its way into the jury trial, which we may trace, insofar as English law is concerned, to the Assize of Clarendon, though it has its beginnings long before that in general European jurisprudence.

The final instantiation of this transformative process from compurgation is the power of a jury to nullify. Though juries may no longer be composed of locals expected to know the law, they are still expected to embody some element of local custom. Though this is a highly contested issue amongst jurists, I argue that the power of nullification (open to abuse though it is), is conceptually integral in the way that the modern jury system functions since the other elements of vicinage, or locality, have been stripped out one by one as the State has grown more powerful on the grand historical timeline.

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Juror *Purgators*: The Evolution of Compurgation and Jury Nullification

JOSH PERLDEINER*

I. INTRODUCTION

Our society has grown used to the modern shape of trial, but that ritual and procedure has not been unchanging through the centuries. Ancient modes of trial differed in many substantial and often surprising ways from our own.¹ The form taken by trial reflects the social organization of the society which created it.² Our own “modern” modes of trial are inherently tied to the way in which our society is structured.³ Compurgation, or oath-swearing, with which this article is concerned, is a fundamentally alien mode of proof and trial to us. However, its history is of great interest to many more “modern” modes.

There has been much scholarly debate over where and when the practice of compurgation originated.⁴ What is certain is that it played a prominent role in the dispute resolution of a primarily familial society.⁵

The same problems of historical descent are attendant on the

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¹ In addition to the Germanic customs addressed *infra*, the practices of classical Roman trials, from which the Continental Inquisitorial style derives, were completely divorced from what most Americans or residents of the United Kingdom would consider trials; civil judges during the Republic, for example, were chosen by the mutual agreement of the parties’ patrons. LEOPOLD WENGER, INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE 35 (Otis Harrison Fisk, trans., The Liberal Arts Press 1955). For records of Roman trials during the Republic see generally, MICHAEL C. ALEXANDER, TRIALS IN THE LATE ROMAN REPUBLIC, 149 BC TO 50 BC (1990).

² See generally, e.g., MICHEL CROZIER, THE BUREAUCRATIC PHENOMENON (2010) (arguing that bureaucratic institutions, such as trial courts, exist in a cultural context which gives them form).

³ *Id.*

⁴ This debate was at its most contentious around the end of the 19th century, when prominent classicists and medievalists (not to mention law scholars) attempted to trace the ethnic origins of various practices. See, e.g., Henry Campbell Black, *Antiquities of the Law of Evidence—Compurgation*, 27 AM. L. REV. 498, 498–99 (1893) (arguing that the idea of the exculpatory oath is an idea fundamental to civilization, developed independently amongst many peoples, the oldest example of which can be traced to Mosaic law). However, to my knowledge, there has yet to be a satisfactory answer to this question. For one thing, compurgation appears to have been in use not only amongst Germanic peoples, but even, for a time, amongst Greeks and Romans. *Id.* at 499–501. Whether this points to a common source is difficult to determine at this remove.

⁵ HENRY C. LEA, SUPERSTITION AND FORCE: ESSAYS ON THE WAGER OF LAW, THE WAGER OF BATTLE, THE ORDEAL, TORTURE 14–15 (2d rev. ed.) (1870).

traditional jury-right. Though some have described the jury as an outgrowth of the old Saxon custom of trial by the ealdorman, there has been considerable contest on that point.⁶ The most commonly accepted reasoning is that the jury trial actually only traces its roots back to the 12th century Assize of Clarendon, under Henry II.⁷

Compurgation bears some hallmarks that make it appear to be, at first blush, somewhat like our conception of a jury trial.⁸ Indeed, there was a time during the 1870s and 80s when it was a common belief that the Anglo-American jury practice itself derived from the practice of oath-swearing.⁹ Though the link between them may be dissolved by scholarship, there is a *reason* scholars thought our practice and oath-swearing were akin: both the medieval jury and the swearing of compurgators express a highly local concern with justice. That is, that justice need be done according to both local rule and local knowledge.¹⁰

There is more to this link than meets the eye. In the Note following, I will make no attempt to reinstate the Victorian argument that the jury emerged from the ancient practice of compurgation. Rather, I will demonstrate that the practice of compurgation stems from the same basic need for local justice as the jury does. This concern with community judgment and local knowledge is reflected in the modern practice of criminal jury nullification, wherein a jury declares that notwithstanding the defendant's guilt, they will not convict. The groundswell of local support in the face of the will of the state that undergirds jury nullification is inherently akin to the practice of compurgation, in which a number of oath-helpers swear that the defendant did not commit the crime or delict, regardless of the factual circumstances underlying the charge.

⁶ See, e.g., J.E.R. Stephens, *The Growth of Trial by Jury in England*, 10 HARV. L. REV. 150, 150–51 (1896) (encapsulating several positions).

⁷ During which time Henry instituted a number of reforms to trial in England, namely shifting the systems of trial away from the classical trial by ordeal, battle, or compurgation, to an evidentiary model. THE ASSIZE OF CLARENDON, reprinted in SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY FROM THE EARLIEST TIMES TO THE REIGN OF EDWARD THE FIRST (William Stubbs ed., 1913) (Requiring twelve men of the region to determine who was entitled to property as one of its changes, leading to the civil petit jury and twelve free men to report of any crimes that had occurred in a region while the Assize was traveling circuit, which appears to be a type of indicting grand jury).

⁸ The similarities between compurgation and the juror-witness model of the medieval jury have been much remarked on by various sources, most of them 19th century commentators. Any of the articles cited herein from the 19th century will give a good overview of this attitude.

⁹ Stephens, *supra* note 6, at 154 (noting that this belief had fallen out of fashion at least by 1896, the time of that article's publication).

¹⁰ Mike Macnair, *Vicinage and the Antecedents of the Jury*, 17 LAW & HIST. REV. 537, 537–38 (1999).

II. COMPURGATION

The practice of compurgation has its origins somewhere in the mists of time.¹¹ In form, compurgation consisted of a defendant, civil or criminal,¹² proving his innocence not by any evidentiary obligation, but rather by swearing that he did not commit the crime or delict. This oath required helpers—*purgators*—to swear together (to *com purgare*, literally to purge together, where *com* is an intensive Latin prefix) to the faithfulness and trustworthiness of the defendant.¹³ Victorians roundly criticized this form of proof as being barbaric, incomprehensible, and illogical.¹⁴ It is only in relatively recent years that sense has been made of what is, to us, a completely alien form of justice.¹⁵

Compurgation reflects the society that produced it: one that was focused on kinship and blood ties. In the early Medieval world out of which compurgation grew, it was not uncommon for unresolved differences to erupt into blood-feuds.¹⁶ This type of conflict was costly and dangerous. It permitted essentially personal problems between two individuals to explode into widespread community violence.¹⁷ “Solidarity was an essential fact of tribal life.”¹⁸ The process of compurgation allowed one side on a potential feud to measure another. In its most basic form,

¹¹ It appears at least as early as the Salic law code of the 5th century C.E. James B. Thayer, *The Older Modes of Trial*, 5 HARV. L. REV. 45, 58 (1891). It appears largely unchanged in the 13th century Customal of Ipswich. *See id.*

¹² There was less difference between civil and criminal matters in the Classical and Medieval period, primarily due to the fact that the distinction between an action on behalf of the state and a personal trespass or delict was hazy at best and often nonexistent, leaving many crimes to be dealt with by an accuser bringing them forward in court. Black, *supra* note 4, at 505, 508; LEA, *supra* note 5.

¹³ *See* MAURICE ALPHEUS BIGELOW, *PLACITA ANGLO-NORMANICA*, at xx (1879) (“Compurgation, in its essential features, consisted in the bringing forward of a definite number of persons, dependent upon the rank of the parties and the object of the suit, who were to swear, not to the facts, but to the credibility of the party for whom they appeared.”).

