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WAS THE JURY EVER SELF-INFORMING?

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I. INTRODUCTION

For nearly two centuries, legal historians have believed that the medieval English jury differed fundamentally from the modern jury. Its members hailed from the immediate vicinity of the dispute and came to trial already informed about the facts. Jurors based their verdicts on information they actively gathered in anticipation of trial or which they learned by living in small, tight-knit communities where rumor, gossip, and local courts kept everyone informed about their neighbors' affairs. Interested parties might also approach jurors out of court to relate their side of the case. Witness testimony in court was thus unnecessary. The jurors themselves were considered the witnesses—not necessarily eyewitnesses, but witnesses in the sense that they reported facts to the judges.¹ They were self-informing; they “came to court more to speak than to listen.”²

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1. See J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 75 (4th ed. 2002); DR. HEINRICH BRUNNER, *DIE ENTSTEHUNG DER SCHWURGERICHTE* 427, 452 (Berlin, Weidmannsche Buchhandlung 1872); JOHN P. DAWSON, *A HISTORY OF LAY JUDGES* 118–28, 213–27 (1960); S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 412, 418, 421, 424 (2d ed. 1981); 1 FRANCIS PALGRAVE, *THE RISE AND PROGRESS OF THE ENGLISH COMMONWEALTH* 243–44 (London, John Murray 1832); 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 622–28 (2d ed., Cambridge Univ. Press 1898); 1 SIR

The idea of the self-informing jury has provided a powerful explanation for many legal developments. James Bradley Thayer and John Henry Wigmore used it to explain the late development of rules regulating oral evidence at trial. No such rules were necessary in the Middle Ages because witness testimony was rare.³ For John Langbein, the decline of the self-informing jury in the fifteenth and sixteenth centuries explained the increasing role of justices of the peace in the prosecution of crime. In medieval times, there was no need for the government to marshal evidence against suspected criminals because the jury knew or collected that information on its own. As early modern jurors became more ignorant of the facts, the government turned to justices of the peace to assemble the prosecution case.⁴ More recently, Thomas Andrew Green explained the medieval jury's extensive discretion and power to nullify the law as a consequence of its self-informing character. Because little evidence was presented in court, judges knew almost nothing about the facts of cases and so could not prevent jurors from deciding cases according to their own notions of culpability.⁵

Although there have long been skeptics,⁶ modern doubts about the self-informing jury began with the publication in 1988 of *Twelve Good Men and True*.⁷ Three of the authors in this collection questioned the extent to which jurors were self-informing. Bernard William McLane and J.B. Post suggested that some fourteenth-century juries may not have been self-

JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 255-65 (London, MacMillan 1883). See also *infra* notes 2-5 (supporting the self-informing character of medieval juries). For historians who disagree with this consensus, see *infra* notes 6, 8-9, and 14.

2. John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 314 (1973).

3. See JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 85-136 (Boston, Little, Brown & Co. 1898); 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 8, at 235-36 (3d ed. 1940); 5 WIGMORE, *supra*, § 1364, at 10-12. More recent research suggests that rules regulating oral testimony did not develop until the eighteenth century, and, thus, that the decline of the self-informing jury was a necessary condition for the emergence of evidence law, but not its immediate cause. See T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 537-40 (1999); John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1171-72 (1996).

4. JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 22, 43, 118-22, 204-05 (1974); Langbein, *supra* note 2, at 314.

5. THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800, at 16-18 (1985).

6. See, e.g., Margaret C. Klingelsmith, *New Readings of Old Law*, 66 U. PA. L. REV. 107, 107-22 (1918); Robert C. Palmer, *Conscience and the Law: The English Criminal Jury*, 84 MICH. L. REV. 787, 795-96 (1986).

7. TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200-1800 (J.S. Cockburn & Thomas A. Green eds., 1988) [hereinafter TWELVE GOOD MEN].

informing,⁸ while Edward Powell argued more generally that fifteenth-century jurors heard evidence in court.⁹ For the most part, all three relied on evidence about jury composition. Some fourteenth-century jurors and most fifteenth-century jurors did not come from the village or even the hundred¹⁰ where the crime allegedly occurred, so they were unlikely to have known about the case. The authors also put forward other arguments, including the practice of releasing a suspect if no accuser came forward to present evidence against him.¹¹ Such acquittals might suggest that jurors did not know enough to convict without the in-court testimony of the victim. Although McLane and Post confined their conclusions to the fourteenth century, Powell questioned whether the jury had ever been self-informing.¹² "My suspicion," he wrote, "is that criminal trial juries were never entirely self-informing in the strict sense in which the term has been interpreted, and that even in the earliest days of jury trial, accusers and witnesses had the chance to inform the jury in court."¹³ Surveying the evidence a few years later, George Fisher lamented that "the scant trial records of those early years make it hard to confirm or rebut this theory of the 'self-informing' criminal jury"¹⁴

The evidence put forward by McLane, Post, and Powell is certainly provocative, but it does not prove that later medieval juries were not self-informing. Even if only a few jurors were from the relevant hundred, those jurors might have known or gathered relevant information that they shared with other jurors.¹⁵ In addition, as Anthony Musson put it, "the self-informing character of trial juries was tempered," but not negated by the evidence he uncovered that early fourteenth-century jurors sometimes

8. See generally Bernard William McLane, *Juror Attitudes Toward Local Disorder: The Evidence of the 1328 Lincolnshire Trailbaston Proceedings*, in TWELVE GOOD MEN, *supra* note 7, at 36–64; J.B. Post, *Jury Lists and Juries in the Late Fourteenth Century*, in TWELVE GOOD MEN, *supra* note 7, at 65–77.

9. See generally Edward Powell, *Jury Trial at Gaol Delivery in the Late Middle Ages: The Midland Circuit, 1400–1429*, in TWELVE GOOD MEN, *supra* note 7, at 78–116.

10. The hundred was an administrative subdivision of the county consisting of a number of villages.

11. See Post, *supra* note 8, at 65, 75–76; Powell, *supra* note 9, at 78, 113.

12. Powell, *supra* note 9, at 78, 97. "Our hypothesis must be that by the early fifteenth century the criminal trial jury was no longer self-informing in the accepted sense—if indeed it ever had been." *Id.* (emphasis added).

13. *Id.* at 115–16.

