Jury selection in Victorian England

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Conor Hanly*

I. INTRODUCTION

> Judges may err, judges may be corrupt. Their minds may be warped by interest, passion and prejudice. But a jury is not liable to the same misleading influences. Twelve men of the vicinage, chosen as they are, can have no bias—no motive to show favour or malice to either party.[1]

This comment from Alexander Wedderburn, almost contemporaneous with Blackstone's better-known description of the jury as the palladium of liberty,[2] makes reference to jury selection as a core element of the protection offered by that institution. Yet at the time, the selection process was a bit of a mess, being dependent on multiple statutes and a variety of common law practices. It was not until 1825 that Parliament enacted legislation to consolidate and streamline jury eligibility and empanelment,[3] thereby creating a system that governed jury selection in most of England and Wales[4] until the 1970s.[5] The provisions of the 1825 Act are well known, but little has been written about how the Act was actually implemented.

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Commented [HCW2R1]: It is a little colloquial, but it gets the point across – the system really was a mess, and one of the main points of the 1825 Act was to streamline the process. Would you prefer 'rather messy' or 'a little chaotic'?

*Insert author affiliation etc

[1] Alexander Wedderburn, later Baron Loughborough and first Earl of Rosslyn, in the House of Commons, 1770, cited in John Campbell, *The Lives of the Lord Chancellors and Keepers of the Great Seal of England*, vVol 7 (J Cockcroft 1875) 277. Wedderburn later served as Attorney General from 1778–80, Chief Justice of the Court of Common Pleas from 1780–93, and Lord Chancellor from 1793–1801.

[2] 4 Bl Comm 343 ("So that the liberties of England cannot but subsist, so long as this palladium remains sacred and inviolable…").

[3] 1 Geo VI, c 50, better known as the County Juries Act 1825. Robert Peel, then Home Secretary, told the House of Commons that his first objective in introducing this legislation was to consolidate the law on juries and their empanelment. HC Deb, 2d Ser, 20 May 1825, vol 13, col 798. The 1825 Act, in section 62, repealed over sixty statutes.

[4] The 1825 Act had limited application to juries summoned in the City of London, the boroughs or at coroners' inquests. For an overview of the jury processes that existed in these jurisdictions, see Departmental Committee on the Law and Practice of Juries, *Report*, Vvol 1, 1913 [Cd 6817] paras 121–36.

[5] The 1825 Act was repealed almost in its entirety by the Courts Act 1971 and the Criminal Justice Act 1972.

The phrase *jury selection* usually refers to the selection process in court. In this article, however, I use the phrase more expansively to include the procedural processes that precede the actual selection of jurors. Through an examination of archival records from the counties of Gloucestershire and Wiltshire, contemporary parliamentary committees, law journals, newspapers and periodicals, we can achieve a more detailed and accurate picture of these processes. The article starts with a discussion on the formation of the jury panels from which the trial juries were selected, and the issue of non-attending jurors. The 1825 Act left this latter issue to the discretion of the courts, but records from the Gloucestershire quarter sessions provide some detail on how the judges dealt with it. The officials involved in the summoning process were not averse to using their position to supplement their incomes, and there is evidence of organised corruption among some court clerks and summoning officers. Finally, the article will consider the results of the selection process; the Gloucestershire records provide us with an occupational profile of quarter sessions' juries at three points across the century, while Wiltshire jurors' books allow us to test the validity of ~~?~~ some contemporary concerns about the systemic exclusion of special jurors from the common juries.[6]

Two main themes emerge. First, the century saw ongoing complaints about the quality of jurors and their supposedly~~allegedly?~~ incompetent verdicts. Some of these ~~perceived failings of the jury system~~complaints were misplaced and perhaps derived from the social prejudices ~~perception~~ of the commentators. Second, the implementation of the 1825 Act was in the hands of a host of largely unpaid parochial and county authorities. These men had the power to implement the Act as they saw fit, and in many cases 'substituted, when they thought it

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[6] Trial juries came in two kinds: common and special. The common juries, which made up the majority of trial juries and almost all of those involved in criminal law, were selected from the men who met the general eligibility criteria set out in the 1825 Act. Special juries were chosen from amongst merchants, bankers and men entitled to the social rank of esquire or higher, or after 1870, men who met a high property qualification.

expedient, practices of their own for their legal duties'.[7] This theme underlines the overall point of the article: to understand the jury selection process in Victorian England, there must be an appreciation of the decisions and actions of the local authorities, as well as of the provisions of the 1825 Act.

II. JURY PANELS

Jury service in the nineteenth century was a select obligation applying only to men who met the property or tax criteria set out in section 1 of the County Juries Act 1825.[8] The 1825 Act tasked churchwardens and overseers of the poor, the mainstays of parochial administration, with the production each year of a list of such men in their areas.[9] These officials, by reason of their local residence, were thought able to easily determine who qualified for jury service. The Act prescribed a number of steps designed to ensure that all men in the locality had an opportunity to object to their names being, or not being, on the list before it ~~being~~was finalised

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[7] Attorney General Coleridge, HC Deb~~, 3d Ser,~~ 17 February 1873, vol 214, col 552. Six years later, as Lord Chief Justice, Coleridge protested against the 'power of persons … in the position of under-sheriffs to alter, evade, or repeal the law'. 'The Jury System', 23 Solicitors' J, 4 January 1879, 178.

[8] The basic criteria were ownership of land worth at least £10 annually, leased property worth £20 annually, assessment to the Poor Tax of at least £20 (~~, or~~ £30 in the county of Middlesex), or occupation of a house containing at least fifteen windows. Property had always been the defining criterion~~a~~ for jury service; for a summary of the criteria prior to 1825, see Joseph Chitty, *A Practical Treatise on the Criminal Law*, v~~V~~ol 1 (A J Valpy 1816) 502–503. See also James C. Oldham, 'Origins of the Special Jury' (1983) 50 U Chi L Rev 137 (the Appendix sets out statutes between 1225 and 1730 and summarises the eligibility ~~of~~ criteria set out in each).

[9] Churchwardens originally had responsibility for the maintenance of the church and the administration of the churchyard. A series of statutes beginning in the sixteenth century, including poor law statutes, began to impose various civic obligations on them as well. The office of overseers of the poor was established by statute in 1597 (39 Eliz I, c 3), under which local justices were required to select local men to take responsibility for the relief of the poor and for the collection of the poor rates. See Sidney and Beatrice Webb, *English Local Government from the Revolution to the Municipal Corporations Act*, v~~V~~*ol 1: The Parish and the County* (Longman, Greene & Co 1906) 21–31. Theoretically, all parishioners could hold these positions, but in practice they tended to be concentrated among the principal ratepayers. For example, Eastwood points to the parish of Culham in Oxfordshire, in which a father and son, who between them paid forty percent of the rates in 1802, held the office of churchwarden for half the period 1780–1825, and the position of overseer for just under half the period 1780–1816. David Eastwood, *Governing Rural England: Tradition and Transformation in Local Government, 1780–1840* (~~Oxford University Press~~OUP 1994) 35.

by the local justices of the peace.[10] The county clerk of the peace received the finalised lists and amalgamated them into a county jurors' book, ready for use the following year. The books were divided by hundred and by parish,[11] and the names of the jurors were set out alphabetically.[12]

The selection of a trial jury formally was in the hands of the sheriff, an official appointed by the Crown who had responsibility for the execution of all writs, warrants and processes of law in the county.[13] In practice, the position of sheriff was largely ceremonial; the functions of the office usually were exercised by a salaried undersheriff,[14] a position often held by the same person for many years.[15] The jury selection process began with the issue of a precept or writ from the relevant court to the sheriff to empanel a jury.[16] On the authority of that precept, the sheriff (more usually the undersheriff) summoned jurors to form a jury panel from which trial juries would be selected. The names of jurors were to be taken from the jurors' book only,[17] but sheriffs had a great deal of discretion in deciding who should be summoned for the jury panel.[18] Prior service generally resulted in immunity from further service for two

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[10] These steps are not relevant to this paper, and can be shortly stated: posting the lists on the door of the parish church to allow for public inspection, and a revision session presided over by a local justice at which final changes could be made. County Juries Act 1825, ss 9 and 10.

[11] For administrative purposes, England and Wales were divided into counties, which were subdivided into districts known as hundreds, which were in turn subdivided into parishes. The City of London, municipal boroughs and various liberties and franchises existed outside of this structure. See Norman Chester, *The English Administrative System 1780–1870* (Oxford University PressOUP 1981).

[12] County Juries Act 1825, s 12.