¹⁴ WILLIAM ROBERTSON, *1 THE HISTORY OF THE REIGN OF EMPEROR CHARLES V*, at 59 (Phillips, Sampson, & Co. 1859); T.F.T. PLUCKNETT, *EDWARD I AND CRIMINAL LAW* 69 (Cambridge Univ. Press 1960) (writing that the ordeal “can only be described as irrational” and that “[t]here was nothing rational about it”); *see also* R.C. VAN CAENEGEM, *METHODS OF PROOF IN WESTERN MEDIEVAL LAW, IN LEGAL HISTORY: A EUROPEAN PERSPECTIVE* 71 (Hambledon Press 1991) (typifying medieval trial as a “recourse to invisible forces . . . [and] renunciation of the reasoned investigation”).

¹⁵ *See generally* H.L. Ho, *The Legitimacy of Medieval Proof*, 19 J.L. & RELIGION 259 (2003) (describing the social and faith-based aspects of compurgation, trial by ordeal, and trial by combat, as well as the mitigating factors of discretion and manipulation); *see also* Rebecca V. Colman, *Reason and Unreason in Early Medieval Law*, 4 J. INTERDISCIPLINARY HIST. 571 (1974); Peter Brown, *Society and the Supernatural: A Medieval Change*, 104 DAEDALUS 133 (1975).

¹⁶ LEA, *supra* note 5, at 15.

¹⁷ *Id.* “When ‘violent self-help and private warfare compete . . . with law’ as forms of social control, the court had to bring every dissension to a categorical close.” Ho, *supra* note 15, at 270 (citing Paul R. Hyams, *Trial by Ordeal: The Key to Proof in the Early Common Law*, in *ON THE LAWS AND CUSTOMS OF ENGLAND—ESSAYS IN HONOR OF SAMUEL E. THORNE* 90 (Morris S. Arnold et al. eds., U.N.C. Press 1981)).

¹⁸ Ho, *supra* note 15, at 269.

families and kin-groupings could come together to examine each other, the plaintiff bringing his *secta*¹⁹ and the defendant bringing his *purgators*. This served as a safety valve, preventing dangerous conflicts from boiling over into the community. Seen in this light, compurgation no longer appears so childish.

However, compurgation did not remain viable in the years following the Assize of Clarendon, save in ecclesiastical courts.²⁰ Nearly contemporaneous with its disappearance was the rise of the criminal and civil jury in England. This section of the Note will explore first, in detail, the sources of compurgation in distant antiquity. Then, I will turn to the effects of compurgation on a society of kinship and feud. Lastly, I will conclude with the vanishing of compurgation altogether, making room for other methods of trial.

A. Sources of Compurgation in Germanic Law

The very earliest written versions of compurgation appear to be contained in the *Lex Salica*, promulgated by Clovis, King of the Franks, in the late fifth or early sixth century of the Common Era.²¹ By the mid-seventh century, the Edict of Rothari alluded to *sacramentales*, usually twelve in number, and by the end of that century so did the law of Ine of Wessex.²² Whether or not compurgation was truly in wide use before the codification of the laws of the Salian Franks in the *Lex Salica* as many earlier scholars suggest, it is certain that by the mid-sixth century it was in widespread use in continental Europe and, at least by the close of the seventh century, it was used in Wessex.²³

¹⁹ Often called “complaint-witnesses” in the scholarly literature, the function of calling *secta* was to bypass the preliminary pleading stage as a proffer that the deed forming the basis of the action was true. Thayer, *supra* note 11, at 47–48.

²⁰ THE ASSIZE OF CLARENDON, *supra* note 7.

²¹ See MAURIZIO LUPOI, THE ORIGINS OF THE EUROPEAN LEGAL ORDER 341–42 (Adrian Belton trans.) (1994) (“[O]ath-helping was a widespread institution, attested by the formularies and admitted in the first Frankish capitularies after the promulgation of the Salic law.”); see also GUY CARLETON LEE, HISTORICAL JURISPRUDENCE: AN INTRODUCTION TO THE SYSTEMATIC STUDY OF THE DEVELOPMENT OF LAW 380–81 (1900) (“The characteristic of this code[, the Ripurian Law,] is greater minuteness of regulation than is found in the Salic Law as to compurgation and the number of compurgators.”). *Purgatores* were also found in the code of the Alamanni, and the Lombards. LEA, *supra* note 5, at 55. But see WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 305–08 (7th ed. 1956) (tracing the history of compurgation back even farther, to the Roman period: “Though oaths were used in the Roman law of procedure, this institution of compurgation was not known to it. It was, however, common to the laws of many of the barbarian tribes who overran the Roman empire.”).

²² LUPOI, *supra* note 21, at 342. These *sacramentales* seem to have served the same function as *purgatores*, though their name indicates that there is a conception of holiness or sanctity to their duty, perhaps indicating that they were made to swear on holy relics or to speak sacred formulae, as was sometimes the case in compurgation.

²³ Though not, interestingly, in Kent, where a contemporaneous law issued by King Wihtræd of Kent states that oaths are sworn only by the interested party (what have been termed *secta* above). *Id.*

Eventually, compurgation was available as a form of justice throughout England. It was contested by a new form of proof after the Norman Conquest, brought over by the invaders: trial by combat, which served many of the same ends as compurgation.²⁴ However, oath-swearing had become, by that time, an institution available to all English freemen and trial by combat was reserved for the nobility, or at least the very wealthy.²⁵ Compurgation was not finally extinguished until some time after the 13th century Assize of Clarendon forbade various older modes of trial in secular courts, though it may have persisted in ecclesiastical contexts.²⁶

B. *Social Effects of a Scheme of Compurgation*

The society which made use of compurgation was one in which bonds of blood and kinship were of paramount importance.²⁷ Blood-feuds were common and extremely dangerous.²⁸ This private action, this violent self-help, led to the development of the compurgatory system by which kin-groups could confront one another in a public place and determine whether or not they truly wished to go forward with the dangerous activity of the blood-feud.²⁹ One of the effects of this scheme was to prevent repeat

Henry Campbell Black notes that “[a]mong the Salian Franks . . . it was considered a privilege and was restricted to the nobility, or was permitted to the ordinary freeman only in the exceptional case of his accuser’s assenting thereto.” Black, *supra* note 4, at 503.

²⁴ Thayer, *supra* note 11, at 65. Wager of battle appears to have been imported from the Frankish dominions by the Normans.

²⁵ Though the sources are confused on this point insofar as the Norman English dominion, the GRAND CHRONIQUES DE FRANCE presents us with a tantalizing view of trial by combat on the continent: “Saint Louis abolished battle in his country because it happened often that when there was a contention between a poor man and a rich man in which trial by battle was necessary, the rich man paid so much that all the champions were on his side and the poor man could find none to help him.” M. PAULIN, Paris, vol. 4, p. 427, 430, al. 3.

In some ways, this mirrors the practice of retaining all available advocates by one party in a litigation, causing them to conflict out of serving the other party.

²⁶ *Infra* Part I.C.

²⁷ STEPHEN D. WHITE, RE-THINKING KINSHIP AND FEUDALISM IN EARLY MEDIEVAL EUROPE (2005).

²⁸ As evinced by the practice of the wergeld, or man-price (called *botes* or *leodes* in the *Lex Salica*), schedules of payments in silver to be paid for various offenses in order to prevent feud-right from attaching. G. LARRY MAYS & LATHAM THOMAS WINFREE, ESSENTIALS OF CORRECTIONS 34 (2008). The *Lex Salica* provided “If anyone finds a man at a crossroads without hands and feet whom his enemies have left mutilated [and he kills him], he shall be liable to pay four thousand denarii.” THE LAWS OF THE SALIAN FRANKS 181 (Katherine Fischer Drew trans., 1991).

This was, in essence, a restriction on interfering with a blood-feud as an outside party—it was not that the death was considered a murder, but that it was being stolen from the rightful side of the feud who had put him there in the first place.