14. George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 591–92 (1997) (footnote omitted).

15. Thomas A. Green, *A Retrospective on the Criminal Trial Jury, 1200–1800*, in TWELVE GOOD MEN, *supra* note 7, at 358, 364–75; Langbein, *supra* note 3, at 1170 n.6. See also McLane, *supra* note 8, at 36, 57 (suggesting that jurors who lacked firsthand knowledge of crimes may have relied on jurors who lived closer to the crime scene).

heard witnesses in court.¹⁶ Nevertheless, reinterpreting the fourteenth- and fifteenth-century evidence is not my principal goal. Rather, I hope to address broader issues raised by Powell and Fisher. Was the jury ever self-informing? Did the medieval jury hear witnesses in court? Could a jury be self-informing and hear witnesses in court? Recent writers have not deemed it necessary to present primary-source evidence supporting the idea that the medieval jury was self-informing.¹⁷ Now that serious scholars have questioned the theory, it is necessary to examine the sources afresh. The need for new evidence is especially acute because the modern debate has focused on the criminal jury, while earlier writers were more concerned with civil cases.¹⁸

This Article will attempt to show that the thirteenth-century criminal jury was self-informing. It argues that jurors came to court with extensive knowledge of the facts. They lived near the place where the crime allegedly occurred, and they did not need in-court testimony to know whether a suspect was guilty. Nevertheless, jurors also probably learned from trial. The defendant undoubtedly spoke at trial and may have swayed jurors. In appeals (private prosecutions), the prosecutor, who was usually the victim, also spoke in court, and jurors could have learned from him or her.¹⁹ Judges questioned the parties and spoke with jurors, and such colloquies might also have contributed to the jurors' opinions. Local officials, such as the coroner or sheriff, were present at trial, and their testimony could also have influenced the jury. Finally, although less frequently, others with information about the case might speak up at trial.

The fact that thirteenth-century jurors learned from defendants, prosecutors, judges, officials, and other witnesses might seem to contradict the idea that the jury was self-informing. Rather, it could be said to confirm Powell's conjecture that "criminal trial juries were never *entirely* self-informing."²⁰ Nevertheless, Powell emphasized the similarity between medieval and postmedieval jurors, while I emphasize the differences. Self-informing is a matter of degree, but differences in degree can still be large

16. ANTHONY MUSSON, PUBLIC ORDER AND LAW ENFORCEMENT: THE LOCAL ADMINISTRATION OF CRIMINAL JUSTICE, 1294-1350, at 205 (1996).

17. See, e.g., GREEN, *supra* note 5, at 16-17 (forgoing citation of primary sources to support the contention that the medieval jury was self-informing); Langbein, *supra* note 2, at 314 (relying on JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (Boston, Little, Brown & Co. 1898)). See also the twentieth-century sources cited in note 1, *supra*.

18. See Fisher, *supra* note 14, at 592-93.

19. Women constituted more than a third of appellors. Daniel Klerman, *Women Prosecutors in Thirteenth-Century England*, 14 YALE J.L. & HUMAN. 271, 287-89 (2002).

20. Powell, *supra* note 9, at 115-16 (emphasis added).

and important. Modern jurors know practically nothing about the cases they decide and rely exclusively on in-court testimony. In fact, those with knowledge of the parties or circumstances are routinely excluded from the jury. Early modern jurors learned most of what they needed to know in court. They may have known a little about the facts of the case or the people involved, but such knowledge did not disqualify them from service. Nevertheless, informed jurors were increasingly required to present their evidence under oath in open court.²¹ Medieval jurors knew a lot and were selected for that reason. They only occasionally heard testimony, and what they learned in court was less important. To borrow a phrase from Green, there was testimony “*alongside* self-informing.”²² Although they sometimes heard witnesses, a wide gulf separates the thirteenth- and the twentieth-century jury.

As noted above, the idea of the self-informing jury is important because it helps explain developments in the history of evidence law, prosecution, and jury nullification. For these purposes, it is not necessary that the jury was *entirely* self-informing or that it *never* heard testimony in court. Rather, it is enough that jurors were sufficiently well-informed that regulation of in-court testimony was not seen as important, that the government did not feel the need to assist in the gathering of prosecution evidence, and that judges knew significantly less about the facts than did the jurors.

Powell implied that the term “self-informing” has usually been interpreted “strictly” to exclude the idea that jurors learned anything from trial.²³ While there are statements in the literature to support that interpretation,²⁴ some of the principal proponents of the self-informing hypothesis have been more moderate. Even before modifying his views in 1988 in *A Retrospective on the Criminal Trial Jury*, Green believed that “[t]he trial often may have constituted an important part of the process by which the jury informed itself or confirmed its earlier impressions.”²⁵ Even

21. John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 220–29 (1988).

22. Green, *supra* note 15, at 370.

23. Powell, *supra* note 9, at 97, 115–16.

24. See, e.g., GREEN, *supra* note 5, at 16 (“No witnesses could come forward . . .”); Langbein, *supra* note 3, at 1170 (“The medieval jury came to court not to listen but to speak, not to hear evidence but to deliver a verdict formulated in advance.”). But see GREEN, *supra* note 5, at 16 n.48, 18 (noting that witnesses appeared at the eyre); Langbein, *supra* note 2, at 314 (stating that “Medieval juries came to court *more* to speak than to listen,” rather than “*not* to listen”) (emphasis added).

25. GREEN, *supra* note 5, at 18 (footnote omitted).

F.W. Maitland and Sir James Fitzjames Stephen noted examples of in-court testimony.²⁶

This Article focuses on the thirteenth-century criminal jury. It discusses the thirteenth century because the sources from this period are more plentiful and because, if the jury was ever self-informing, it was self-informing then. It marshals evidence from criminal cases because the modern debate has focused on such cases and because David Seipp has recently written on the self-informing nature of the civil jury.²⁷ Although this Article focuses on the trial jury, it will also consider the presenting jury.²⁸ During the thirteenth century, presenting jurors ordinarily served on the trial jury, and the two juries were hard to distinguish. In fact, because the presenting jury was drawn only from the hundred, while the trial jury included representatives from the four neighboring villages, the presenting jury had access to less local knowledge than the trial jury.

II. JURY COMPOSITION

McLane, Post, and Powell based their arguments against the self-informing jury primarily on evidence of jury composition, so it is appropriate to begin with that issue. Self-informing juries should be from the locality where the crime was allegedly committed. Ideally, they are from the villages closest to the scene of the crime. At the very least, they hail from the relevant hundred. McLane, Post, and Powell showed that fourteenth- and fifteenth-century sheriffs were unable to assemble juries composed exclusively of men from the relevant hundred, much less from nearby villages.

In contrast, thirteenth-century criminal juries consisted of twelve freeholders from the hundred and twenty people from the nearest four villages. This is especially clear for the eyre.²⁹ All freeholders of the

26. See *PLEAS OF THE CROWN FOR THE COUNTY OF GLOUCESTER BEFORE THE ABBOT OF READING AND HIS FELLOWS JUSTICES ITINERANT IN THE FIFTH YEAR OF THE REIGN OF KING HENRY THE THIRD AND THE YEAR OF GRACE, 1221*, at xli (F.W. Maitland ed., London, MacMillan 1884) ("Occasionally other persons who are not jurors give evidencce . . .") (footnote omitted); STEPHEN, *supra* note 1, at 259-60 ("[T]hough the jurors were themselves the witnesses . . . other witnesses might be and sometimes were called upon criminal trials.").