[13] Sidney and Beatrice Webb (n 9) 16–18.

[14] ibid 289.

[15] It was standard practice for the incoming sheriff to re-appoint the sitting undersheriff, ibid. In some cases, the position of undersheriff was passed on from father to son. Samuel Cooper, Undersheriff for Oxfordshire, for example, told a select committee that he had held his position for twelve years, that his father had held the position for many years, as had his grandfather before that. Select Committee on the Office of High Sheriff, *Report*, (HC 1830, HC 520), 19.

[16] Either a general precept or a writ of *venire facias* would be issued depending upon the court. Chitty (n 8) 506–509.

[17] County Juries Act 1825, s 14.

[18] Evidence given to a Departmental Committee in 1913 indicated that in some counties, such as Hertfordshire, Kent, Sussex and Yorkshire, there was a systematic selection procedure (e.g., in Hertfordshire, a set number of jurors were selected from each parish up to the number required for the panel). Departmental Committee (n 4) para 107. Other counties, such as Durham, Carnarvonshire and Northumberland, had no such systematic plan and selected jurors haphazardly, ibid para 108.

years,[19] and the sheriff and the~~?~~ clerk of the peace were required to maintain a list of all men who had served as jurors at assizes and at quarter sessions.[20] The 1825 Act did not specify the precise manner in which the panel jurors were to be chosen, but section 20 ~~of the 1825 Act~~ required that 'Jurors shall be returned from the Body of the County, and not from any Hundred or Hundreds, or from any particular Venue within the County'. Thus, a sheriff could not simply proceed alphabetically through the jurors' book, as doing so would result in a jury panel drawn exclusively from only one part of the county. Notwithstanding section 20, however, officials in some counties told a parliamentary committee that they excluded men from certain parishes because their location made travelling to the courts too inconvenient. In Hertfordshire, for example, juries were typically drawn only from three or four parishes.[21] In Lancashire, jurors for particular sessions were taken only from particular hundreds.[22] Direct evidence for this practice can be seen also in the Wiltshire jurors' book for 1859, in which the following notation appears:

> In consequence of the great distance from Salisbury of the parishes of Wroughton and Little Hinton, the Magistrates of the Swindon Division in 1836 recommended that the Jurors of those parishes should be summoned to attend at Devises Assizes or Marlborough Session and not at Salisbury.[23]

The parishes in question lie around forty miles from Salisbury, and travelling that distance in the nineteenth century would have imposed considerable inconvenience on the jurors. The

[19] County Juries Act 1825, s 42. In Middlesex, the immunity was for the next two terms or vacations; in the counties of Hereford, Cambridge, Huntingdon~~,~~ and Rutland, the exemption was for one year, while in the county of York the exemption was for four years~~,~~ ibid.
[20] ibid ss 40 and 41.
[21] Select Committee on Special and Common Juries, *Report*~~,~~ (1868 HC 401-I)~~,~~ QQ 529 (evidence of Richard Nicholson, Clerk of the Peace for Middlesex and Hertfordshire).
[22] ibid QQ 628-30, 743 (evidence of Frederic Deacon, Undersheriff for Lancashire).
[23] Wiltshire and Swindon History Centre A1/265/99 (Wiltshire jurors' book for 1859, unnumbered pages for the Hundred of Elstub and Everley, Parish of Wroughton).

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Commented [15]: This is not quite clear. If I understood your description above correctly, the top-level organising principle of the books was the hundred, then the parish. This would mean there were separate alphabetical lists for each parish. It thus seems unlikely that a sheriff would proceed alphabetically, because it would be obvious that all those on the list came from the same parish?

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assizes at Devises and the sessions at Marlborough were only half that distance away. The decisions made by the local authorities in Wiltshire, Hertfordshire and Lancashire had laudable motives but lacked any legal basis. Further, as the *Law Times* noted, these kinds of decisions undermined the sense of a jury being drawn from the body of the county and should be ended.[24] But they did not end: the Wiltshire restriction, at least, continued to the end of the century.[25]

Some sheriffs also openly second-guessed Parliament as to who should sit on juries by excluding some potential jurors who met the eligibility criteria set in the 1825 Act.[26] Frederic Deacon, Undersheriff for Lancashire, for example, told a parliamentary committee that he and his colleagues only made use of about half of the men in the jurors' book, principally because he was unhappy with the quality of the other half.[27] In particular, Deacon took exception to beersellers and publicans acting as jurors; such men made up 'a great proportion' of those excluded in Manchester.[28]

A jury panel typically contained between forty-eight and seventy-two names listed alphabetically.[29] A party to a case being tried had a statutory right to inspect a copy of the panel, which the sheriff was required to maintain for seven days prior to the start of the court sessions.[30] Under the 1825 Act, jurors were entitled to at least ten days' notice of their selection

[24] 'The Jury System', 43 L Times, 3 August 1867, 210.
[25] The Wiltshire jurors' book for 1892, for example, contained the same inscription as in the 1859 book. Wiltshire and Swindon History Centre, A1/265/120 (Wiltshire jurors' book for 1892, unnumbered pages for the Hundred of Elstub and Everley, Parish of Wroughton).
[26] This was not a new practice; King points out that authorities regularly excluded otherwise eligible butchers from jury service in Essex in the eighteenth century. See P J R King, '"Illiterate Plebeians, Easily Misled": Jury Composition, Experience and Behaviour in Essex 1735–1815' in J S Cockburn and Thomas A Green (eds), *Twelve Good Men and True* (Princeton University PressUP 1988) 254, 259.
[27] Select Committee on Special and Common Juries (1868) (n 21), QQ 661–64. Henry Avory, Clerk of Arraigns at the Central Criminal Court, similarly told the Select Committee that various people were excused because, in Avory's judgment, they 'ought not to be summoned', and included 'persons who are dependent for their livelihood on their manual labour; journeymen, men actually working with their own hands, carpenters, and so on.', ibid Q 1331.
[28] ibid Q 662. This attitude towards people involved in the drinks industry was long-standing: Eastwood notes that in 1793, the Oxfordshire Quarter Sessions prohibited publicans being named as High Constable, and in 1794 the Buckinghamshire Quarter Sessions followed suit. Eastwood (n 9) 87. These prohibitions reflected a 'widespread belief in the social irresponsibility' of such people. ibid.
[29] County Juries Act 1825, s 19.
[30] ibid.

on the jury panel;[31] the Juries Act, 1870 reduced that period to six days.[32] The 1825 Act required that jury summonses be delivered personally,[33] but legislation enacted in 1862 allowed summonses to be posted.[34]

A. The Problem of Non-Attendance

Any juror who failed without reasonable excuse to attend the court as directed on the summons was liable to a fine.[35] What constituted a reasonable excuse was left unspecified by the Act, and the amount of the fine to be imposed was similarly left to the discretion of the court. Crosby cites a number of examples of fines, ranging from £5 on a juror in 1870 who was thirty minutes late, to forty shillings on two jurors in 1889.[36] The Treasury, at least formally, took a hard-line approach to such fines; the Treasury Solicitor indicated in 1866 that he would remit fines for non-attendance only extraordinarily.[37] Crosby points out, however, that the Treasury Solicitor's practice had no bearing on the actions of local authorities.[38]

We can get an idea of how local authorities dealt with juror non-attendance from records of the jury panels summoned to attend the Gloucestershire quarter sessions. Table 1 shows the attendance of jurors at three points across the century, roughly a generation apart.[39]

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[31] ibid s 25.
[32] Juries Act 1870, s 20.
[33] County Juries Act 1825, s 43.
[34] Juries Act 1862, s 11.
[35] County Juries Act 1825, s 38. A juror was deemed to be in default if he failed three times to answer to his name. ibid.
[36] Kevin Crosby, 'Before the Criminal Justice and Courts Act 2015: Juror Punishment in Nineteenth- and Twentieth Century England' (2016) 36 Legal StudiesLS 179, 203.
[37] ibid (citing *Case as to the Remission of Jury Fines*, 23 March 1866, National Archives TS 25/1468). Crosby gives as an example a case in 1861 in which a fine on an old man who was outside the age limit set by the 1825 Act was let stand. The Treasury took the view that the man was at fault for not having arranged to have his name removed from the jurors' book. *Case: Jury Act – 6 Geo IV c 50*, 4 December 1861, National Archives TS 25/1162.; sSee also 'Fining Jurors for Non-Attendance', 31 L Times, 3 April 1858, 35 (noting that at the Lincolnshire Winter Assizes, Justice Crompton imposed fines of £20 each upon eighty-seven county justices for non-attendance as grand jurors, which fines the Treasury refused to remit).
[38] Crosby (n 36) 203.
[39] Gloucestershire Archives, Q/SJb/2/6 (1822–43), Q/SJb/2/7 (1844–74) and Q/SJb/2/8 (1875–78). The years reviewed are the calendar years of 1826, 1850 and 1875. The 1851 Epiphany Sessions began in December 1850 and were included for the purposes of this study because the jurors summoned for that session were required to appear for service within the 1850 calendar year. The 1850 figure, therefore, covers five sessions while the figures for the other two years cover only four sessions.