²⁹ F.J.C. HEARNshaw, LEET JURISDICTION IN ENGLAND ESPECIALLY ILLUSTRATED BY THE RECORDS OF THE COURT LEET OF SOUTHAMPTON 332–33 (H.M. Gilbert & Son 1908). Wergeld also served to bind actions to the community. See LEA, *supra* note 5, at 18 (“In its relations to the community, therefore, each family in the barbaric tribes was a unit, both for attack and defence,

offenders from having access to compurgation. Those members of a kin-group who were brought before the hallmoot (or *althing*, or judicial body of whatever stripe) repeatedly would find their credit slowly degrading with their kindred.³⁰ At some point, they would then be unable to produce the essential number of *purgators* to clear them. This served as a check on those chronically unable to avoid enraging, injuring, or damaging others.³¹ An example of this judicial oath can be seen in an 1101 C.E. case where two bishops were the *purgators* of a brother prelate from a charge of simony in the consistory court—their oaths were simply, “I believe that Norgaud, Bishop of Autun, has sworn the truth. So help me God.”³²

This early Germanic judicial scheme was carried forward long after the tribal organizations that gave it birth and purpose had vanished. The divisions between the Salian and Ripaurian Franks, fundamental to the old Frankish kingdom of Clovis, were replaced by the patchwork Empire of Charlemagne. Frankia gave way in the east to the Holy Roman Empire, in the west to West Frankia. Charlemagne’s reforms on the mainland reintroduced the Roman system of jurisprudence to Gaul. Amongst the kingdoms of England, however, the Germanic method of trial persisted.³³ It became known, in English courts, as the “wager of law.”³⁴ This practice remained available as an option for the defense in some English claims as late as 1833.³⁵

Alongside trial by ordeal and battle, these were known as “methods of proof,” and they were seen not as competing narratives about how trials should be performed, but rather as equally potent ways to “prove” the truth.³⁶

whether recourse was had to the jealously preserved right of private warfare, or whether the injured parties contented themselves with the more peaceful processes of [legal process] . . .”).

³⁰ LEA, *supra* note 5, at 57–58.

³¹ *Id.*

³² *Credo Norigaudum istum Eduensem episcopum vera jurasse, sicut me Deus adjuvet*. HUGO FLAVINIAC, *CHRONICON, LIBER II* (author’s translation, likely 12th century). This is one of the simplest forms of oath-swearing. There are more elaborate examples, including the use of relics or bibles to guarantee the truthfulness of the oaths sworn or making use of long and particularly difficult to recall oaths that the oath-helper must swear without hesitation and without mistake in order to successfully purge the accusation. See, e.g., LEA, *supra* note 5, at 25–26; A.H.F. Lefroy, *Anglo-Saxon Period of English Law*, 26 *YALE L.J.* 291 (1916) (detailing some of the types and modes of compurgation).

³³ It did so along several other methods of proof—trial by ordeal and, after the coming of the Normans, trial by combat.

³⁴ This term was used only after the Norman Conquest. Black, *supra* note 4, at 513.

³⁵ FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 641 (2013).

³⁶ The proof of compurgation was that either that the act *did not occur* or that it *should not be punished*. The proof of trial by ordeal was the same, though God, rather than the community made that determination. See generally Ho, *supra* note 10. So, too, for trial by combat, which was seen to be the judgment of God for his chosen champion but may in fact be an outgrowth of the ancient Nordic practice of *holmgang*, the judicial duel between hazel branches in which the slanderer or insulter proves

The wager of law in the kingdoms of Great Britain has roots in Welsh as well as Anglo-Saxon practice.³⁷ The oath-helping of Saxon *thegns* falls into this category of particularly English oaths, as distinguished from the Germanic oaths of the Continent.³⁸

As the importance of blood kinship withered with the growth of more powerful kingdoms, and particularly with the unification of Britain into a single polity outside of Wales and the far north,³⁹ compurgation began to take on a new role.⁴⁰ Compurgation in English Hundred Courts no longer had the same conciliatory role that it had served during the period of private justice that dominated the early Middle Ages. Indeed, compurgation began to be used as an alternative to other popular modes of proof.⁴¹

The detachment from this earlier mode can be seen in the oath sworn by William, Bishop of Ely, in 1194. King Richard I of England, attempting to make peace between William and the Archbishop of York, required that William of Ely swear with a hundred priestly compurgators that he had neither caused nor desired the arrest of the archbishop.⁴² Of course, the samples of compurgations cited are from cases of extremely high-status parties. Unfortunately, high-status cases such as these may provide relatively little insight into the world at ground-level in the English hundred courts.⁴³ Extant court rolls will have to be examined in much

his insult by defending it in combat. For a general description of *holmgang*, see Olav Bø, *Hólmgangra and Einvigi: Scandinavian Forms of the Duel*, 2 *MEDIEVAL SCANDINAVIA* 132–48 (1969).

³⁷ ANOMALOUS LAWS, Book IX ch. v § 3, ch. xxxviii § 1 (articulating the rule that a man who suspected another of theft could go to him with a relic and in the presence of witnesses demand an oath of negation, a failure in which was a conviction of the crime imputed, without further trial).

Further, Henry C. Lea contends that the Ostrogoths of Italy and the Visigoths of France and Spain were the only “barbarian” nations in whose codes the practice of compurgation has no place. LEA, *supra* note 5, at 28 (“On the other hand, the Salians, the Ripuarians, the Alamanni, the Baioarians, the Lombards, the Frisians, the Saxons, the Angli and Werini, the Anglo-Saxons, and the Welsh, races springing from origins widely diverse, all gave to this form of purgation a prominent position in their jurisprudence, and it may be said to have reigned from Southern Italy to Scotland.”).

³⁸ King’s *thegns* were an appointed position in the Saxon kingdoms of Great Britain, though shire *thegns* were simply great men who owned more than five hides of land and performed services for the king or local officials. A *thegn*’s oath was worth that of six villeins. WILLIAM STUBBS, *LECTURES ON EARLY ENGLISH HISTORY* 168 (Arthur Hassall ed., 1906).

³⁹ This unification was begun with the recognition of Æthelstan as the king of the English in 927 C.E. by King Constantine of Scotland, King Hywel Dda of Deheubarth, Ealdred of Bamburgh, and King Owain of Strathclyde in the north of the island. N. J. HIGHAM, *THE KINGDOM OF NORTHUMBRIA: AD 350–1100*, at 190 (1993).

⁴⁰ LEA, *supra* note 5, at 57.

⁴¹ In later codes, trivial offenses or small claims were often cured by the defendant’s oath, while more important classes of adjudication would require the summoning and sealing of *purgators* based on the degree of crime alleged. *Id.* at 50.

⁴² ROGER DE HOVEDEN, 2 *ANNALS OF ROGER DE HOVEDEN: COMPRISING THE HISTORY OF ENGLAND AND OF OTHER COUNTRIES OF EUROPE* 322–23 (Henry T. Riley trans., 1853).

⁴³ Note that both of the examples provided were not kept in bureaucratic records or notes, but rather in annals, which, in the 12th century, were very similar to popular history today.

greater detail with this hypothesis in mind than they have been to date. For the purposes of this Note, I merely attempt to establish the existence of the information, not to categorize it in any systematic way.

We find one John Fox the younger in the rolls of the court at Ely,⁴⁴ unable to produce the required number of oath-swearers:

John of Elm plaintiff appears against John Fox the younger in a plea of trespass wherefore he carried off [nine] hundreds of his sedge and unjustly detains them from him.