27. See David J. Seipp, *Jurors, Evidences, and the Tempest of 1499*, in *THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND: THE JURY IN THE HISTORY OF THE COMMON LAW* 75 (John W. Cairns & Grant McLeod eds., 2002).

28. The presenting jury was the jury that accused persons of crime. It was the forerunner of the grand jury.

29. The eyre was a periodic session of royal justice, held in the countryside, that heard a wide range of civil and criminal cases.

county, as well as four lawful men and the reeve from every village, were summoned to the eyre. The hundred bailiff or electors chosen by him then chose the presenting jurors from among those present at the eyre. If a case went to trial, four lawful men and the reeve from each of the nearest four villages were sworn and added to presenting juries to constitute the trial jury.³⁰

The existence of separate juries for each hundred is well attested by the structure of the eyre rolls, which divide cases by presenting district. In addition, lists of jurors, which survive for many eyres, invariably show twelve jurors for each hundred.³¹ Often, the plea rolls also show that representatives of the nearby villages participated in the trial jury. Although the participation of the villages was not always recorded, the failure to do so probably reflects variation in enrolling practices.³² If the villagers were indeed absent, this would have resulted in an amercement,³³ which would have been recorded. While plea rolls record a number of "defaults" for failure to attend the eyre, the number of such defaults was small, especially in comparison to the enormous number of people who were summoned.³⁴

At this point, it is sensible to step back and reflect on the implications of the fact that eyre jurors were not selected until the eyre had begun. Civil jurors and jail-delivery³⁵ jurors were summoned in advance for jury service and so could make inquiries and be informed by the parties before they left for court.³⁶ The four lawful men and reeve from each village, who were summoned by the sheriff to be trial jurors at the eyre, would have had a

30. 1 THE 1235 SURREY EYRE 20, 94, 97–98 (C.A.F. Meekings & David Crook eds., Surrey Record Soc'y, vol. 31, 1979). Even though the representatives of the villages were sworn and associated with the presenting jurors in delivering the verdict, the sources do not always refer to them as jurors. For example, plea rolls often report the verdict in a form that suggests the villagers were not part of the jury: "The jurors and the four neighboring villages say on oath that . . ." See, e.g., THE ROLL OF THE SHROPSHIRE EYRE OF 1256, at 230, case 618 (Alan Harding ed., Selden Soc'y, vol. 96, 1981). See also *infra* note 62 and accompanying text, where the jury is referred to as "the twelve." Nevertheless, because the villagers were sworn and seem to have delivered their verdict along with the presenting jurors, this Article refers to them as part of the jury, as is common in the literature.

31. See, e.g., 1 ROYAL JUSTICE AND THE MEDIEVAL ENGLISH COUNTRYSIDE: THE HUNTINGDONSHIRE EYRE OF 1286, THE RAMSEY ABBEY BANLIEU COURT OF 1287, AND THE ASSIZES OF 1287–88, at 419–21 (Anne Reiber DeWindt & Edwin Brezette DeWindt eds., 1981) [hereinafter ROYAL JUSTICE]; THE ROLL OF THE SHROPSHIRE EYRE OF 1256, *supra* note 30, at 301–06.

32. 1 THE 1235 SURREY EYRE, *supra* note 30, at 97.

33. An amercement was a monetary penalty. Today it would be called a fine.

34. See, e.g., THE ROLL OF THE SHROPSHIRE EYRE OF 1256, *supra* note 30, at 203, 207–08, 210, 214–15, cases 514, 535, 544, 565.

35. Jail delivery was a periodic session of royal justice in the countryside that tried those in jail or out on bail.

36. 2 POLLOCK & MAITLAND, *supra* note 1, at 624–25.

similar opportunity to gather evidence before the eyre. On the other hand, the twelve presenting jurors, who also formed the nucleus of the trial jury, would not. Perhaps some of them could anticipate that they would be chosen to be jurors. Before the eyre even began, the hundred bailiffs might have notified those they would choose as electors, and the electors might have notified those they would choose as the remaining jurors. If so, the jurors could have discussed the cases with those who would have useful information. Nevertheless, there is no evidence that jurors had advance notice they would be chosen, so they may have come to the eyre without any particular preparation. While they probably knew something about the offenses and offenders from living in the relevant hundred, this may not have been sufficient to enable them to decide cases confidently. Fortunately, there were many opportunities for them to inform themselves at the eyre before trial. They could talk to representatives of the villages, coroners, other officials, and other freeholders who had been summoned. Those with an interest in particular cases might also approach them to relate their side of the story.

The discussion so far has concerned trials in eyre. Thirteenth-century suspects could also be tried at jail delivery. Unfortunately, much less is known about jail delivery than about the eyre. In the preface to his edition of late thirteenth-century Wiltshire jail deliveries, Ralph Pugh concluded that suspects were frequently tried before juries from hundreds that had no apparent relationship to the crime, and that the four neighboring villages played little, if any, part.³⁷ As will be discussed below in Part V, it is not surprising that jail-delivery jurors were less local than eyre juries. Nevertheless, my own survey of early jail-delivery rolls suggests that the neighboring villages played a role throughout the thirteenth century.³⁸

III. CASES WITHOUT VICTIM-PROSECUTOR PARTICIPATION

One of the more convincing arguments that Post and Powell advanced against the self-informing jury theory is that defendants were frequently

37. WILTSHIRE GAOL DELIVERY AND TRAILBASTON TRIALS, 1275-1306, at 18-19 (Ralph B. Pugh ed., Wiltshire Record Soc'y, vol. 33, 1978).

38. JUST 3/18/2, m. 1 (Essex 1282 jail delivery, eight cases mentioning neighboring villages); JUST 1/1179, mm. 25-25d (Norfolk and Suffolk 1259 jail delivery, thirteen cases mentioning neighboring villages); JUST 1/1179, m. 14 (Suffolk 1254 jail delivery, three cases mentioning neighboring villages); JUST 1/1177A, m. 4d (Suffolk 1250 jail delivery, three cases mentioning neighboring villages); JUST 1/36, mm. 4-5 (Berkshire 1225 jail delivery, seventeen cases mentioning neighboring villages). All citations beginning "JUST" refer to documents in the National Archives, Kew, England. The *Southern California Law Review* could not check the JUST sources and relies on the author for the accuracy of these citations.

released without trial if no accuser came forward against them at jail delivery.³⁹ There are alternative explanations for this phenomenon. Perhaps judges released such defendants because they thought that if a victim did not feel sufficiently aggrieved to come to court, the crime was not serious enough to merit trial. Nevertheless, Post and Powell were correct that this practice might imply that the victim-accuser usually presented testimony at trial and that, in the absence of such testimony, the jury lacked sufficient information to convict. It is therefore instructive to consider how thirteenth-century courts treated cases where no accuser appeared at trial.