Table 1: Non-Appearance of Jurors at Gloucestershire Quarter Sessions

Jurors Not Present		
Jurors Excused	Jurors Fined	Other
8	7	3
14	9	1
15	7	1
37	23	5

	Total Summoned	Jurors not Present
1826	166	18
1850	243	24
1875	197	23
Total	606	65

The figures show a high level of consistency across the century. The rate of non-appearance hovered around ten percent, which suggests general compliance with the summonses. The majority of the jurors who failed to attend were excused, with no reason being recorded in most cases (nineteen out of thirty-seven). When the reason for an excusal was recorded, ill health was the most common, followed by age and death (twelve, four~~,~~ and two, respectively). The process by which Gloucestershire jurors sought an excusal is unclear, but formally the power to issue an excusal vested in the judge or the sessions chairman.[40] Nevertheless, a 1913 departmental committee noted a non-statutory practice that developed in the nineteenth century

[40] Departmental Committee (n 4) para 120.

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by which applications for an excusal would be reviewed by a court official or even the undersheriff who, if the application was warranted, would take responsibility for issuing the excusal.[41] The extent to which this system applied in Gloucestershire is unclear, but the committee noted that ~~the system~~it had been generally adopted around the country.[42]

A third of the jurors who failed to appear were fined, the standard fine for non-appearance on a petty (or trial) jury being forty shillings. Jurors who failed to appear for service on a grand jury,[43] by contrast, typically suffered fines of £5: all but one of the thirty-three grand jurors who failed to appear received such a fine.[44] The records for 1850, however, show that six of these fines were remitted due to subsequent appearance. A further three were reduced, one to ten shillings and two to five shillings. There is no record of any fines being remitted or reduced in the other two years.

III. OFFICIAL CORRUPTION

William Burchell, Undersheriff for Middlesex, told the Select Committee on Special and Common Juries that jury service 'is an unpopular service, and do what we will, it always has been, and always will be, an unpopular service, because it is an unremunerative service.'[45]

[41] i~~I~~bid~~.~~ a~~A~~ court official might claim to be acting under the authority of the judge or chairman, but an undersheriff had no power to issue an excusal. Nevertheless, the witnesses before the committee agreed that the system worked well~~, ibid~~.
[42] ibid.
[43] The grand jury, consisting of between twelve and twenty-three members, considered the prosecutor's evidence to decide whether the matter should proceed to trial. If at least twelve grand jurors considered the evidence sufficient, the grand jury proffered the formal indictment against the accused~~.~~ Chitty (n 8) 306–308; Henry R Dearsly, *Criminal Process* (W G Benning 1853) 32–34. Grand jurors were expected to be 'good and lawful men', and Blackstone commented that they were usually 'gentlemen of the best figure of the county'~~.~~ 4 Bl Comm 299.
[44] The exception, an innkeeper, was fined 40 shillings.
[45] Select Committee on Special and Common Juries, *Report*~~,~~ (HC 1867, ~~HC~~ 425)~~,~~ Q 561.

Punch wrote in 1859 that not one in twenty Britons went into the jury box with a happy face.[46] Some men tried to send an employee in their stead,[47] while others put their property into their wives' names in order to avoid eligibility for jury service.[48] With prospective jurors willing to go to such lengths, there were opportunities for corruption notwithstanding this being an offence under the 1825 Act.[49] Some corruption was relatively low-level and opportunistic. As noted above, summoning officers were required to summon jurors personally until 1862, and even thereafter, personal service remained the standard means of issuing a summons.[50] Personal service facilitated the bribery of summoning officers, and complaints were common.[51] A summoning officer usually had more summonses than he needed, which he could dispense as he pleased and no account was required for any unserved summonses.[52] John Froud, a former summoning officer at the Clerkenwell Sessions House in London, confirmed under oath as a witness in a trial that he had made a living from bribery. He summoned more jurors than were needed and then took bribes from ~~jurors~~ those who wanted to avoid service, seeking at

[46] 'Jury Torture', *Punch* (London, 1 January 1859) 4.
[47] 26 Law J, 23 May 1891, 343.
[48] AO, Letter to the Editor, (1895) 59 J P N 556.
[49] County Juries Act 1825, s 43. Bribery to avoid jury service was a long-standing problem~~.~~ ~~S~~See Douglas Hay, 'The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century', in J S Cockburn and Thomas A Green (n 26) 305, 319.
[50] See Select Committee on Special and Common Juries (1867) (n 45) Q 1119 (evidence of Henry Pollock, Associate at the Court of Exchequer).~~–~~ See also 'Our Jury System' (1874) 9 Law J, 25 April 1874, 229 (commenting, twelve years after the 1862 Act, on the need to use postal summonses to avoid corruption). As late as 1913, the Departmental Committee on Jury Service was still able to regard postal service as merely an alternative to personal service. Departmental Committee (n 4), para 115.
[51] See, e~~.~~g~~.~~, 'Juries and Jurors', 6 Jurist (ns), 29 December 1860, 463, 465 (noting allegations that sheriffs' officers would not summon some favoured people); 'Abuses in the Jury System', 7 Solicitors' J, 20 December 1862, 121 (reporting an incident at the Exchequer Chamber Court in which a juror informed Baron Martin of the practice of bribery by summoning officers, information that was supported by other jurors); 14 Solicitors' J, 25 June 1870, 687 (commenting on the practice of 'tipping' summoning officers); 15 Solicitors' J, 28 January 1871, 227 (noting the need to punish summoning officers who had 'hitherto been able to practise extortion on people qualified to serve as jurymen,' and that such men had the 'power of levying black mail by the infliction of frequent summonses'). But see Select Committee on Special and Common Juries (1867) (n 45), QQ 439~~–~~41 (evidence of Thomas Nelson, Solicitor for the City of London, denying that sheriffs' officers were tipped), and Q 608 (evidence of William Burchell, Undersheriff for Middlesex, stating that the accusations against summoning officers were unjust, and denying that the summoning officers took bribes from people seeking to avoid jury service).
[52] Select Committee on Special and Common Juries (1867) (n 45), Q 63 (evidence of T~~.~~W~~.~~ Erle, Associate at the Court of Common Pleas)~~.~~ ~~S~~See similar evidence from Henry Pollock, Associate at the Court of Exchequer at Q 1146.

least two shillings and sixpence from each.[53] A report into the summoning of jurors by the Middlesex County Solicitors found that a summoning officer by the name of Strong had regularly charged jurors a guinea in exchange for tearing up the jury summons.[54]

Instances of more systematic and organised corruption in the operation of the jury laws also occurred. The most spectacular scheme,[55] which was investigated by Thomas Nelson, Solicitor for the City of London,[56] concerned one Charles Mayhew, a clerk to the Ward Clerk of one of the wards in the City of London. Mayhew had access to the jury lists in his own ward, and as a result was able to offer to men on the London special jury list a guarantee against jury service in return for a subscription of one guinea per year. In the event that a subscriber received a summons, Mayhew would arrange for someone to attend the court to state that the juror had gone abroad. If that did not work and the juror was fined for non-attendance, Mayhew himself would swear out a false affidavit that the juror had been away so that the fine would be remitted. Nelson found that this scheme had been going on for at least five years, and estimated that Mayhew had received between £400 and £500 each year.[57] This was double what a mid-nineteenth-century clerk would earn in a year.[58] Mayhew died before he could be prosecuted, but his clerk was convicted of conspiracy to defeat the course of justice. Nelson indicated that

[53] 'Summoning Juries', 8 Law J, 31 May 1873, 317. T~~,~~ ~~T~~the *Law Journal* also noted that Froud's evidence suggested that accepting bribes was normal behaviour among summoning officers~~,~~ ibid. See also Select Committee on Special and Common Juries (1868) (n 23), QQ 16–17 (evidence of Henry Mitchell, Vestry Clerk for the Parish of Whitechapel, concerning two instances in his own knowledge of summoning officers being paid to take the jury summons away – the amount of the bribe varied between a half-crown and a couple of guineas), and QQ 1222, 1227–32 (evidence of John Marks, a plumber and builder by occupation, and a frequent juror, informing the Committee that he had been told by his neighbour that buying one's way out of jury service was easy)~~,~~ Marks' evidence was confirmed by another frequent juror, David Meredith, a hosier~~,~~ ibid QQ 1273, 1287–88.