And the said John Fox comes and defends etc., and says that he carried off no sedge of the said John of Elm as he surmises against him, and this is he ready to defend against him in such wise as the court shall consider. And of this he has waged a law, and the said John of Elm has conceded him the said law, and the said John Fox has declined to make the law. Therefore it is considered that the said John of Elm do recover his sedge and that the said John of Fox be in mercy (3 d.);⁴⁵ pledge, John of Elm.⁴⁶

From this record, we can see that compurgation was, at least in some way, effective. John Fox was unable or unwilling to bring together *purgators* to clear his name, and instead was levied a three pence fine. Though records like these can be somewhat opaque—we cannot, for example, tell whether or not John Fox the younger did indeed carry off the sedge, whether he was wealthy enough not to mind the fine, whether he asked others to be his *purgators* and was rebuffed, or a variety of other potential circumstances—we can certainly see that compurgation did not always result in the alleged wrongdoer being pardoned.

But we cannot view this record alone. The Selden Society also preserved an interesting manual from the mid-13th century—the “Court Baron,” which contains instructions for a lord or bailiff in ordering his local court. These make-believe suits and crimes can serve to instruct us on the idealized practices of the period. Maitland dates this somewhere around 1265 C.E., making it of much later mint than the early practices of

⁴⁴ Ely was a large Fenland monastery before the Conquest, and later became the seat of an important bishopric. The court held there was that of the ecclesiastical lord, the Bishop of Ely.

⁴⁵ The “d” here mentioned is a dinar, a silver penny and the form of currency at the time, called pennies (hence the English plural “pence”).

⁴⁶ This pleading is from the period of 1285–1327, clearly after the passage of the Assize. However, since it is a civil pleading, the Assize of Clarendon would not have precluded the use of the wager of law here. This translation was made in the late 19th century by the editors of the Selden Society papers. 4 SELDEN SOCIETY I, *The Bishop of Ely's Court at Littleport*, in THE COURT BARON 123–24 (Frederic William Maitland & William Paley Baildon eds., 1890) [hereinafter THE COURT BARON].

compurgation discussed above.⁴⁷ The first type of form is the “hue levied,”⁴⁸ namely that the peace has been disturbed. Once the case is described to the assembly and Richard is asked if he has heard (“Fair friend Richard, hast heard that which the bailiff hath counted against thee? Yea, sir.”),⁴⁹ he is instructed that “this court awardeth that thou be at thy law six-handed at the next court against Robert and against his suit, to acquit thyself”⁵⁰

This formula is instructing Richard to produce six *purgators* by the next court date, generally a month away. Likewise, William Tailor is commanded to do the same in the charge of breach of the assize of beer (a criminal offense against the lord) in a later formula.⁵¹ Again, Robert Fisher, who sold fish in breach of the patent franchise of the town, was ordered to be at his law six-handed.⁵² So is Stephen Carpenter, for battering strangers.⁵³ For a greater charge involving a number of people (A., B., C., and D.) the bailiff instructs them to be at their law *twelve* handed—i.e., producing twelve *purgators*.⁵⁴ The same number goes for a man guilty of breaching the forest law and hunting on the lord’s land.⁵⁵ The manual contemplates that there will be those who cannot make their law by lack of the necessary *purgators*,⁵⁶ or even through a confession,⁵⁷ thus placing them “in mercy” of their lord and the wronged party.

The bailiff was also given instruction on how to carry out the “inquest,” or the manner of questioning both the parties to a suit and the pledges to a purgatory oath.⁵⁸ This form of adjudication grew together with the so-called *vicini* questioned in these inquests: the use of neighbors as a special source of testimony in the world of Anglo-Saxon trial.⁵⁹ These questions bear directly on the case. For example:

Also it was inquired of the chief pledge whether he knew how many and whom he had in his tithing. And it was witnessed that he did, [but on reading] the names of the

⁴⁷ *Id.* at 6.

⁴⁸ *Id.* at 20.

⁴⁹ *Id.* at 21.

⁵⁰ *Id.*

⁵¹ *Id.* at 25.

⁵² *Id.* at 27.

⁵³ *Id.* at 28.

⁵⁴ *Id.* at 31.

⁵⁵ *Id.* at 35.

⁵⁶ *Id.* at 58–60.

⁵⁷ *Id.* at 65.

⁵⁸ *Id.* at 71–73.

⁵⁹ *Vicini* were most prominent in issues of boundary-determination or conveyance of property. However, the use of local witness/jurors expanded to expressly cover the conception of justice as something essentially local and requiring the specialized knowledge of neighbors and peers. See Macnair, *supra* note 10, at 556–57.

several persons it is found that R. Smith has concealed N. and N. who have removed themselves into the land of the Preceptor of the Knights Templars. And it is commanded that they be distrained to return with their chattels to the lord's land, and the said R. is in mercy, 2 s.,⁶⁰ for the concealment.⁶¹

We may gather from this formula that the chief *purgator* was asked questions about the oath he swore and found wanting in his response. The result is a fine to the *purgator* himself. But both the proof offered in the form of the *purgator*'s oath and the counter-proof of the reading of the names, are forms of local and customary knowledge. The chief pledge himself offers his own knowledge of affairs to the court and the court consults a local record to confirm or deny it.

Indeed, we may even witness the purgation bending back against the original accuser: "R. cometh against N. and maketh a law in the suit which was between them. And N. is in mercy, 3 s., for a false complaint; pledges N. and N."⁶² In this formula, because R. managed to defend himself by producing oath-takers, N. was fined for a false complaint. Punishment of this kind relies on a local village-level calculus of interests. If R. was truly to blame, surely those with the most knowledge of the affair, the neighbors of both R. and N., would not swear against N. knowing that R. had done wrong.

This is an idealized source from somewhere in the mid-12th century. It does not represent a record of actual cases. In a sense, this formulary is more telling than any individual case could ever be, such as that of John Fox presented above. The opacity of each individual recording in the case of real cases is here obliterated—the formulary describes exactly the various permutations that the bailiff should take. All potentially useful branches are recorded for the attentive reader, so that individuation of circumstance might not take him by surprise.⁶³

H. L. Ho warns us to ask the questions that medieval litigants would have asked, albeit in the context of the trial by ordeal: "If God accepts the proband by making him sink in cold water, is it because he is innocent? Or is the repentant being shown mercy?"⁶⁴ Though he here refers to the

⁶⁰ Presumably the "s" stands for shillings, a denomination of currency larger than a penny by a factor of twelve.

⁶¹ THE COURT BARON, *supra* note 46, at 72.

⁶² *Id.* at 76.

⁶³ For a practice that was supposedly done away with in the Assize of Clarendon, criminal compurgation seems alive and well in this ~1260ish formulary manual. Another surprising note is that this book was recopied throughout the 14th and 15th centuries. Indeed, Maitland hypothesized that it may have been copied as late as the 1600s.

⁶⁴ Ho, *supra* note 15, at 280; *see also* R.C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 69 (1973) ("[I]n the twelfth century some authors interpreted the successful ordeal of a

ordeal, this could as easily be asked during a compurgation or wager of law; is the proband being granted a second chance? The functions of this judicial process are multifaceted, and can satisfy a number of sociological needs.

The post-Conquest world was one in which private law was being transformed into professional law.⁶⁵ Compurgation is the foremost of the forms of private law; indeed, it existed primarily as a method for the solution of private disputes that, as we have seen, might otherwise have ended in bloodshed. Still, it is important to remember that these images of compurgation exist across time and across a spectrum of changing social structures. No one example represents anything other than its own particular milieu. The sum total must be imagined along a continuum of praxis extending from the earliest Germanic compurgation until the time when it was wholly extinct in Britain.

C. *The Vanishing of Compurgation*

Compurgation was more or less ended as a practice in the secular courts of England in the 12th century by the Assize of Clarendon.⁶⁶ Although ecclesiastical courts continued to practice compurgation, few common folk had access to them.⁶⁷ There were, as mentioned above, a certain number of survivals that continued far into the 19th century in particular civil matters, but as a general mode of proof, it was no longer in use.