The most comparable cases were appeals (private prosecutions) in which the appellor (prosecutor) had died, retracted his or her case, settled with the defendant, or decided that he or she no longer wanted to prosecute. For most of the early thirteenth century, judges released defendants in such cases without trial. For a brief period around 1220, and more permanently starting in the mid-1240s, judges began routinely to put these defendants to trial, despite the appellor's lack of interest.⁴⁰ The mere fact that such cases were put to jury trial suggests that the jury was self-informing and not dependent on testimony by the victim-accuser.

Even stronger evidence comes from the verdicts rendered in such cases, which are summarized in Table I.

TABLE I. Jury verdicts by level of appellor participation, 1218–22 and 1246–94

Level of appellor participation	Number in data set	% guilty
Appellor died before trial	18	33
Appellor retracted or did not prosecute	280	44
Appellor settled with defendant	89	78
Appellor prosecuted the case to jury trial	126	71

Notes: “% guilty” includes cases in which the jury said the defendant was guilty of some, but not all, of the charges brought against him. Nearly all cases in which the “appellor settled with the defendant” were also cases in which the “appellor retracted, or did not prosecute.” For an example of such a case, see *infra* text accompanying note 54. The row labeled “Appellor prosecuted the case to jury

39. See *supra* note 11 and accompanying text.

40. Daniel Klerman, *Settlement and the Decline of Private Prosecution in Thirteenth-Century England*, 19 LAW & HIST. REV. 38, 38–40, 50–53 (2001). This article did not address the treatment of appeals when the appellor died, but those cases conform to the same pattern.

trial" includes cases that were quashed for technical reasons, but then sent to jury trial anyway.

These figures come from a data set of more than a thousand eyre appeals from fourteen counties during the period 1194–1294.⁴¹ As can be seen from the table, jurors often rendered guilty verdicts even when accuser participation was minimal. Even when the appellor had died, jurors rendered guilty verdicts a third of the time. When the appellor had retracted or did not prosecute at the eyre, the jury still convicted more than forty percent of the time. It is highly unlikely that appellors provided any evidence to the jury in such cases. On the other hand, conviction rates in such cases were lower than when the appellor prosecuted the case to jury trial. Since active participation and even testimony by the appellor is likely in such cases, it is possible that the lower conviction rates reflect the fact that the jury lacked sufficient information to convict.⁴² On the other hand, it is also possible that the lower conviction rate reflects the fact that many appellors retracted or failed to prosecute because they knew their cases were weak. The high conviction rate in cases in which the appellor settled supports this conjecture.⁴³

The evidence in this part has been confined to appeals, which were a small and decreasing proportion of cases. Comparable evidence is impossible to gather in cases prosecuted by presentment (public prosecution) because the records do not indicate whether the victim-accuser appeared at trial. This failure to record, however, is itself probative. If the presence of the victim-accuser were necessary, then it is likely that he or she would have been required to attend the eyre. In this regard, it is noteworthy that fifteenth-century sheriffs were instructed to summon "all those who wished to prosecute prisoners" at jail delivery.⁴⁴ No comparable summons to prosecutors was issued in the thirteenth century.⁴⁵

41. *Id.* at 21–22.

42. No inferences should be drawn from the fact that jurors were less likely to convict when the appellor died than when the appellor retracted or decided not to prosecute, because the difference in conviction rates is not statistically significant.

43. For an example of such a case, see *infra* text accompanying note 54. For a discussion of the high conviction rates in such cases, see Daniel Klerman, *The Selection of Thirteenth-Century Criminal Cases for Trial* (Jan. 17, 2001) (unpublished manuscript, on file with author).

44. Powell, *supra* note 9, at 107. See J.G. BELLAMY, *THE CRIMINAL TRIAL IN LATER MEDIEVAL ENGLAND* 103 (1998). Note, however, that Bellamy believes the purpose of this proclamation was primarily to inform appellors, not victims prosecuting their cases by indictment.

45. 1 CLOSE ROLLS OF THE REIGN OF HENRY III, A.D. 1227–1231, at 227–28, 386, 388–89 (1902) (1229 and 1230 jail deliveries); JUST 3/14/1, m. 11 (Devon 1271 jail delivery); 1 THE 1235 SURREY EYRE, *supra* note 30, at 20.

IV. TRIAL ACCOUNTS

Trial accounts are potentially the most valuable evidence in establishing whether medieval juries were or were not self-informing. McLane's, Post's, and Powell's discussions contain surprisingly few trial accounts, largely because fourteenth- and fifteenth-century sources are so uninformative. Nevertheless, as Musson has demonstrated, even sources as arid as jail-delivery plea rolls can be coaxed to yield information on trial procedure.⁴⁶ Fortunately, the thirteenth-century sources, which include treatises, plea rolls, and early reports, are much more copious. Although each of these sources has its own problems, together they paint a coherent picture of thirteenth-century juries. Jurors came to trial already informed. Sometimes they supplemented their knowledge with testimony provided by officials and other witnesses.

A. TREATISES

The treatise attributed to Bracton, probably written sometime in the late 1220s or early 1230s, contains a rather full account of a trial in eyre. I have excerpted the most relevant parts:

We must now speak of those indicted by popular rumour When because of rumour and suspicion the truth of the matter ought to be investigated by the country . . . the judge, if he is wise, ought first to inquire (if he has doubts and the jury is suspect) from what man or men the twelve jurors have learned what they put forward in their *veredictum* concerning the indicted man; having heard their answer thereon he may readily decide if any deceit or wickedness lies behind it. For perhaps one or a majority of the jurors will say that they learned the matter put forward in their *veredictum* from one of their fellow jurors, and he under interrogation will perhaps say that he learned it from such a one, and so by question and answer the judge may descend from person to person to some low and worthless fellow, one in whom no trust must in any way be reposed. . . . [W]hen proceedings of this kind have reached the point of an inquest, in order that judgment may be reached with greater certainty and risks and doubts removed, let the justice inform the indicted man that if he suspects any of the twelve jurors he may remove him for just cause, and let the same be said of the [jurors of] the vills, as where there are deadly enmities between some of them and the indicted man, or there is a greedy desire to get his land, as was said above; if there is ground for suspicion all are to be removed, that the inquiry may proceed free of all doubts. . . . When the twelve jurors and the [jurors of]

46. See MUSSON, *supra* note 16, at 201–05.

the four townships are present, those of the villis will take an oath first, each by himself or all together; lifting up their hands let them swear in these words . . . 'Hear this, ye justices, that we will speak the truth about what is asked of us on the king's behalf, nor will we for any reason fail to tell the truth, so help us God etc.' . . . Then let one of the said justices speak in this way: 'Such a one, who is here present, charged with the death of such a one (or some other crime) comes and denies the death and everything else and on this matter puts himself for good and ill upon the words of your mouth. . . . And therefore we tell you that on the faith that binds you to God and by the oath that you have taken you are to let us know the truth thereof, nor are you to fail in saying whether or not he is guilty of what is alleged against him . . . through fear or love or hate but with God only before your eyes, nor are you to oppress him if he be innocent of the said offence'. His discharge or condemnation will then follow, according to their verdict. . . . In all crimes, major and minor, the justices, if they deem it expedient [and] for good reason, [as] where a serious crime is being concealed and the jurors intend to hide the truth through love, hatred or fear, may separate the jurors one from the other and examine each of them individually in order to establish the truth adequately.⁴⁷