[54] 8 Law J, 8 November 1873, 664.

[55] The *Solicitors' Journal* said that it would be a 'misnomer to describe [this scheme] as unfair, it is a scandalous and most unwarrantable abuse~~.~~', 9 Solicitors' J, 15 July 1865, 822.

[56] Select Committee on Special and Common Juries (1868) (n 23), Q 409; 'The Jury Lists', 42 Law Times, 9 February 1867, 286. The details of Mayhew's scheme that follow, and the investigation of it, are drawn from Nelson's evidence to the Select Committee, Select Committee on Special and Common Juries (1868) (n 23),~~at~~ Q 409, unless otherwise stated. The *Solicitors' Journal* had drawn attention to the operation of this scheme several years earlier~~,~~ ~~S~~see 9 Solicitors' J, 15 July 1865, 822; 10 Solicitors' J, 15 September 1866, 1079.

[57] ibid Q 411.

[58] Jeffery G~~.~~ Williamson, *Did British Capitalism Breed Inequality?* (Allen & Unwin 1985) 12 (estimating a clerk's average annual salary in 1851 to be £236).

he had intended to prosecute the subscribers to Mayhew's scheme but that became impossible without Mayhew's evidence which was lost on his death.[59]

IV. JURY SELECTION

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By long tradition, a trial jury had twelve members.[60] The names of trial jurors were selected from the jury panel by lot.[61] In cases of treason and felony, names were called one at a time and the first twelve who answered the call were sworn.[62] In misdemeanour cases, jurors were sworn in groups of four until twelve were empanelled.[63] In civil cases, the names of jurors were drawn as in felony cases.[64] The empanelment of jurors was subject to challenge by the parties. In criminal cases, defendants could challenge peremptorily or for cause. Peremptory challenges required no justification and the court had no option but to grant them.[65] The defendant could peremptorily challenge up to twenty jurors in felony cases[66] or thirty-five jurors in treason

[59] Select Committee on Special and Common Juries (1868) (n 21) Q 409.

[60] See Chitty (n 8) 505 ('The petit jury, when sworn, must consist precisely of twelve, and is never to be either more or less on the trial of the general issue, and this fact it is necessary to insert upon the record.'). Coke justified the number twelve by reference to 'holy writ, as in twelve apostles, twelve stones, twelve tribes, etc.' Edward Coke, *Institutes of the Laws of England*, Vol 1, (J H Thomas ed) (1628) (S Brooke 1818)Co Inst vol 1, 1628, 155a. Duncombe similarly referred to the twelve apostles, and the fact that the 'tribes of Israel were twelve, the patriarchs were twelve, and Solomon's officers were twelve.' Giles Duncombe, *Tryalls per Pais, or, The Laws of England concerning Juries by Nisi Prius*, vVol 1 (E & R Nutt 1725) 64–65. Some nineteenth-century commentators rejected such claims as superstition,; sSee especially HC Deb, 3d Ser, 16 February 1872, vol 209, col 560 and HC Deb, 3d Ser, 17 February 1873, vol 214, col 550 (*per* Attorney-General [(later Lord Chief Justice]) Sir John Coleridge); Joseph Brown, *The Dark Side of Trial by Jury* (William Maxwell 1859) 18.; sSee also Joseph Brown, 'Trial by Jury – Should it be Abolished?' 74 Law Times, 4 November 1882, 23 (arguing that a similarly strong case could be made for seven jurors (seven wise men of Greece and seven wonders of the world) or for four jurors [(four elements, four evangelists, four seasons]).

[61] 'Trial by Jury', (1838) 2 Law Magazine 532. Jurors were expected to swear to find a true verdict according to the evidence, although a series of statutes in the 1830s allowed certain groups to affirm to do so,. 'The Jew Bill – The Anomaly of the Law of Oaths', *The Economist* (London, 26 July 1851) 809–11 (summarising the law as it then stood). The Criminal Law Amendment Act, 1867 (30 & 31 Vict c 35) s 8 permitted judges to take affirmations from any jurors who genuinely objected to taking the oath. 30 & 31 Vict c 35 s 8.

[62] John Jervis, *Archbold's Summary of the Law relating to Pleading and Evidence in Criminal Cases*, 11th ed. (W N Welsby, ed), 11th edn, (S Sweet, V and R Stevens, and G S Norton 1849) 98.

[63] Archbold (n 62) 98. The *Law Times* preferred this procedure, arguing that jurors should be sworn as quickly as possible., 'The Simplification of Criminal Procedure', 88 Law Times, 29 March 1890, 381–82.

[64] County Juries Act 1825, s 26.

[65] Chitty (n 8) 534.

[66] County Juries Act 1825, s 29. At common law, defendants could peremptorily challenge up to thirty-five jurors in all felony cases, or one less than three full juries., Chitty (n 8) 534. This number was reduced to twenty by 32 Hen 8 c 3 (1540).

cases;[67] there was no right of peremptory challenge in misdemeanour cases.[68] The Crown had no right of peremptory challenge as such:[69] section 29 of the 1825 Act provided that in cases in which the Crown was a party, the Crown would have to assign a cause to any challenge to a juror. Cause did not have to be shown until the entire panel had been gone through, however; until that point, challenged jurors were ordered to 'stand by' and the court would simply call the next juror.[70] Unless the panel was exhausted, then, this stand-by power effectively gave to the Crown an unlimited power of peremptory challenge.

Challenges for cause, as the name suggests, were challenges brought against jurors for a specific reason, and could be brought against the array or against the polls.[71] A challenge to the array was an allegation that some procedural defect rendered the entire panel unsatisfactory,[72] while a challenge to the polls was a challenge to specific jurors and could be brought even if a prior challenge to the array had failed.[73] When challenges for cause were brought, the court would appoint two triers, usually from among the empanelled jurors, to determine the challenge.[74]

A. Jury Composition

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[67] Treason Act 1554 (1 & 2 Ph & M c 10) (1554).
[68] James F. Stephen, *A General View of the Criminal Law of England*, 2nd ed (2nd ed, Macmillan, 1890) 166. Chitty commented that peremptory challenges could be exercised only in favour of life, Chitty (n 8) 535. In practice, however, some courts hearing misdemeanour cases operated a form of the Crown's stand-by procedure in the defendant's favour; see *R v Blakeman* (1850) 3 C & K 97, 175 Eng RepER 479. The stand-by power will be discussed shortly.
[69] Chitty states that at common law, the Crown had an unlimited right of peremptory challenge, but this was removed by 35 Edw I stat 4 (1307), Chitty (n 8) 533–34.
[70] See J. F. McEldowney, '"Stand By for the Crown": An Historical Analysis' [1979] Crim L R 272.
[71] Chitty (n 8) 533.
[72] Jervis (n 62) 99–100 (citing *R v Dolby* (1821) 1 Car & K 238, 174 Eng RepER 791 [(KB)), as an example. The defendant in this case was being prosecuted for seditious libel by a group called the Constitutional Association, of which the sheriff was a member).
[73] Chitty (n 8) 539.
[74] ibid 547–50.

Many contemporaries agreed that, as the Law Amendment Society put it in 1867, 'the class left to serve on common juries consists principally of farmers in the rural districts, and shopkeepers in towns; and by juries thus composed must all criminal cases be tried.'[75] Several years earlier, Justice Coleridge gave similar evidence to the Judicial Business Commissioners, saying that the common jurors were 'almost exclusively drawn from the small farmers and small tradesmen.'[76] Contemporaries presented no empirical evidence for these views, but the work of modern historians offers support for them. Conley, for example, found that in the average jury list for the Kent Assizes between 1859 and 1880, gentlemen made up fifteen percent of the jurors, farmers made up twelve percent, merchants made up thirty-six percent, and skilled artisans made up thirty percent.[77] In largely rural English counties, such as Buckinghamshire and the Black Country, farmers made up the majority of jurors, followed by tradesmen and artisans.[78] This stands to reason: the jury system was built on property ownership, and farmers were principal property owners in an agricultural county, and therefore would likely be heavily represented on jury panels. The same is true of jurors summoned for service at the quarter

[75] Select Committee on Special and Common Juries (1867) (n 45) 63 (Law Amendment Society, *Report of the Special Committee on the Preservation and Amendment of Trial by Jury*, 1867). Labour activists agreed with the Society's assessment, albeit with different considerations in mind, ~~,~~ ~~S~~see, for example, Allen Upward, *Trial by Jury and the Labour Movement: A Plea for Reform* (John Heywood 1891) 7, 17; 'The English System of Trial by Jury', *Reynold's Weekly Newspaper* (London, 8 December 1850) 1; Henry Crompton, 'Class Legislation', ~~,~~ (1873) 13 Fortnightly R 205.