The decline of compurgation as a mode of proof occurred around the same time as the rise of the jury trial. Coincidental or not, this alignment of events led a few scholars in the mid-19th century to conclude that the dying light of compurgation was taken up by the jury trial: that one essentially *became* the other. Of course, this has been debunked as spurious, or at least as resting on somewhat shaky ground.

known criminal as a measure of grace: God wanted to give the criminal another chance or to reward those who had confessed their sins to a priest and were then ‘*salvati per confessionis virtutem.*’”).

⁶⁵ Macnair, *supra* note 10, at 587–88.

⁶⁶ The Assize was promulgated under Henry II, and detailed restrictions on acceptable modes of trial. THE ASSIZE OF CLARENDON, *supra* note 7.

However, as the popularity of the Court Baron shows, the difference between criminal and civil modes of trial was not yet clearly distinguished, and compurgation may have been available as a mode of trial or proof in criminal matters in the secular courts until well after Henry’s Assize of Clarendon was promulgated.

⁶⁷ Consistory courts were available only when the crime was one charged by the Church (such as blasphemy) or when any of the litigants were clerics. Even taking minor orders would allow someone to claim the protection of the Church, which was just one of many benefits to becoming a lay canon, an attractive route for many in the 12th century.

III. THE ROOTS OF JURY NULLIFICATION

The medieval origins of the jury spring from that milieu and any resemblance of modern juries is very slight. Jurors were meant to be informed members of the local community, serving as both witnesses and determiners-of-fact.⁶⁸ County or royal judges would charge them with settling cases, and settle cases they did: by using their own knowledge of them.⁶⁹ The American fear of biased jurors never entered into the equation. What reads as bias to us read to the medievals as a firm basis for knowledge of the case at hand.⁷⁰ It is easy to see the temptation of drawing an evolutionary line from compurgation to the jury because of all they have in common. Those who do fall into the same trap as the Victorian Medievalists.⁷¹

The jury would seem to be the creation of the very same Assize of Clarendon which ended the wide-spread use of compurgation.⁷² However,

⁶⁸ Of course, this depended on the type of proof being sought. *Purgators*, as seen above, could still be questioned like witnesses, and they served a role that was wholly unique from that of the traditional juror. Still, it is conceivable that the notion of knowing townfolk who swear to the truth or falsehood of a claim may have developed into one requiring the court itself to produce these townfolk as jurors, rather than each side in a case producing their own oath-takers.

For example, the Synod of Toul in 838 resolved a boundary dispute not by empanelling a jury, but by “investigating by the testimony of many, clergy and lay, who appeared to be the older.” Macnair, *supra* note 10, at 562. This type of inquiry was known as an inquest, and it has many of the attributes of compurgation and jury trial admixed in different quantities depending on the time and place of the inquest. See Edmund M. Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. CHI. L. REV. 247, 247–48, 251 (1937) (describing the evolution of the inquest into the jury trial, but also noting that the common law preference for testimony of witnesses antedates the jury).

These witnesses in the formal inquest made use of their own personal knowledge. Macnair, *supra* note 10, at 572. Macnair argues, convincingly, that the jury does not descend directly from communal judgments such as compurgation, but rather was intermediated by the use of formal *vicini* in the inquest-style adjudications, which themselves transmitted the notion of local custom as a mode of proof down to the later English jury. *Id.* at 587–88.

For more on the inquest process in the English context, see Robin Fleming, *Oral Testimony and the Domesday Inquest*, 17 ANGLO-NORMAN STUD. 101 (1995).

⁶⁹ Macnair, *supra* note 10, at 562.

⁷⁰ “[T]o those small-scale societies which favour the kind of flexible face-to-face justice in which honor and personal reputation are intimately bound up with innocence and guilt, the kind of dispassionate inquiry into fact which we believe to constitute a higher form of jurisprudence will often seem . . . repugnant.” RICHARD FIRTH GREEN, *A CRISIS OF TRUTH—LITERATURE AND LAW IN RICARDIAN ENGLAND* 101–02 (Univ. of Pa. Press 1999).

⁷¹ The most obvious positivist trap, of course, is teleological. We cannot help but find “growth,” “evolution,” and “progress” when we view the past through the lens of the present. Thankfully, though this methodology was widespread in Victorian history, Victorian legal scholarship seems to have escaped the brunt of it. Many of the late 19th century articles cited herein are very critical of this positivist viewpoint.

⁷² A body of twelve of the more lawful men of each hundred had the duty of presenting under oath any person believed to be a robber, thief, murderer, or harbinger of such criminals and to act as a sort of indicting grand jury in the interests of the king’s peace. This indicted grand jury is commonly cited as the genesis of the jury-trial in Anglo-American law. However, this narrative may be too simple.

its roots are sunk deep in the bedrock of the common law itself, which is demonstrated by such records as King William of Normandy journeying to Penden Heath in 1072 “in order to ascertain carefully from old Englishmen the truth of the law and to have a hearing there about some customs and lands”⁷³ Indeed, the jury right of England has precedent in the Dicasts of Athens, the Judices of Rome, and in the customs of Danes, Lombards, Franks, Norwegians, Swedes and Scandinavians.⁷⁴

What, then, is the origin of jury nullification? Proponents trace jury nullification to a group of early 17th-century English cases.⁷⁵ The division between the realms of act and law that all lawyers are familiar with was introduced in 1649 during the first trial of Lieutenant Colonel John Lilburne for treason.⁷⁶ He was acquitted, but put on trial again in 1653 for criticizing the privileges of a member of Parliament.⁷⁷ His defense was that the law criminalizing the expression of anti-government opinions was itself criminal.⁷⁸ The jury agreed that the law was *ultra vires*, and released Lieutenant Colonel Lilburne.⁷⁹

Seventeen years later, the Quaker leaders William Penn and William Mead were arrested for sedition.⁸⁰ In court, Penn argued, “[t]he question is not, whether I am guilty of this indictment, but whether this indictment be legal.”⁸¹ Four of the twelve jurors in Penn’s trial refused to convict him. The judge threatened the jurors, telling them “you shall be locked up without meat, drink, fire, and tobacco; you shall not think thus to abuse the court; we will have a verdict by the help of God, or you shall starve for it.”⁸² When the jury returned, it found Mead not guilty and Penn guilty of speaking sedition, but not to an unlawful assembly.⁸³ The jury was sent out again. On its final return, the jury found both defendants not guilty.⁸⁴ The

For example, Frankia already had an accusatory jury to act in the king’s interest long before the Assize. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 121 (1913).

⁷³ 1 *ENGLISH LAWSUITS FROM WILLIAM I TO RICHARD I*, at 14 (R.C. van Caenegem trans., 1990).

⁷⁴ Catherine K. Roselle, *Origin of Trial by Jury*, 16 *WOMEN LAW. J.* 4 (1928). Catherine Roselle went on to argue that the shiremoot of England, the regular judicial meeting of each shire, was the continuation of the ancient folkmoot in which something resembling trial by jury can be seen. *Id.* at 5.

⁷⁵ G. Frank Gormlie, *Jury Nullification: History, Practice, and Prospects*, 53 *GUILD PRAC.* 49, 51 (1996).

⁷⁶ But, at that time, the jury was to judge both fact and law. Lileburne stated that the jurors “are in law judges of law as well as fact.” M. Creagon, *Jury Nullification: Assessing Recent Legislative Developments*, 43 *CASE W. RES. L. REV.* 1101, 1103 (1993).

⁷⁷ Phillip. B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 *W. VA. L. REV.* 389, 401 (1989).

⁷⁸ Creagon, *supra* note 76, at 1104.

⁷⁹ *Id.*

⁸⁰ Scott, *supra* note 77, at 394.