This passage is overflowing with evidence that jurors were self-informing. If the judge was suspicious of the presenting jurors, he questioned them about the sources of the information. Obviously, the information on which the jurors based their presentment (accusation) was not presented in court; otherwise, the judge would not have to ask about it. Once the judge was satisfied with the presentment, the defendant was allowed to challenge the jurors "for just cause." Note, however, the examples that *Bracton* gives for removing a juror: "deadly enmities" and "greedy desire to get . . . land." Knowledge of the facts or parties was not a ground for exclusion. The jurors, including both the presenting jurors and the representatives of the four neighboring villages, were then sworn, and the judge gave them their charge. Then, without any mention of witnesses or evidence, the jurors delivered their verdict and the judge rendered the judgment: "discharge or condemnation." Although one can imagine many complex reasons why there is no discussion of witnesses or other evidence, surely the simplest is that witnesses and other evidence were not an ordinary or important part of trial. Finally, *Bracton's* description of trial ends by noting that if the judge suspected that the jurors were concealing

47. 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 403-06 (George E. Woodbine ed., Samuel E. Thorne trans., 1968) (brackets, parentheses, and the items therein are part of Thorne's translation) (footnotes omitted).

crime, they were to be examined individually. Jurors could only conceal crime, and it only made sense to question them, if they had knowledge beyond what they learned at trial.

The *Placita Corone*, a treatise most likely composed circa 1274–75, largely confirms *Bracton*'s account. Unlike *Bracton*, the *Placita* consists mostly of dialogues of court interactions. Most deal with appeals and show how the parties to such cases should plead. The parties themselves do most of the talking, although occasionally the judge participates.⁴⁸ Witnesses are conspicuously absent. In one revealing dialogue, the judge admonishes the defendant, "Tell us the truth, for if you don't we shall get to know from the country,"⁴⁹ implying that it is "the country" (i.e., the jury) rather than witnesses who will inform the court of what really happened.

The last part of the *Placita* is especially enlightening because it provides three accounts of indictments tried at jail delivery.⁵⁰ All portray trial as primarily a conversation between the judge and the accused. Unlike the appeal cases, the accuser or victim is completely absent. Instead, the judge takes on a quasi-prosecutorial role, coaxing the defendant into submitting to jury trial or badgering the defendant to confess. Once the defendant submits to jury trial, as in *Bracton*, there is nothing to report except the verdict. There is no mention of witnesses or other evidence. The following excerpt is typical:

"Sheriff, why has this man been taken?"

"Sir, for the death of a man whom he is supposed to have killed in self defence, as he says."

"What is your name?"

"Sir, Thomas de N."

"Thomas, what was the name of the man whom you killed in premeditated attack, feloniously as a felon?"

"Sir, if you please, I have never been a felon and never did mischief to living man, in premeditated attack; and so I have done nothing wrong against the man whose name you ask: who, feloniously as a felon and in premeditated attack tried to kill me on such a day, at such an hour, in such a year in my own house in such a township, for no fault on my part and solely on account of his own malice."

"Tell us the circumstances."

48. See *PLACITA CORONE OR LA CORONE PLEDEE DEVANT JUSTICES* 8–9, 16–17 (J.M. Kaye ed., Selden Soc'y, Supp. Series, vol. 4, 1966).

49. *Id.* at 8.

50. See *id.* at 17–22.

"Sir, I was unwilling to lend or hire to him a horse for the purpose of riding about his business And because I refused him the loan of my horse he ran at me in my own house with a Welsh knife I did not at first return his blows; but when I realized that he was set on killing me I started to defend myself: that is to say I wounded him in the right arm with a little pointed knife which I carried, making no further onslaught and acting in this way only to save my own life."

"Did he die of such wound?"

"In truth, sir, I do not know"

. . .

"Thomas, you have greatly embroidered your tale and coloured your defence: for you are telling us only what you think will be to your advantage, and suppressing whatever you think may damage you, and I do not believe you have told the whole truth."

"Sir, I have told the whole truth, and related the affair from the beginning to the end in every detail: and of this I trust myself to God and the country for both good and evil."

And so let an inquest be held.

And the jury said the same as Thomas had related. So the justice then says:

"Thomas, these good people testify by their oaths to the truth of what you have said. So our judgment is that what you did to him, you did in self defence. But we cannot release you from this prison without the king's special order. However we will send a report of your case to the king's court and ensure that you receive his special grace."

"Sir, I thank you."⁵¹

Because this is jail delivery, there is no presenting jury to state the accusation. It is the sheriff, therefore, who takes on this role and thus assumes a speaking part, albeit a small one. The bulk of the case involves a conversation between the judge, who seems quite hostile, and the defendant. The defendant says quite a bit, and in similar real cases, the jurors may have been influenced both by what he said and how he said it. Once the defendant has put himself on the jury, there is again no sign of testimony or evidence. The jury's verdict is reported immediately.

The description of trial in *Britton* (c. 1290-95) is similar to *Bracton*'s, but with two principal differences. First, *Britton* allows the defendant to

51. *Id.* at 19-20.

challenge jurors who have served on the presenting jury.⁵² Second, *Britton* says that if the jurors cannot agree and judicial questioning reveals that the jurors “know nothing of the fact, let others be called who do know it.”⁵³ The first difference will be discussed in Part V below. The second is very strong evidence that *Britton* believed that jurors were or should have been self-informing. Unfortunately, there is no corroborating evidence on this point.

B. PLEA ROLLS

Because treatise writers are not completely reliable, it is important to compare their writing to other trial accounts. The most important are probably eyre plea rolls, the official Latin record of eyre proceedings. Unfortunately, plea rolls record frustratingly little information. Often they contain only the charge, the jury verdict, and miscellaneous amercements. This is especially true of thirteenth-century jail-delivery records, which provide only the most skeletal information. Fortunately, there was wide variation in clerical practice regarding eyre plea rolls, and even a clerk who usually recorded only bare bones facts occasionally put some life into his writing. Consider, for example, the following case from the 1247 Bedfordshire eyre:

John son of Benedict appealed Ivo Quarel, Osbert Cokel and Henry Wyncard in county court of [breach of the] king's peace, wounds and imprisonment etc. And he [John] now comes and does not want to prosecute them. Therefore let him be committed to jail and his sureties, Ayltrop Balliol and Walter son of Odo, are in mercy [fined]. And Ivo and the others come [to court]. And the jurors testify that they [John, Ivo, Osbert, and Henry] have settled and they say that, in truth, the aforesaid Ivo and the others came to the property of Matthew of Leyham in Barford and fished there without Matthew's permission and contrary to his wishes. The aforesaid John came along and asked them for a pledge, and the aforesaid Ivo would not give him one, but instead struck the aforesaid John in the head with a hatchet and made two wounds each three inches long down to the crest of the head. And they [Ivo and the others] beat him badly. And afterwards they took him and bound him and put him in a boat and took him from this county [Bedfordshire] to the county of Huntingdonshire to Ivo's house at Buckden. There they dragged him with a rope to a window of Ivo's solarium and forced him to break the window with an ax. And they painted the wall near the window with the blood flowing from the wounds the aforesaid Ivo had

52. 1 BRITTON 30 (Francis Morgan Nichols trans., Oxford, Clarendon Press 1865).