[76] Common Law (Judicial Business) Commissioners, *Report*~~,~~ (HC 1857, ~~HC~~ 2268~~,~~) Q 525. See also Roland K~~.~~ Wilson, *History of Modern English Law* (Rivingtons 1875) 102 (noting that the juries were 'taken by a mixture of chance and selection from the middle ranks of the community'); 'Juries', 6 Jurist, 21 April 1860, 152 (noting that the common juries were 'composed exclusively of retail traders or small tenant farmers, according as they are drawn from urban or rural districts'); Select Committee on Special and Common Juries (1868) (n 21) Q 1273 (evidence of David Meredith, a hosier who had served on a jury, that juries were composed of the lower classes of tradesmen).

[77] Carolyn A Conley, *The Unwritten Law: Criminal Justice in Victorian Kent* (~~Oxford University Press~~OUP 1991) 17.~~–~~ A further five percent of ~~the~~ jurors were clerks and two percent were labourers. Conley's use of the term 'merchant' in this context is curious in that people so described qualified as special jurors. For reasons to be discussed shortly, it seems unlikely that special jurors would make up a third of the jury lists. It is possible that Conley intended this group to refer to retailers.

[78] For Buckinghamshire, see Eastwood (n 9) 215 (finding that farmers predominated on jury panels in 1825 and 1826, followed by tradesmen and yeomen or small employers). For the Black Country, see David Philips, *Crime and Authority in Victorian England: The Black Country 1835~~–~~–1860*, (Rowman & Littlefield 1977) 106 (finding a predominance of farmers in a Black Country jury list in 1836, followed by small tradesmen, artisans and skilled labourers).

sessions in Gloucestershire. Table 2 presents the occupational profile of the trial (petty) juries and the grand juries, again at three points across the nineteenth century a generation apart.

Table 2: Composition of Gloucestershire Quarter Sessions Petty and Grand Juries by occupation (in percent):[79]

	1826		1850		1875	
	Petty	Grand	Petty	Grand	Petty	Grand
Specials	0	0	<1	1	0	3
High Class	1	99	0	48	1	62
Farmers/Yeomen	44	0	49	24	44	16
Unskilled Workers	1	0	3	0	2	0
Skilled Workers	41	1	33	10	37	4
Retail/Services	14	0	14	13	15	7
Clerks/Government	0	0	<1	1	1	0
Other	0	0	0	3	0	7
Unknown	0	0	<1	0	1	0

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Commented [HCW20R19]: The categories were mine, and I think largely self-explanatory, but you are quite correct about specials and high-class jurors. I have included an explanation of those categories in n 79. Thank you.

Farmers and yeomen[80] accounted for nearly half of all jurors summoned in Gloucestershire, while skilled workers accounted for just over one third, and retailers one eighth. Between them, these three groups accounted for more than ninety-five percent of all common jurors summoned. Unskilled workers were virtually entirely absent, never accounting for more than three percent of the total. Special and high-class jurors were equally conspicuous by their

[79] Gloucestershire Archives Q/SJb/2/6, 7 and 8. The figures given are percentages, and all have been rounded, so the totals may not add up to one hundred percent100%. Most of the categories I have used are self-explanatory. Special jurors were men eligible to serve on a special jury and will be discussed at length later 9text at nn 92-94). By high class jurors, I mean men who did not qualify as special jurors but nevertheless held high social rank or professional standing, such as school masters, engineers and chemists.

[80] Yeomen were freeholders who owned and cultivated their own land., sSee Oldham (n 8) 148–49 (citing Thomas Smith, *De Republica Anglorum* [(first published 1583, L Alstom, ed, 1906) (1583)], 42).

absence. In the three years surveyed, only three jurors from these categories, out of a total of ~~six hundred and five~~605,[81] were summoned for common jury service. Yet high-class jurors clearly were available: Table 2 also sets out the composition of the Gloucestershire grand juries at quarter sessions. Recall Blackstone's comment that grand jurors were generally 'gentlemen of the best figure of the county'.[82] This was certainly the case in Gloucestershire; high-class jurors made up all but one of the grand jurors summoned in 1826, half of the grand jurors summoned in 1850, and nearly two-thirds of those summoned in 1875. Evidently, local authorities preferred to keep these higher-class jurors for service on grand juries.

Thus, the burden of the jury system was not dispersed equitably. Only a small percentage of the adult male population was eligible for service, and only a portion of that select group would be likely to serve on common trial juries. Contemporaries expressed concern that the farmers and shopkeepers found on these juries were incapable of doing their job properly. *The Era*, for example, wrote that while vacancies were usually filled with the most competent people, when it came to juries the 'simple rule seems to be, to place precisely the most incompetent and unfit men who can be selected~~.~~'.[83] Citing a report from *The Times*, the editorial went on to suggest that the standard of education among jurors was so low that the prisoners being tried were probably better educated.[84] Similarly, the *Satirist* complained that the 'composition of the Common Jury Lists seems to be conducted on the principle of selecting the most uneducated and incompetent persons to be found in the respective counties with the requisite property qualifications~~.~~'.[85]

Lawyers were equally critical of common jurors. The Common Law Commissioners felt that common juries, especially in agricultural areas, were 'sometimes composed of a class

[81] Six hundred and six men are listed, but one man in 1875 was not in fact summoned despite his name being on the list.
[82] See above, n 43.
[83] 'The Jury Nuisance', *The Era* (London, 11 April 1847) 9.
[84] ibid.
[85] 'The Scandalous Jury System – More Illustrations', *Satirist* (London, 12 August 1848) 333.

of persons whose intelligence by no means qualifies them for the due discharge of judicial functions~~.~~.'[86] The Commissioners continued:

> Such persons, unaccustomed to severe intellectual exercise or to protracted thought, and used to an active life and out-door employment, when shut-up for hours in a jury-box, bewildered by law terms, by conflicting evidence, and the disputations of contending advocates, who appeal to their prejudices, sometimes pronounce verdicts which bring the institution of juries into disrepute.[87]

Serjeant Pulling told the Select Committee on Special and Common Juries that his experience in Wales was 'not in favour of trial by common jury; there have been so many instances of mistrials~~.~~', [88] The legal journals were equally critical, especially the *Jurist*, which commented in 1844 that the job of a juror would be difficult even if the juries were 'composed of men far more educated and astute than they usually are~~.~~'.[89] Five years later, the *Jurist* commented that juries were usually filled with 'persons with scarcely sufficient education to understand the ordinary conversational language of educated men, and quite incapable of any close or acute reasoning~~.~~', [90] The *Law Times* was also concerned, and regularly recommended the abolition of special juries so as to ensure a mix of higher and lower quality jurors on the common juries.[91]

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[86] Commissioners of Common Law, *Second Report*~~,~~ (~~-~~HC 1853, ~~HC~~ 1626~~,~~) 6.
[87] ibid~~.~~; a~~A~~ virtually identical paragraph appeared in the *Jurist*~~,~~ s~~S~~ee 6 Jurist, 29 December 1860, 463, 464.
[88] Select Committee on Special and Common Juries (1867) (n 45) Q 372. John W~~.~~ Burrup, Undersheriff for Gloucestershire, told the committee that juries in his jurisdiction contained some very illiterate men, especially those in the mining districts~~.~~ Select Committee on Special and Common Juries (1868) (n 21) Q 826~~.~~ Charles Bull, Undersheriff for Kent and Sussex, told the same committee that in parts of Sussex 'you find men of no education whatever; men who can hardly read and write~~.~~', ibid Q 950.
[89] 'Judicial Opinion on the Evidence', 8 Jurist, 21 December 1844, 481.
[90] 'Law Magazine and Jury Trial', 13 Jurist, 11 November 1849, 293.
[91] See, for example, 'Juries', 12 Law Times, 14 October 1848, 55; 'Juries', 35 Law Times, 30 June 1860, 181; 41 Law Times, 16 December 1865, 89 (endorsing a suggestion by T W Erle, Associate of the Court of Common Pleas, that special juries be abolished and that the eligibility criteria be raised); 41 Law Times, 30 June 1866, 594; 'Juries', 42 Law Times, 16 March 1867, 379.