⁸¹ *Penn & Meads’ Case*, (1670) 22 Charles II.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

judge fined each juror forty marks and ordered their imprisonment until the fine was paid.⁸⁵

Edward Bushell, one of the original four dissenting jurors and the jury foreman, filed a writ of habeas corpus. Chief Justice Vaughn wrote an opinion in *Bushell's Case*, holding that a trial judge cannot evaluate how the jury sees the evidence and thus, jurors were beyond the penalty of perjury or contempt for making a finding that the judge did not agree with.⁸⁶ Vaughn ordered that the jury:

find for the plaintiff or defendant upon the issue to be tried, wherein they resolve both law and fact complicatedly, and not the fact by itself; so though they answer not singly to the question what is law, yet they determine the law in all matters where issue is joined. . . .⁸⁷

This bifurcation between law and fact, never before seen in medieval sources,⁸⁸ heralds the rise of the jury's power to nullify laws. Yet, it is still clearly an extension of the old common law system whereby local lay jurors acted as witnesses not only to the goings-on in the case, but to the law itself.⁸⁹ This is a palpable tension between the power of the locality and the centralizing power of the state. By the 17th century, the notion of a nation-state had emerged, there was an understanding of state structure, and the centralization process that went back and forth through the Classical and Medieval periods had by now reached completely new heights.⁹⁰

Jury nullification, at least as presented by Justice Vaughn, is a completely opaque process and one in which the judiciary has no authority to pry. In the classical medieval English trial, local juror-witnesses *and judges* were exposed to charges of perjury if they delivered contested

⁸⁵ *Id.*

⁸⁶ *Bushell's Case*, (1670) 22 Charles II.

⁸⁷ Creagon, *supra* note 76, at 1106–07; *Bushell's Case* at 1010, 1015–17.

⁸⁸ The more common medieval conception was that provided in the 1071 suit presented above. ENGLISH LAWSUITS, *supra* note 73.

⁸⁹ *Id.*

⁹⁰ Interestingly, the Magna Carta provides us with a look into the process of governmental centralization in the Middle Ages by the anti-government stance it takes. Throughout the late Classical and Medieval periods, every time a monarch attempted to accrue rights to him or herself, there was a strong backlash from the powerful elites that were left out of such a system. MAGNA CARTA, 1215, 1199–1216 John Lackland. Charlemagne's empire was created in the face of such anti-government backlash, but at a time when local lords still had to be confirmed by the king at Aachen to receive their titles, and were in fact ministerial appointments. Contrast the creation of the county system in Frankia in the 9th century (under which worthwhile underlings were appointed by the king to be counts) with the hatred of the royal representatives in England in the 11th and 12th centuries—the shire reeves, or sheriffs.

verdicts.⁹¹ Vaughn's innovation in *Bushell's Case* was to place the jury's deliberation completely beyond the reach of the judiciary or any process of review.⁹² Of course, this is no longer the case in most Anglo-American courts, at least in civil cases. Jury verdicts can be overturned on stringent grounds of unreasonability. Yet, the guarantee of the jury-right under the United States Constitution⁹³ makes it impossible for a United States judge or magistrate to displace the findings made by a jury in a criminal context. The modern U.S. criminal jury is just as protected from the ire of the judge as the jury in *Bushell's Case* after Vaughn's opinion.

This practice was carried into American jurisprudence during the colonial period, when the power of the jury to nullify laws was seen to be an essential element of the criminal justice system.⁹⁴ Justice Story, however, circumscribed the power of the jury in *United States v. Battiste*.⁹⁵ The "physical power to disregard the law" belonged to the jury, but Story thought that the jury *should not* follow its own interpretation of the law.⁹⁶ Still, in the wake of the 1850 Fugitive Slave Act, juries continued to nullify.⁹⁷

IV. MODERNITY

A. *The Connection of Vicinage*

Both jury nullification (indeed, the entire process of the jury trial) and the now-defunct adjudicatory process of compurgation spring from the same well: the importance of locality to justice. This is seen in the juror-witness practice, which is tied inextricably to the practice of compurgation, as well as in the power of the 17th century jury (still composed mostly of peers and locals) to overturn unjust laws. The concept and requirement of *vicinage* embodies this powerful sentiment, and is usually associated with the modern notion of a jury of *peers*.⁹⁸

⁹¹ "[O]aths were taken very seriously by medieval jurists. Perjury attended their violation; and the law concerning oaths, their consequences, and the circumstances in which they might be mitigated, was complex." Elizabeth Makowski, *Cloister Contested: Periculosus as Authority in Late Medieval Consilia*, 71 JURIST 334, 342 (2011) (citing RICHARD HELMHOLZ, *THE SPIRIT OF CLASSICAL CANON LAW* 167, 172–73 (1996)); see also Michael D. Gordon, *Invention of a Common Law Crime: Perjury and the Elizabethan Courts*, 24 AM. J. LEGAL HIST. 145, 146 (1980).

⁹² Mark DeWolf Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 584 (1939).

⁹³ E.g., U.S. CONST. art. III, § 2.

⁹⁴ Howe, *supra* note 92.

⁹⁵ 24 F. Cas. 1042 (C.C.D. Mass. 1835).

⁹⁶ *Id.* at 1043.

⁹⁷ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 110 (1998).

⁹⁸ The concept is drawn from 14th century Legal French and means roughly the local neighborhood, or place where the crime was committed. "Whereas venue refers to the locality in which charges will be brought and adjudicated, vicinage refers to the locality from which jurors will be drawn. . . . The vicinage concept requires that the jurors be selected from a geographical district that

As early as the 11th century, the English nobility considered trial by a jury of, not only peers, but peers selected from their *vicinage*, that is, from their County, to be an essential element of freedom.⁹⁹ In 1774, trial by a jury of the *vicinage* was discussed by the Provincial Congress of North Carolina as “the only lawful inquest that can pass upon the life of a British subject.”¹⁰⁰ The Continental Congress, declaring the inalienable rights of British Subjects to the inhabitants of Quebec, said:

The next great right is that of trial by jury. This provides, that neither life, liberty or property, can be taken from the possessor until twelve of his unexceptional countrymen and peers of his vicinage, who from that neighborhood may reasonably be supposed to be acquainted with his character, and the characters of the witnesses, upon a fair trial and full enquiry, face to face in open Court, before as many of the people as chuse [sic] to attend, shall pass their sentence upon oath against him. . . .¹⁰¹

Jury nullification has had a checkered history in American jurisprudence. A number of high-profile criminal cases have been resolved by a jury’s failure to convict *even though* the jurors believed the evidence against the defendants—the trials of Dr. Jack Kevorkian¹⁰² and Oliver North,¹⁰³ for example. Yet, a debate rages in the American field of jurisprudence over whether juries should be informed of this power to

includes the locality of the commission of the crime, and it traditionally mandates that such district not extend too far beyond the general vicinity of that locality.” WAYNE R. LAFAYE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 738–39 (2d ed. 1992).

⁹⁹ We can confidently make this assessment because it is one of the rights that Magna Carta guarantees. *MAGNA CARTA*, 1215, 1199–1216 John Lackland. However, it was immaterial to those barons whether this guarantee had its origin in the Great Charter or “whether, as is more probable, it existed before and was, by the Charter, secured against Royal influence.” Henry G. Connor, *Constitutional Right to a Trial by a Jury of the Vicinage*, 4 U. PA. L. REV. & AM. L. REGIS 197, 198 (1908–09).

¹⁰⁰ North Carolina Convention, Aug. 27, 1774, reproduced in Connor, *supra* note 99.

¹⁰¹ 1 JOURNALS OF THE CONTINENTAL CONGRESS 107 (1774).

¹⁰² Dr. Kevorkian was charged with violating Michigan’s ban on assisted suicide. There was uncontroverted evidence that he helped the decedent inhale carbon monoxide, but he was acquitted by a Detroit jury. JEFFREY ABRAMSON, *WE, THE JURY* 65 (1994).