53. *Id.* at 31 (footnote omitted).

given the aforesaid John, and they dragged him through the window and set upon him a blanket and some linen saying that he had stolen them. And they raised the hue [and cry] and caused the men who responded to the hue [and cry] to understand that eighteen thieves had come to his house, and that all except the aforesaid John had gotten away. So they put the blanket and the linen on him and took him to Huntingdon and gave him to the sheriff to be incarcerated. And he remained in prison until his tithing delivered him. Therefore let the aforesaid Ivo and the others be taken into custody. Later Ivo Quarel came and made fine for forty marks⁵⁴

What is most notable about this case is the detailed account that the jurors provided of what happened. Although it is possible that they heard testimony in court and then provided this complex narrative as a synthesis of what they heard, this seems implausible. From whom would they have heard such testimony? The appellor, although present at the eyre, did not want to prosecute and had, in fact, settled with the defendants. He is unlikely to have testified. The defendants had no incentive to provide the information. Perhaps third parties, to whom the appellor had previously related his ordeal, testified in court. Most likely, however, the jurors had informed themselves out of court by talking to the appellor while he was still interested in pursuing the case or by talking to representatives of the relevant villages to whom the appellor might have spoken. They might also have learned from the appellor's presentation of the appeal at the county court. It is notable that jurors are said to "testify" (*testantur*). They were seen as witnesses themselves, although it is unlikely they were eyewitnesses. Rather, they were hearsay witnesses, synthesizing what they heard from others before coming to court.

The jury's testimonial role is highlighted in a case from the 1227 Essex eyre. A chaplain was appealed for arson and claimed benefit of clergy. As was common in such cases, the jurors nevertheless rendered a verdict. They said that he had committed arson and "they disclosed certain reasons for this" (*ostendunt inde certas rationes*).⁵⁵ As the theory of the self-informing jury suggests, reasons and facts were not argued to the jury; rather, jurors offered them to the judge.

While the plea rolls generally support the idea that the jury came to court well-informed of the relevant facts, they also suggest that jurors sometimes learned from trial. Not only would trial give the defendant, the judge, and the appellor (if it was an appeal) a chance to speak about the

54. JUST 1/4, m. 30 (transcription and translation by the author).

55. JUST 1/229, m. 16 (transcription and translation by the author).

case, but other persons are occasionally mentioned in the plea rolls as providing information in open court. A homicide appeal from the 1218 Yorkshire eyre provides a particularly informative example of in-court testimony. After the principal defendant, Simon, was convicted and hanged, the record continues with proceedings against accessories. The key parts are italicized, and the original Latin of important verbs has been supplied:

The same Jordan appeals as accessory Geoffrey of Stallingborough. *The sheriff, the neighbourhood, and the jurors bear witness [testantur] that this Geoffrey came before them after Hawisa's death and said that the same Simon had many times asked him to come with him to kill Hawisa, and that on the night on which she was killed he had asked him to go with him and he said that he would not, and immediately Simon went with his daughters and killed her, and if he should wish to deny this he would prove it against him as the court shall adjudge. It was attested [testatum fuit] by the bishop of Durham's serjeant of Howden and the 4 villages and all the neighbourhood that before Geoffrey was taken they found upon him a certain jewel box and border of cloth which they well know [noverunt] to have belonged to Hawisa, and upon William his son they found a razor and tunic which belonged to Peter of Duffield, Hawisa's husband, who has set out to the land of Jerusalem, and William said [dixit] that Geoffrey his father entrusted them to him and Geoffrey denied [dedixit] this.*

Afterwards Geoffrey came and admitted [*cognovit*] that he was present where the aforesaid Hawisa was killed and he appeals thereof William the smith of Duffield⁵⁶

It is apparent that there were a lot of people speaking in court in this case. As would be expected, the appellor, defendant, jurors, and representatives of the four villages spoke. The jurors in particular spoke at length, informing the judge of many details about the case. The sheriff and the neighborhood (*visnetum*) joined with the jurors in reporting what Geoffrey had told them after Hawisa's death. While the record makes it sound as though the sheriff, neighborhood, and jurors spoke in unison, it is far more likely that the sheriff, one or two neighbors, and a representative of the jury spoke one after the other, saying roughly the same thing. For similar reasons, the bishop of Durham's serjeant of Howden, neighbors, and representatives of the four nearby villages probably spoke separately about finding the deceased's goods in the defendant's possession.

56. ROLLS OF THE JUSTICES IN EYRE BEING THE ROLLS OF PLEAS AND ASSIZES FOR YORKSHIRE IN 3 HENRY III (1218-19), at 300 (Doris Mary Stenton ed., Selden Soc'y, vol. 56, 1937).

It is not entirely clear, however, whether the serjeant and neighbors spoke in open court. Unlike the prior testimony, their words are introduced by a past-tense verb—*testatum fuit* rather than *testantur*. While this change in verb tense might indicate that the testimony was communicated to jurors before the eyre, the eyre rolls are notoriously inconsistent in their use of verb tenses. Later in the same record, Geoffrey's confession is recorded in the past tense, even though it clearly happened at the eyre in open court. The record also indicates that William said that his father gave him the razor and tunic that had belonged to the deceased. Again, William probably spoke in court, although the use of the past tense might suggest otherwise.

Because the defendant confessed, there is no verdict in this case. Nevertheless, it suggests that testimony was given in open court, and that such testimony could have provided evidence that influenced jury verdicts. As Maitland noted, there were no rules against in-court testimony.⁵⁷ Because so many people were summoned to the eyre, it was inevitable that some attendees, especially officials, would have had knowledge about particular cases. It should not be surprising that those with knowledge wanted to speak at trial, or that judges allowed them to do so. Nevertheless, the fact that witnesses sometimes spoke in court does not necessarily detract from the self-informing nature of the jury. For example, in the case above, the testimony of the serjeant, neighbors, and sheriff seems duplicative.⁵⁸ Everything they said was also said by either the presenting jury or the four villages, who together would have constituted the trial jury if the defendant had not confessed. This case thus provides a nice illustration of how witness testimony at trial is not incompatible with the idea that jurors came to trial already well-informed.

Although this case shows that witnesses sometimes testified at trial, it does not prove that they were an ordinary part of criminal trials. To document the frequency and nature of such testimony, I looked for witnesses in four crown pleas eyre rolls. These rolls contain 1300 cases from different parts of England, spanning most of the century. Table 2 summarizes the frequency of testimony, who the witness was, and what he spoke about.