B. Special Jurors on Common Juries

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Oldham notes that concerns with the quality of jurors have existed for centuries, and cites a royal proclamation from 1607 to that effect.[92] From these concerns developed the idea of ensuring a jury of higher quality jurors in particular kinds of cases. By the eighteenth century, the institution of the special jury had evolved and subsequently was formalised by the 1825 Act.[93] Section 31 defined special jurors as bankers, merchants and those who held the social rank of esquire or higher; after 1870, those who met a relatively high property threshold also were included.[94] The qualifying terms in the 1825 Act were inherently ambiguous, and numerous contemporaries complained that many special jurors did not in fact deserve the title. Many suggested that the overseers accepted self-descriptions at face value.[95] Thus, the *Legal Observer* suggested that many special jurors described as merchants were in reality mere dealers in hops, ale, liquors, and timber, and were no different from common jurors.[96] The *Solicitors' Journal* wrote that anyone could be a special juror depending on how he described himself, and suggested that butlers and footmen were able to describe themselves as merchants because their wives kept shops.[97] The apparent ease of falsely claiming special juror status, combined with the improbability of special jurors serving on common juries, created a clear incentive to falsely claim that status. If this had been a common practice, however, one would expect to find a relative abundance of special jurors, yet multiple witnesses before a

[92] Oldham (n 8) 142.
[93] ibid 210.
[94] County Juries Act 1825, s 31, superseded by Juries Act 1870, s 6.
[95] Select Committee on Special and Common Juries (1867) (n 45) QQ 9, 170 (evidence of T W Erle, Associate of the Court of Common Pleas), QQ 290, 304 (evidence of Serjeant Pulling), QQ 525, 528 (evidence of William Burchell, Undersheriff for Middlesex), QQ 962–63 (evidence of Charles J. Abbott, Undersheriff for Surrey), and Appendix App No 2, 63 (Law Amendment Society, *Report of the Special Committee on the Preservation and Amendment of Trial by Jury*, 1867); Select Committee on Special and Common Juries (1868) (n 21) QQ 112–13 (evidence of Walpole E. Greenwell, Vestry Clerk at the Parish of St. Marylebone), QQ 613–15, 710 (evidence of Frederick Deacon, Undersheriff for Lancashire), and Q 1075 (evidence of Sir William Erle, former Chief Justice of the Court of Common Pleas).
[96] 'Country Special Juries', (1843) 26 Leg Obs 410.
[97] 11 Solicitors' J, 24 August 1867, 968.

parliamentary committee testified that special jurors were in short supply. David Deans, Clerk to the High Bailiff of Westminster, for example, told the committee that there were only 512 special jurors in the twelve parishes of Westminster.[98] John W. Burrup, acting Undersheriff for Gloucestershire, told the same committee that in his county there were only 251 special jurors out of a total of 7,005 jurors, a proportion of only four percent.[99] Charles Bull, Undersheriff for Kent and Sussex, noted that out of 16,000 jurors in Kent and 7,500 jurors in Sussex, there were only 400 and 197 special jurors, respectively, or less than three percent in each county.[100] The testimony of these witnesses is supported by official returns to Parliament, which show that special jurors made up a little over three percent of all jurors in 1852 and 1853.[101] The inclusion of a property qualification in the eligibility criteria in the 1870 Act, however, dramatically increased the number of special jurors available. The Wiltshire jurors' book for 1880, for example, indicates a total of 1,027 special jurors, or some twenty percent of the total number of jurors listed.[102] Two-thirds were listed as farmers or yeomen; such men would not have qualified as special jurors under the 1825 Act. Forty-eight jurors in the 1890 book described as merchants, and four described as esquire, were not listed as special jurors. These omissions from the special juror list indicate that, at least in Wiltshire, the parochial authorities did not simply accept self-descriptions at face value.

[98] Select Committee on Special and Common Juries (1868) (n 21) QQ 235–36, 297.
[99] ibid QQ 815–16.
[100] ibid QQ 913–19; See also ibid Q 128 (evidence of Walpole E. Greenwell, Vestry Clerk for the Parish of St. Marylebone, noting that in the Parish of St. Pancras, there were less than 50 special jurors out of 6,628 jurors in total; in Paddington, there were 220 out of 3,790; in St. James', in the centre of Westminster, there were not 20 special jurors for every 1,000 jurors); 'The Grievances of Jurymen', 16 Solicitors' J, 24 February 1872, 300 (in which Henry Lopes, MP, is reported to have said that there were only 1,800 special jurors in the whole county of Middlesex. Lopes said that he would have expected a greater number from Marylebone or Westminster alone).
[101] *Abstract of Returns of the Number of Persons on the Jury List for each County, City and Borough in England and Wales for the Years 1852 and 1853*, 1854, (H.C. 1854., 134), 2–3.
[102] Wiltshire and Swindon History Centre, A1/265/109.

The absence of special jurors on common juries may have contributed to the perception that common juries were of poor quality.[103] Contemporaries complained frequently that sheriffs removed the names of special jurors from the jurors' books.[104] This practice apparently derived from section 31 of the 1825 Act, which required that sheriffs 'take from' the jurors books the names of all men qualified as special jurors and to create a separate special jurors' list. Many sheriffs, it was said, interpreted this provision to mean that the names of special jurors should be removed from the jurors' book, thereby precluding such jurors from serving on common juries.[105] Many legal commentators argued that section 31 intended only that a

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[103] See, for example, Commissioners on Common Law, *Second Report* (n 88) 6 (stating that the higher class of jurors had 'more cultivated minds and superior intelligence'); 'Composition of Juries', 21 Law Times, 20 August 1853, 198 (reproducing Justice Coleridge's comments at the Gloucestershire Assizes in 1853 that the inclusion of special jurors in common juries would speed up business as such jurors would require a much shorter charge and summing up); Select Committee on Special and Common Juries (1867) (n 45) Q 1087 (evidence of George W G Potter, Secondary of the City of London, noting that many common jurors were retail dealers who did not possess the specialist knowledge of special jurors); Select Committee on Special and Common Juries (1868) (n 21) Q 586 (evidence of Richard Nicholson, Clerk of the Peace for Middlesex and Hertfordshire, stating his greater respect for the opinions of special juries).

[104] See 'Juries', 6 Jurist, 21 Apr. 1860, at 152 (noting the practice of the undersheriffs' offices to 'eliminate from the list from which the common jury is selected all persons described as esquires or persons of higher degree, or as bankers or merchants'); 'Juries', 4 Solicitors' J, 24 March 1860, 388, 389; 'On the Defects of Our Jury System', 5 Solicitors' J, 1 December 1860, 71, 73 (reproducing a paper read by Thomas G. Gibson to a meeting of the Metropolitan and Provincial Law Association at Newcastle, in which the author noted the 'general, if not universal, practice … for many years, to summon the persons on the 'Special Jurors' List' only for the trial of an exceptional and special nature.'); Select Committee on Special and Common Juries (1868) (n 21) Q 912 (evidence of Charles Bull, Undersheriff for Kent and Sussex, stating that on receiving the jurors' book, the sheriff '[took] out from the list all those against whom the description of banker, merchant, or esquire, is written'); 'Special Jurors in Criminal Trials', 13 Law J, 13 April 1878, 227 and 'Lord Justice Bramwell on Jurymen', 22 Solicitors' J, 13 April 1878, 472 (both noting that in his charge to the Grand Jury at Nottingham, Lord Justice Bramwell said that the practice of removing special jurors from the common jury list was common throughout England and Wales); 'Reform of the Jury System', 65 Law Times, 26 October 1878, 430 (noting that a 'rigid line has been drawn between the two classes of jurors, and none of those named special have been called upon common juries. This distinction is as mischievous as it ~~i~~as? illegal.').