¹⁰³ In 1989, a federal jury acquitted Oliver North of nine of the twelve charges against him, regardless of uncontroverted evidence supporting them. See George Lardner, Jr., *North Guilty on 3 Counts in Iran-Contra Affair: Ex-NSC Aide Is Acquitted on 9 Charges*, WASH. POST, May 5, 1989, at A1, A10–11. North was only convicted on the charges in which he acted alone and was acquitted on all charges that he was ordered by superiors to perform, notwithstanding the jury instruction that it was not a defense that North acted under the direction of his superiors. See ABRAMSON, *supra* note 106, at 66–67.

nullify.¹⁰⁴ Many scholars decry the practice of jury nullification as an inherently uncontrollable power that saps the life of the judicial system.¹⁰⁵ The very notion of jury nullification is currently in disfavor, particularly because it is so unassailable.¹⁰⁶ There is nothing that can be done to impeach a jury's verdict under the procedure of Anglo-American criminal law short of the allegation of some kind of illegal impropriety with the jury itself.¹⁰⁷

A number of arguments have been advanced against jury nullification over the last decade, though there is a considerable literature defending it as well.¹⁰⁸ However, each of these arguments necessarily is uninformed as to the various upwellings of social pressure that gave birth to similar systems—of vicinage and compurgation—in the medieval past. By examining jury nullification in its proper setting, as one of a long line of locality-embracing judicial procedures, we can make a determination as to its worth with the long and weather gaze of history to assist us.

Those who defend the use of jury nullification tend to use language very similar to those examining the locality-driven procedures of compurgation. “[T]he jury disperses and decentralizes authority.”¹⁰⁹ “Its existence constitutes one of the strongest guarantees of civil liberty and due process. In trial by jury, the people judge between the State and the

¹⁰⁴ See Alan W. Schefflin & Jon M. Van Dyke, *Jury Nullification: Contours of a Controversy*, LAW & CONTEMP. PROBS. 55 (1980) (“The critical issue... has become whether the defendant has the right to have the jury instructed as to its universally-recognized power.”).

¹⁰⁵ See, e.g., Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996) (arguing that the procedural safeguards given to jury nullification make it one that should be jettisoned, particularly because of the lack of such civil safeguards as special verdicts, judgment as a matter of law, and the appeals process in the criminal context).

¹⁰⁶ Ernest T. Lindberg, *Speaking of Ethics: Jury Nullification Arguments*, 17 WASH. LAW. 14, 14 (2003).

¹⁰⁷ Travis Hreno, *Necessity and Jury Nullification*, 20 CAN. J.L. & JURIS. 351, 351 (2007). Nevertheless, there are a number of articles arguing in favor of jury nullification. See, e.g., Michael E. Korte, *He Did It but So What—Why Permitting Nullification at Court-Martial Rightfully Allows Members to Use Their Consciences in Deliberations*, 223 MIL. L. REV. 100 (2015); Jeffrey Abramson, *Four Models of Jury Democracy*, 90 CHI.-KENT L. REV. 861 (2015).

¹⁰⁸ It would be pointless to marshal all the arguments on either side here, particularly as they will be expounded upon in the sections below. The most powerful, of course, are those that remind us of the overwhelming power of the elite in a locality to decriminalize truly atrocious behavior, such as the refusal of juries in the South to find white men guilty of crimes against black men or women during the Civil Rights movement or other impermissible systematic abuses of jury nullification. *But see* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (discussing how federal prosecutors often lose cases that they should win when black jurors refuse to convict black defendants and suggesting that because the lines of racial bias were arrayed against black defendants, this may actually serve as a balance on other, ingrained social iniquities).

¹⁰⁹ *The Jury in Criminal Trials* 16-17 (Law Reform Comm'n of Canada, Working Paper No. 27, 1980).

accused, and the State has little or no control over the outcome.”¹¹⁰ The notion of the jury as a counterbalance to the impersonal power of the state squares with fear or distrust of an uninterested authority figure that later medieval courts despised. While the origins of compurgation lie in an age when there was little or no central authority at all, it certainly adapted to be a counterweight against royal and baronial influence in England.¹¹¹

B. *The Argument Against Nullification*

Arguments against nullification are many and varied. Many center around the costs of a nullificatory program to the “truth-seeking” process,¹¹² though this is but one of many “costs” presented by nullification’s detractors. Even more than legal scholars, the American judiciary itself is in opposition to the concept of jury nullification and has codified that opposition into law.¹¹³

The Supreme Court explicitly held, in *Standefer v. United States*,¹¹⁴ that the jury may “acquit out of compassion or compromise or because of their ‘assumption of a power which they *had no right to exercise . . .*’”¹¹⁵ The Second Circuit agreed in 1997.¹¹⁶ This principle is expressed by preventing the judge from instructing a jury that it may nullify.¹¹⁷ The New York Bar Association’s Committee on Professional Responsibility traced this belief to *Sparf and Hansen v. United States*.¹¹⁸ Notwithstanding this, the Bar Association of New York decided that “a lawyer may, consistent with ethical rules, appeal for jury nullification *if not prohibited by the*

¹¹⁰ CHRISTOPHER GRANGER, *THE CRIMINAL JURY TRIAL IN CANADA* 8 (2nd ed. 1996). Though both of these sources speak to the Canadian criminal jury, they echo the very same sentiments that animate the defense of the American criminal jury system, that the jury is a bastion of liberty.

¹¹¹ For this argument, see *supra* Part I.

¹¹² Hreno points this out in *Necessity and Jury Nullification*, listing three general arguments forwarded by opponents of nullification, namely: 1) nullification is unnecessary because it is preventable, 2) nullification can be prevented practically, and 3) nullification is not a conceptual necessity. Although he rejects arguments 2 and 3, he is somewhat hesitant about rejecting the first out of hand. Still, because he believes nullification cannot be prevented practically and, more importantly, that it is a conceptual necessity of the jury trial, he is one of the rare critics to side in its favor. The implication, of course, is that if nullification *can be* prevented it *should be*. Hreno, *supra* note 107, at 351–52.

¹¹³ AMAR, *supra* note 97, at 110.

¹¹⁴ 447 U.S. 10 (1980).

¹¹⁵ *Id.* at 22 (emphasis added).

¹¹⁶ *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) (declaring jury nullification to be a violation of the juror’s oath to apply the law as instructed by the court).

¹¹⁷ *United States v. Dougherty*, 473 F.2d 1113, 1133–35 (D.C. Cir. 1972).

¹¹⁸ *Report on Jury Nullification*, 54 RECORD OF THE ASS’N OF THE BAR OF THE CITY OF NEW YORK 197, 199, citing *Sparf*, 151 U.S. 51, 106 (1895) (in which the Supreme Court ruled that juries do not have the right to judge and decide the law, the court instructed the jury that it “could not, consistently with the law arising from the evidence, find the defendants guilty of manslaughter, or of any offense less than the one charged”).

Court.”¹¹⁹

Critics also warn that jurors’ motives are inscrutable—they may be moved by “caprice or unprincipled favoritism,”¹²⁰ like the southern juries who refused to convict white defendants who victimized blacks in the face of extremely good evidence.¹²¹ Indeed, scholar Gary Simson warned that the difference between mercy and revenge was a distinction without principal and that jury nullification is a dangerous anachronism.¹²²

Research evidence exists that suggests jurors do sometimes disregard the application of the law because they see it as unfair.¹²³ There is also experimental evidence that tends to show informing juries of their power to nullify would increase the instances of nullification, one of the stated fears of nullification critics.¹²⁴ They fear that this will encourage jurors to ignore the law altogether and give them the excuse to exercise their personal prejudices and biases.¹²⁵

These arguments are powerful. The machinery of the state can often be used to protect the rights of those the community seeks to ostracize, degrade, or endanger.¹²⁶ Yet, a powerful state cannot remain unchecked in its centralization of powers, particularly those that touch on such an important local issue as justice. For justice is rarely the concern of an entire country or state—rather, it is an intensely local and communal concern. This represents the danger, the keystone or crux between the legitimate aspects of community concern and the illegitimate ones of prejudice and bias.

How, then, can the jury be saved? If it is stripped of its power to nullify, it will lose its ability to respond to community concern. If it is

¹¹⁹ *Id.* at 204 (emphasis added).