57. See 2 POLLOCK & MAITLAND, *supra* note 1, at 628.

58. For another example of duplicative testimony, see J.G. JENKINS, *CALENDAR OF THE ROLL OF THE JUSTICES ON EYRE, 1227*, at 48, case 527 (Buckinghamshire Archaeological Soc'y, vol. 6, 1942).

TABLE 2. Testimony^a in eyre plea rolls by topic and speaker, 1221–86

	Coroner	Sheriff	County ^h	Other officials	Non- officials ⁱ	Unidentified speaker ^j	Total
Law enforcement misconduct ^b	1	1	2	1	0	20	25
Flight ^c	0	1	0	0	0	13	14
Forfeiture ^d	0	0	0	0	0	14	14
Accusation ^e	0	0	0	0	0	9	9
Guilt ^f	1	2	0	1	0	3	7
Other ^g	4	0	1	0	2	4	11
Total	6	4	3	2	2	63	80

Notes:

^a “Testimony” means words spoken at trial by a speaker not identified as a judge, juror, village, appellor, defendant, defendant’s attorney, or ordinary claiming a defendant as cleric. The numbers in the table count instances of testimony. Sometimes, as in the 1218 Yorkshire case quoted above, there was more than one instance of testimony in the same case. As a result, some cases are counted twice, or even three times, in the table. The eighty instances of testimony occurred in only sixty-eight cases.

^b Testimony about individuals, officials, and groups who failed to fulfill their law enforcement responsibilities, including villages that failed to pursue suspects, sureties or bailors who failed to ensure someone’s presence at the eyre, and misappropriation of forfeited chattels.

^c Testimony about whether a suspect fled or abjured and/or information about suspects who fled or abjured, including whether suspects who fled were tried and/or executed elsewhere.

^d Testimony regarding whether a defendant who either fled or was convicted owned chattels or lands, and/or testimony regarding the chattels’ or lands’ value.

^e Testimony that accuses someone not previously mentioned of an offense other than law enforcement misconduct. Such accusations were most often of homicide.

^f Testimony about whether a suspect was guilty.

^g Testimony that does not fall in any of the above categories (e.g., testimony stating that a case was removed to the Bench in Westminster, or that a neighbor was sick and thus could not attend the eyre).

- ^h Testimony by representatives of the county court.
- ⁱ Testimony by an ordinary person (i.e., not a coroner, sheriff, other official, or representative of the county court).
- ^j Testimony where the speaker was not identified. For example, the record might simply say "it was testified that" (*testatum est quod*). It is also possible that, in such instances, the jury was speaking.

Sources: ROLLS OF THE JUSTICES IN EYRE BEING ROLLS OF PLEAS AND ASSIZES FOR GLOUCESTERSHIRE, WARWICKSHIRE AND STAFFORDSHIRE, 1221, 1222, at 331-415 (Doris M. Stenton ed., Selden Soc'y, vol. 59, 1940); ROYAL JUSTICE, *supra* note 31, at 292-408, 476-87; THE ROLL OF THE SHROPSHIRE EYRE OF 1256, *supra* note 30, at 196-300, 307-09; 2 THE 1235 SURREY EYRE 379-443 (C.A.F. Meekings & David Crook eds., Surrey Record Soc'y, vol. 32, 1983).

The table suggests that testimony was quite uncommon. The plea rolls record only eighty instances of testimony in 1300 cases. This means testimony was recorded in only six percent of the cases. Even six percent may exaggerate the extent to which witnesses appeared because the speaker in the overwhelming majority of such instances was not identified. Rather, the testimony is introduced by an ambiguous formula, most often "Later it was testified that" (*postea testatum est quod*). It is possible that such information was actually provided by the jurors, in which case it would not be categorized properly as witness testimony in the sense used in this Article. The idea that such formulae were used to introduce words spoken by the jurors is supported by the 1286 Huntingdonshire eyre roll, which often uses the formula "Later it was testified *by the jurors* that" (*postea testatum est per juratores quod*) rather than "Later it was testified that."⁵⁹ This suggests that clerks writing other eyre rolls may have used "Later it was testified that" as a shorthand for "Later it was testified by the jurors that." If one counted only cases that explicitly identified the person or group speaking, only seventeen instances of testimony were recorded, which represents testimony in barely one percent of cases. Of course, it is possible that there were many instances of testimony that were not recorded, but given the evidence from other sources, such as the treatises and reports discussed below, this seems unlikely.

The topics of the testimony are also revealing. The overwhelming majority of the testimony was about collateral matters rather than a

59. ROYAL JUSTICE, *supra* note 31, at 293, 295, 299, 307, 310, 360-61, 373, 401, cases 348, 351-52, 363, 384, 392, 528, 571, 656. *But see id.* cases 363, 388, 442.

defendant's guilt or innocence. For example, almost a third of the testimony was about law enforcement misconduct, such as a village's failure to pursue a fleeing suspect or a pledge's failure to produce someone at the eyre. Much of the remaining testimony concerned whether a suspect had fled or abjured, or whether such a suspect was tried or executed (or both) elsewhere. In addition, a substantial amount of testimony was about forfeited chattels or lands. Only sixteen instances of testimony were about matters at the core of the jury's function: accusations of felony and the guilt or innocence of the accused. Therefore, testimony like that in the Yorkshire 1218 case quoted above is recorded to have occurred in barely one percent of cases. The fact that testimony was almost always about collateral matters may help explain why it is not mentioned in other sources, such as treatises or *Year Book* reports.

It is also worthwhile to note the positions of those identified as speakers. The most common were officials such as the sheriff and coroner. Since such persons were heavily involved in law enforcement activities prior to the eyre and were required to attend the eyre, it is not surprising that they often had useful information to contribute. It was extremely rare for records to indicate ordinary persons speaking at trial. I found only two such instances in the 1300 cases examined.

One important unresolved issue about this testimony is whether it was sworn. Maitland thought it was not,⁶⁰ a view supported by the lack of any mention of witness oaths in the plea rolls or treatises. Although arguments from silence are always dangerous, given the copious evidence for oaths by jurors, appellors, appellees (defendants in appeals), and compurgators, silence here may be quite telling. On the other hand, the plea rolls often make use of the verb "to testify" (*testari*), which might suggest that witnesses were sworn.

The plea-roll evidence thus substantially augments our knowledge of the thirteenth-century jury by showing that there was occasional in-court testimony. Nevertheless, such testimony seems to have been rare and largely restricted to collateral matters. In addition, it was probably provided most often by officials rather than by ordinary persons.