[105] A minority of commentators tried to defend the practice by pointing to the discomfort that high-class jurors would have felt by being forced to work alongside common jurors.~~,~~ ~~S~~see, for example, Select Committee on Special and Common Juries (1868) (n 21) QQ 1466–67 (evidence of Sir William Bodkin, Assistant Judge at the Middlesex Sessions, noting how unpleasant it would be for a gentleman to serve alongside his own butler.~~)~~). See also ibid Q 1416 (evidence of Henry Avory, Clerk of Arraigns at the Central Criminal Court, stating that special jurors might rebel at the notion of serving on common juries, although he personally gave that attitude little consideration); 'Special and Common Jurymen', (1844) 8 J P N 273 (pointing to the 'despair and indignation' that gentlemen would feel at being forced to serve alongside common jurors). Charles Abbott, Undersheriff for Surrey, argued that forcing the two kinds of jurors together could result in class dissension in the juries, and told the Select Committee that he had seen such conflict arise when a tales was prayed on special juries (i.e., when extra jurors had to be drafted because the panel had been exhausted but the jury was still was still incomplete).~~,~~ Select Committee on Special and Common Juries (1867) (n 45) Q 1016. Other witnesses before the Select Committee took the opposite view.~~,~~ Sir William Erle, the former Chief Justice of the Court of Common Pleas, for example, argued that mixing the two classes of juror would 'strongly tend to a unison among different classes of society, and it would tend to take away the notion of standing by one class and setting one class against the other.'~~,~~

separate list of special jurors be created from the general list.[106] Several commentators pointed out that special jurors were paid for their service, not simply because of their superior abilities, but also in recognition of the greater burden borne by the special juror who had to serve on both kinds of jury.[107]

Excluding special jurors left common juries 'without any admixture of the special element trying complicated cases of commercial fraud, about which they know nothing, or endeavouring to weigh minute facts of circumstantial evidence, for which they are utterly unfitted.'[108] Many commentators were especially concerned at leaving virtually all criminal cases to be tried by common jurors. The *Satirist*, for example, complained that:

> [A]ll the educated and superior gentlemen of the county are set apart to try such important questions as whether John Noakes removed a load of straw from off his farm without bringing back an equivalent amount of manure, or did not plant Big Patch Field with 12lbs of red clover seed to the acre, or did not keep sows of the true Somerset breed; but the utterly unimportant question as to whether he should

Select Committee on Special and Common Juries (1868) (n 21) Q 1071. Sir William went on to assert his belief that the different kinds of jurors would cooperate together; ibid Q 1074; Henry Avory, Clerk of Arraigns at the Central Criminal Court, disputed Abbott's view of the effect of inserting common juror talesmen on special juries; in Avory's experience, such jurors were 'engaged in the discussion the same as the others.', ibid Q 1422; T W Erle, Associate of the Court of Common Pleas, took a similar view; 'Composite' Juries' (1873) 2 Law Magazine (4th ser) 354, 356.

[106] See, for example, Commissioners on Common Law, *Second Report* (n 88) 6; Commissioners on Common Law, *Third Report*, (1860, HC 1860, 2614,) 8; 'Juries and Jurors', 6 Jurist (ns), 29 December 1860, 463, 464 (noting that special jurors had a legal obligation to serve on common juries); Select Committee on Special and Common Juries (1868) (n 21) QQ 1061, 1070, 1091–92 (evidence of Sir William Erle, former Chief Justice of the Court of Common Pleas); 'Reform of the Jury System', 65 Law Times, 26 October 1878, 430–31 (commenting that the practice was illegal under the pre-1870 law and under the 1870 Act). In the House of Commons, the Attorney-General Sir John Coleridge, later Lord Chief Justice, expressed the view that the exclusion of special jurors from common juries rendered trial by common jury unconstitutional. HC Deb (3d ser), 17 February 1873, vol 214, col 552.

[107] See, for example, 'Juries', 4 Solicitors' J, 24 March 1860, 388, 389 (noting that special jury service is to be 'understood cumulatively' to the liability to serve on common juries); 23 Solicitors' J, 18 January 1879, 216 (reporting Justice Lindley's charge to the grand jury at Carlisle that special jurors had an obligation to serve on special juries as well as on common juries, and were paid for this extra service). See also 'Juries', 6 Jurist (ns), 21 April 1860, 152–53; 'Juries and Jurors', 6 Jurist (ns), 29 December 1860, 463, 464; 'On the Defects of Our Jury System', 5 Solicitors' J, 1 December 1860, 71, 73.

[108] 'Special Jurors in Criminal Trials', 13 Law J, 13 April 1878, 227; 'Lord Justice Bramwell on Jurymen', 22 Solicitors' Journal, 13 April 1878, 472.

> be hanged, embowelled, and burned for treason, transported for felony, or imprisoned for misdemeanour, are left to the adjudication of poor quality jurors.[109]

The prevalence of the practice of removing special jurors is unclear. Lord Justice Bramwell stated in 1878 that the practice occurred throughout the fifty-two counties of England and Wales, and in the cities and boroughs.[110] Certainly, Parliament considered the practice to be enough of a problem to enact section 15 of the Juries Act 1870, which provided that section 31 of the 1825 Act was not to be construed as authorising the removal of special jurors from the jurors' books. Section 19(2) of the 1870 Act further provided that no one should be exempt from serving on a common jury by reason of being on a special jury list. Notwithstanding these provisions, however, in 1879, Lord Chief Justice Coleridge publicly ~~publicly~~ condemned the practice, and threatened sheriffs and undersheriffs with heavy fines if they continued with it.[111] This suggests that, in Coleridge's mind at least, the 1870 provisions had failed in their purpose. Responding to Coleridge's comment, William Burchell, Undersheriff of Middlesex, wrote to *The Times* to express the irritation of undersheriffs with the Lord Chief Justice's intervention, and defended the legality of their practices.[112] In another, remarkable letter to *The Times*, an unnamed undersheriff went so far as to accuse the Lord Chief Justice of an attempt to unconstitutionally influence the sheriff in the selection of a jury.[113] All these sources suggest that the practice was widespread.

[109] 'The Scandalous Jury System – More Illustrations', *Satirist* (London, 12 August 1848) 333. Lord Justice Bramwell similarly pointed out to a Nottingham grand jury that the best jurors would try a case involving a warranty about a horse, leaving the residue of jurors to try matters of life and death.; 'Special Jurors in Criminal Trials', 13 Law J, 13 April 1878, 227; 'Lord Justice Bramwell on Jurymen,' 22 Solicitors' J, 13 April 1878, 472.
[110] 'Special Jurors in Criminal Trials', 13 Law J, 13 April 1878, 227; 'Lord Justice Bramwell on Jurymen', 22 Solicitors' J, 13 April 1878, 472.
[111] 'Summoning Jurors at the Assizes', 14 Law J, 11 January 1879, 16.
[112] William Burchell, Letter to the Editor, 'Special and Common Juries', *The Times* (London, 16 January 1879) 11.
[113] An Undersheriff, Letter to the Editor, 'The Judges and the Jury Panel', *The Times* (London, 8 January 1879) 12.

The Wiltshire jurors' books for 1859 and 1880, which bracket the period in which most of the complaints above were made (i.e., the 1860s and 1870s), tell another story. The 1859 book shows 115 jurors listed as esquire or higher, merchant or banker (some three percent of the total).[114] By 1880, the book, which was printed with headed columns, contained a specific column to indicate which jurors qualified as special jurors: 1,027 did so (some twenty percent of the total).[115] These jurors' books contradict the contemporary claims that sheriffs all around England routinely removed special jurors from the jurors' books. Of course, there is no way of knowing whether the names of other special jurors were removed from the Wiltshire books, but this seems unlikely at least on a systemic level—why remove some special jurors but leave so many more? It is noteworthy that those who made the claims about removing special jurors never gave any empirical support for their assertions~~claims~~; thus, their claims might have been merely impressionistic. Alternatively, it may be that the local authorities in Wiltshire followed the statutory procedure more strictly than authorities in other counties. Either way, the evidence from Wiltshire suggests that the practice of removing special jurors from the jurors' books was less widespread than contemporaries believed.

Commented [24]: just for variety's sake, to avoid having "claims" three times in close succession

Commented [HCW25R24]: Absolutely – thank you!

The fact that special jurors' names appeared in the jurors' books did not guarantee that special jurors would appear on jury panels, however: as noted earlier, few special jurors appeared on the Gloucestershire common jury panels. What was needed, therefore, was a means of controlling the undersheriffs' summoning discretion. Before his elevation to the bench, Attorney General Coleridge twice introduced legislation to replace randomly selected juries with what he termed 'composite juries': juries in which a proportion of the jurors would be taken from the special jury panels.[116] Such composite juries had been in use in Scotland

[114] Wiltshire and Swindon History Centre, A1/265/99.
[115] Wiltshire and Swindon History Centre, A1/265/109.
[116] HC Deb~~, 3d ser,~~ 17 February 1873, vol 214, cols 552–53. The bills in question~~s~~ were the Juries ~~Bill,~~ HC Bill (1872) [114] and the Juries HC Bill ~~,~~ (1873) [35]. In the 1872 Bill, ~~clause~~ cl 51 proposed that murder juries consist of twelve men, evenly split between special and common jurors; ~~Clause~~ cl 52 proposed that in the County Courts,

since 1825,[117] where a defendant was entitled to a jury in which five of the fifteen jurors were drawn from the special jury list.[118] The Attorney General argued that simply ending the exclusion of special jurors from the common jury panels would not be enough, as such a practice would leave to chance the presence of special jurors on common juries.[119] In most places, the sheer number of common jurors would overwhelm the special jurors, making it unlikely that any special jurors would be chosen.[120] The Attorney General's proposal faced considerable opposition. Parliamentarians were concerned primarily with the effect that this measure would have on public confidence: Gathorne Hardy, MP, for example, suggested that popular opinion would hold that the measure was designed to influence verdicts to the detriment of poor people.[121] Another concern was that due to the disparity in numbers between special and common jurors in most parts of the country, special jurors would face a much greater likelihood of being called to serve than would common jurors.[122] The law journals expressed concern that composite juries would foster division and class distinction. The *Law*

a jury would consist of five members, all to be drawn from common jurors, while ~~clause~~ cl 53 proposed that in all other cases, the jury would have seven members, with two being special jurors. As regards the 1873 Bill, Coleridge proposed an amendment at Committee stage to require a composite jury.