¹²⁰ Irwin A. Horowitz et al., *Jury Nullification: Legal and Psychological Perspectives*, 66 BROOK. L. REV. 1207, 1210 (2000).

¹²¹ See, e.g., JEFFREY ABRAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 111–12 (1994); W. William Hodes, *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075, 1090, 1096–97 (1996).

¹²² Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 516 (1976).

¹²³ Horowitz et al., *supra* note 120, at 1230–31 (citing the study by Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046, 1049 (1997)).

¹²⁴ *Id.* at 1232–36 (“When juries were instructed that they could determine both facts and law, there was a rationality to their decision making. That is, they were merciful when the community would be merciful and the law would not (the euthanasia scenario) and they were severe when the community might be expected to be severe, even when the law made conviction on the most severe charge rather difficult.”). See generally Irwin A. Horowitz, *The Effect of Jury Nullification Instructions on Verdicts and Jury Functioning in Criminal Trials*, 9 LAW & HUM. BEHAV. 25 (1985).

¹²⁵ Horowitz et al., *supra* note 120, at 1238. Still, the authors noted in their conclusion that “there will be instances in which justice may be better served by men and women departing from the strict letter of the law.” *Id.* at 1248.

¹²⁶ E.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

granted the power to nullify without principal, it will expose criminal defendants to arbitrary (or worse, actually prejudicial) judgment.

C. *Jury Nullification and the Anglo-American Wellspring*

Though Justice Story announced the death of the wager of law in American jurisprudence,¹²⁷ the concept of localized justice performed by the community has not died out in American law. Indeed, it was transmitted through different channels, making its way down to the modern trial. The social forces that gave rise to the practice of compurgation may be gone,¹²⁸ but the concerns that animated the public performance and community involvement remain. That is, we still require the law to conform to what the community believes to be right.¹²⁹

Our modern conception of the law has been shaped by the great assemblies and legislatures of Europe, as well as the philosophers of the Enlightenment. We are taught that law is something magisterial, descending from a powerful state.¹³⁰ However, though law may be promulgated from the top of the state downwards, such as the onerous and much-hated forest laws of the Normans,¹³¹ much of the basic functions of

¹²⁷ “Now, whatever may be said upon the question, whether the wager of law was ever introduced into the common law of our country by the emigration of our ancestors, it is perfectly clear that it cannot, since the establishment of the State of Tennessee, have had a legal existence in its jurisprudence. The constitution of that State has expressly declared, that trial by jury shall remain inviolate; and the constitution of the United States has also declared, that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. Any attempt to set up the wager of law, would be utterly inconsistent with this acknowledged right. So that the wager of law, if it ever had a legal existence in the United States, is now completely abolished.” *Childress v. Emory*, 8 U.S. 642, 674–75 (1823).

¹²⁸ The strong factionalism that gave rise to the need for a balance between kin-groups cannot exist in the modern state. Family power has been sufficiently tempered to extinguish the possibility of the blood feud. Centralization of power and the creation of a new type of state has effectively quashed the kind of dangerous kin-groupings that threatened the stability of early medieval society.

¹²⁹ Indeed, this is the basis of the Anglo-American notion of the common law, which is a law descended from that ascertained by inquest from the medieval communities and villages. When a local bailiff wanted to know what the punishment for a crime was, he inquired of the community. Frank I. Schechter, *Popular Law and Common Law in Medieval England*, 28 COLUM. L. REV. 269, 274 (1928) (“The average litigating Englishman of the twelfth and thirteenth centuries . . . would seek protection in the local, rather than the royal courts in almost every conceivable situation requiring civil redress . . .”); see also JENKS, EDWARD PLANTAGENET 218 (1902) (“The conception of the Crown, as the sole fountain of justice, is a very modern conception in legal history.”).

¹³⁰ See, e.g., THOMAS HOBBS, *LEVIATHAN* (1651).

¹³¹ The Normans, like most continental aristocracy, enjoyed hunting game. In order to do so, game preserves were required. These preserves existed on the continent at the time of the Norman Invasion, but were not part of the Anglo-Saxon or Norse heritage that was fostered throughout England. After the coming of William the Conqueror, the forest laws established private royal forests wherein hunting by any except the king (or those with patents of the king) were prohibited. Margaret L. Bazeley, *The Extent of the English Forest in the Thirteenth Century*, 4 TRANSACTIONS ROYAL HIST. SOC’Y 140 (1921).

the English and continental law courts grew from community law—that is, sprang up from below.¹³²

V. CONCLUSION

Although Victorian commentators often misunderstood the nature of the relationship between compurgation and the jury trial, it should be apparent that the existence of that relationship cannot now be denied. It is particularly important in Anglo-American law because of the efforts through which the *vicinage* concept, inherent in compurgation, were carried into the future—that is, by allowing the locality to have input on judgment delivered. This notion has survived colonization and transplant, and distrust of outsiders, founded as it was in the bloody times of the late Classical period, is still the norm in Anglo-American jurisdictions.¹³³ The government should be wary of this power, or at least be prepared to follow the popular will if it cannot sway it.

Like any system, that of nullification is open to abuse. The excesses of Southern juries during the Civil Rights era have painted it with a lasting stain. However, the right to the judgment, not just of a jury but of the community in which a crime or wrong was committed, is one that has been guaranteed since the dawn of our legal system in the dim ages when the ancient Brythonic, Germanic, Grecian, Italic and Scythian laws comingled in the cauldron of the ancient world. It inheres in our very notion of what it means to be just—since the earliest days of European law, it has been critical to our ancestors that they be judged not by an uncaring and uninvolved arbiter, but by the very people who knew them.

Indeed, the guarantee of the criminal jury trial, enshrined in both Magna Carta and the American Constitution, requires, by its very nature, the promise that the jury may decide *on whatever grounds it pleases*. This is not a flaw of justice, but rather one of its essential characteristics as it was originally conceived by the European world. Any attempt to eradicate the power of jury nullification would be to remove the last vestige of *vicinage*, of being judged not by the state, but by knowing peers, that

This represents just one of many types of law that did not bubble up from below, but rather was imposed by the elite for an elite purpose. Many others could be cited, from coinage reforms to the Diocletian laws restricting trade. See, e.g., Salvatore Riccobono, *Outlines of the Evolution of Roman Law*, 7 *LOY. L.J.* 159 (1926).

¹³² A continental example of this would be Roman contract law, which evolved to assist commercial dealings but was not imposed in the same sense as the forestry laws were in England. Melius de Villiers, *The Roman Contract According to Labeo*, 35 *YALE L.J.* 292 (1925–26); Max Radin, *Roman Law of Quasi-Contract*, 23 *VA. L. REV.* 241 (1936); Ernst Freund, *Contract and Consideration in Roman Law*, 2 *COLUM. L.T.* 167 (1889).

¹³³ This was true in the original, medieval context as well. Engagement with the powerful warrior-authorities of the medieval world were much different than wandering into a judge. Self-help may not have been available save for when a large number of families to agree to expunge the character trait.

remains in Anglo-American law.

As the conception of the jury shifts further and further away from that of an informed panel in order to protect and insulate criminal defendants from bias and prejudice, it imperils the very purpose of the jury trial. There must, of course, be a certain level of protection from the vicissitudes of the capricious jury, but at the end of the day, it is the community to which the enforcement of law has been entrusted. The only way to repair a deficiency in this process is to repair the deficient community itself, else we risk stripping the counterbalancing power of the locality from the law altogether.

The old rite of compurgation lives anew in nullification. It was not an inexplicable aberration of a barbarous time, but rather an embodiment of the necessity of community judgment when the state is weak. This anti-centralizing force in criminal jurisprudence is the bedrock of English and American jurisprudence. Let us, then, not replace one kind of king with another when it comes to the criminal courtroom. Let us cease to seek for ways to stamp out nullification, and come to understand it for what it is, not what we fear it to be.