[117] Juries (Scotland) Act 1825, s 17 (providing that in criminal trials jurors were to be selected by ballot from two boxes, one for common jurors and one for special jurors, with names being drawn in the proportion of two to one). See also Archibald Alison, *Practice of the Criminal Law of Scotland*, v~~V~~ol 2~~,~~ (Blackwood 1833) 383 (noting that one third of the jurors were drawn from the special jury list); Robert W Renton and Henry H Brown, *Criminal Procedure according to the Law of Scotland* (William Greene & Sons, 1909) 124 (noting that fifteen jurors were chosen, 'five special and ten common'); Ian D Willock, *The Origins and Development of the Jury in Scotland* (Stair Society 1966) 182 (noting that the assize jury list was 'normally drawn from both [common and special] Books in the proportion of two common jurors to one special juror, and the same proportion was reflected in the jury itself').

[118] Given Coleridge's support for composite juries, it is surprising that he made no reference to the system being operated in Scotland. The Lord Justice Clerk, Lord Kingsburgh, made one of the few direct comparisons between English and Scottish procedure on the issue of composite juries in an address in Glasgow in 1891~~.~~, 'The Criminal Law System of England and Scotland', 91 Law Times, 27 June 1891, 158, 160.

[119] HC Deb ~~,~~ ~~3d ser,~~ 17 February 1873, vol 214, cols 552~~–~~–53. These comments were made in the context of the second reading of the Juries Bill, 1873.~~-~~ T W Erle, the Associate of the Court of Common Pleas, who drafted the 1872 Bill, similarly argued that random selection was a 'loose and unsystematic method, inherently irregular in its effect, and entirely dependent on chance~~.~~', ~~,~~ T ~~.~~W~~.~~ Erle, 'Composite Juries', [1873] Law Magazine (4th Ser) 354, 359 ~~(1873)~~.

[120] HC Deb ~~,~~ ~~3d ser,~~ 17 February 1873, vol 214, col 553~~.~~.

[121] HC Deb~~,~~ ~~3d ser,~~ 27 June 1873, vol 216, cols 1513~~–~~–14~~;~~~~,~~ ~~.~~ s~~S~~ee also ibid~~.~~, 1512~~–~~–13, 1514~~–~~–15, 1515~~–~~–16~~,~~ and 1516~~–~~–17 (contributions from Alderman W Lawrence, and Messrs Gregory, Goldsmid and Walter, respectively.)

[122] See ibid cols 1513~~–~~–14 (comments of Gathorne Hardy, MP, calculating that in Kent special jurors would have to serve nineteen times more often than common jurors). Messrs Goldsmid and Floyer supported Hardy on this point~~,~~ ~~-~~ ibid~~.~~~~,~~ 1515~~–~~–16 and 1516, respectively.

Journal, for example, wrote that the 'specials would feel their presumed superiority, and that the common jurors would resent the presumed superiority of the specials. We have a dread—we submit, a wholesome dread—of the indirect recognition of class distinctions in the Courts of Justice.'[123] The Select Committee on the Juries Bill 1872 rejected the Attorney General's proposal,[124] as did the Committee considering the Juries Bill 1873.[125] The *Law Journal* noted that this 'experimental' measure had been 'fairly submitted to the judgment of the House of Commons, and [had] been repudiated.'[126]

V. CONCLUSION

The County Juries Act 1825 streamlined the jury selection procedure, and on its face that procedure seems straightforward. The overseers and churchwardens drew up the juror lists from which the county jurors' book was compiled. The sheriffs and undersheriffs used this book to summon jury panels that represented the body of the county. The courts enforced the summonses and selected the trial juries from the panels. The trial juries, composed of men deemed reliable by virtue of property ownership, then decided the cases put into their charge. All very orderly. Yet this article has shown that the implementation of this system was rather less orderly. Two themes emerge from the evidence presented. First, far from being the palladium of liberty of Blackstonian lore, nineteenth-century juries were the subject of continuing complaints about the incompetence of jurors. The truth of these complaints is hard

[123] 8 Law Journal, 25 July 1873, 400, 401; See also 16 Solicitors' J, 18 May 1872, 529 (arguing that composite juries 'would be not unlikely to lead to unpleasant differences of opinion, instead of fair deliberation').
[124] See Juries HC Bill, (1872), as amended by the Select Committee [230], clsauses 52–54; See also HC Deb, 3d ser, 17 February 1873, vol 214, col 551 (in which Attorney-General Coleridge decried the Select Committee's resistance to his proposal).
[125] As originally drafted, the Juries Bill 1873, clause cl 52, proposed that juries in treason and murder cases would have twelve jurors as opposed to the seven members proposed for all other trials in clause 54. Attorney-General Coleridge proposed at Committee stage to amend clause 52 by requiring that four of the jurors would be drawn from the special jury panel, HC Deb, 3d ser, 27 June 1873, vol 216, col 1506; Following debate, the Attorney-General accepted that he had no support for his measure and withdrew it, ibid col 1517.
[126] 'The Juries Bill', 8 Law J, 2 August 1873, 449.

to gauge now; it is possible that these complaints reflected the perceptions of commentators, usually of high social or professional standing, of jurors drawn from a lower social position. Be that as it may, these perceptions led to a reduction in respect for juries and jury trial among professionals involved in the judicial process, who would be less likely to mount a defence of jury trial just as it was coming under attack.[127]

Second, the influence of county officials on the jury selection process was immense. The sheriffs, and especially the undersheriffs, often departed from the system laid down by Parliament, and different practices existed in different parts of the country. The undersheriffs excluded groups of formally qualified persons due to personal assessments of those groups' suitability, and ignored the body of the county requirement by choosing jurors only from certain parts of the county. These acts are clear, being confirmed both by the undersheriffs' own testimony to a parliamentary committee and through an examination of archival sources. Contemporaries also complained of undersheriffs removing special jurors from the county jurors' books, but as we have seen, the jurors' books for Wiltshire suggests that this practice was not as uniformly followed as some claimed. Nevertheless, Parliament took the claims seriously and introduced legislation in 1870 to deal with it. Yet it seems that undersheriffs were able to resist these remedial actions, at least in some areas, as shown by Lord Chief Justice Coleridge's intervention nine years later. This is what the *Law Journal* referred to as the 'latent force' in English public officials who were able to ignore instructions from their nominal superiors.[128] By looking beyond the bare legislative provisions and examining the practices of these officials, not only does this latent force become more visible, but we also gain a better understanding of how the jury system actually operated in the nineteenth century. Contemporaries were aware that this system did not always operate properly, and complaints

[127] I have discussed this point in the context of civil jury trial. See Conor Hanly, 'The Decline of Civil Jury Trial in Nineteenth-Century England' (2005) 26 J Leg Hist 253.
[128] '-Jurors in Criminal Trials', 13 Law J, 13 April 1878, 227.

about the quality of the juries were ongoing. Parliament amended some details of the selection system in 1862, then examined the system in detail in 1867-68, and took further remedial steps in 1870. Yet ultimately the operation of the system was not in parliamentary hands. Nameless and often unaccountable local officials exercised a more direct control over the jury system than even a parliamentary committee or a Lord Chief Justice.

Commented [26]: This sounds a little melodramatic? After all, your article shows that we do know the names of quite a number of them.

Commented [HCW27R26]: It is a little dramatic, but I wanted to convey the impact on the system of the decisions and practices of these minor parochial/county officials who were nameless in the sense that they would not have been known outside of their immediate locales. We know the names of a relative handful of them only because they happened to be called as witnesses before parliamentary committees. My inclination is to leave it as is?