C. *YEAR BOOK* REPORTS

The last few pages have focused on plea rolls, the official record of court proceedings. Toward the end of the thirteenth century, a new form of

60. 2 POLLOCK & MAITLAND, *supra* note 1, at 628.

legal literature emerged—reports, often called *Year Books*. These were unofficial notes on cases, probably written by lawyers for themselves and each other. The overwhelming majority of these reports deal with civil matters, but, as Seipp has noted, there was a trickle of criminal cases.⁶¹ Some of the reports provide vivid insights into the conduct of trials because, like the *Placita Corone*, they take a dialogue form that seems to record what actually transpired in court. Unlike the *Placita*, however, the reports are about actual cases, not hypotheticals. The following case from the 1293–94 Yorkshire eyre is illustrative of the richness of some reports:

Judge: Hugh, it was presented to us that you committed rape . . . How do you want to acquit yourself?

Hugh: Lord, I request that I be able to have counsel lest I be deceived in royal court for lack of counsel.

Judge: You ought to know that the king is a party to this case and prosecutes you *ex officio*, and in this situation the law does not allow you to have counsel against the king . . . And therefore, on the king's behalf, we order all the pleaders who are your counsel to withdraw.

[The pleaders were removed.]

...

Judge: Do you consent to these twelve honest men, because we know that they do not want to lie for us?

...

Hugh: I consent to my peers, but not to the twelve who accused me. . . .

[Hugh successfully challenged several of the jurors.]

Judge: We accuse Lord Hugh of the rape of this woman. He denied it. Asked how he wants to acquit himself, he said, "by good country" and put himself on you for good or bad. And therefore we order you, by virtue of your oath, to tell us whether Lord Hugh raped this woman or not.

The twelve: We say that she was raped with force by Hugh's men.

Judge: Did Hugh consent to the deed or not?

The twelve: No.

Judge: Did they know her carnally?

The twelve: Yes.

Judge: Against the woman's will or with her consent?

61. See David J. Seipp, *Crime in the Year Books*, in *LAW REPORTING IN ENGLAND* 15, 16–17 (Chantal Stebbings ed., 1995). Seipp was kind enough to share with me his list of late thirteenth-century *Year Book* cases involving crime.

The twelve: With her consent. . . .

Judge: Lord Hugh, because they acquit you, we acquit you.⁶²

Like the accounts in the *Placita Corone*, trial was primarily a dialogue between the judge and the defendant. The judge took a quasi-prosecutorial role, expelling the defendant's lawyers and, in passages omitted above, challenging his claim to clerical privilege and bullying him into submitting to jury trial. As in *Britton*, the defendant was allowed to challenge jurors who had served on the presenting jury. Once the jury-selection process was over, the judge immediately charged the jury. As in all of the treatises and most of the plea-roll accounts, there is no mention of witnesses. Given the lavish detail with which other aspects of this case were recorded, it would be surprising for the reporter to have omitted witness testimony and arguments about such testimony if witnesses had in fact testified. The latter part of the report is a dialogue between the judge, who seems to have known nothing of the facts, and the jurors, who told him what they knew (or, perhaps, what they wanted him to believe). The independence of jurors from what was said in court is underlined by the fact that, while the presentment and preliminary proceedings had said nothing about accomplices, the jurors' verdict states that it was Hugh's men, not Hugh himself, who had intercourse with the woman.

On the whole, this and other thirteenth-century reports confirm the accounts given in the treatises.⁶³ The testimony of witnesses is never mentioned. Rather, trial was primarily a conversation between the judge and the defendant, and secondarily between the judge and the jury. Immediately after being impaneled, or perhaps after some deliberation,⁶⁴ the jury rendered its verdict.

V. EXPLAINING THE DECLINE OF THE SELF-INFORMING JURY

This Article has tried to show that thirteenth-century jurors were self-informing. By the mid-fifteenth century, however, it is clear that jurors were becoming increasingly dependent on in-court testimony. Why did the jury become less self-informing? Undoubtedly, increased mobility and other social changes played a large role.⁶⁵ The essays by McLane and Post,

62. Y.B. 30-31 Edw. 1, at 529-32 (translation by author). Contrary to the *Year Book* editor's suggestion, this case is from the Yorkshire eyre. David Crook, *Triers and the Origin of the Grand Jury*, 12 J. LEGAL HIST. 103, 116 n.71 (1991).

63. Y.B. 30-31 Edw. 1, at 521, 528-29, 534, 535, 538-39, 541.

64. *Id.* at 541. See 1 BRITTON, *supra* note 52, at 31.

65. See Langbein, *supra* note 2, at 315.

however, suggest that fourteenth-century changes in jury composition played a part, at least in criminal cases. The timing suggests two explanations: the transition from eyre to jail delivery⁶⁶ and the exclusion of presenting jurors from the trial jury.

The last regular eyre occurred in the early 1290s. Eyres had always been held infrequently. At the turn of the thirteenth century, they were commissioned about every four years, and, as the century progressed, they became less frequent. Toward the end of the century, decades might separate eyres. Even four years was a long time to hold a homicide suspect in jail before trial, to expect jurors to remember the facts, or to require appellors to remember the exact phrasing of their pleadings in county court.

By the end of the thirteenth century, and probably several decades earlier, jail delivery had become the principal forum in which criminal cases were heard. The rise of jail delivery undoubtedly represented an improvement in the justice system. Jail-delivery sessions, which were held roughly twice a year, dramatically alleviated the problems caused by delay. Such frequent sessions, however, had at least one unanticipated effect: They made it difficult to recruit local jurors.

For eyres, recruitment of jurors was relatively easy. Although the sheriff summoned all freeholders, this was not a heavy burden because the eyre met so infrequently. In addition, because the eyre was the forum for a wide variety of civil and criminal cases, many individuals had to attend anyway. Finally, those who served on juries would have perceived the importance of their presence because jurors from all but the smallest hundreds would have been involved in more than a dozen cases. Even the representatives of the villages, who were specially summoned, probably would have been involved in at least a few cases.

Recruitment for jail delivery was very different. Such sessions were held much more frequently, so summoning all freeholders and representatives from every village to each session would have imposed a huge burden. In fact, doing so was forbidden by statute.⁶⁷ Even though jail-delivery sessions were often held at the same time as assizes for civil cases, because assize sessions were also held more frequently, fewer people had litigation to attend to. In addition, the increasing employment of attorneys and pleaders meant the parties themselves might not attend, even if they had pending cases. As a result, jurors had to be specially summoned

66. See David Crook, *The Later Eyres*, 97 *ENG. HIST. REV.* 241, 246-47 (1982).

67. Provisions of Westminster, 1259, 43 Hen. 3, c. 13; Statute of Marlborough, 1267, 52 Hen. 3, c. 18.

and naturally found service burdensome. In addition, because jail-delivery sessions were held so frequently, relatively few cases were heard at any one session. As a result, jurors would have felt that service was not worth the effort. If hundred jurors appeared, they likely would have had only one or two cases to try. If representatives of the village appeared, they likely would have tried only a single case. Not surprisingly, although representatives of the villages were still summoned, sheriffs seem to have given up trying to get them to attend. In addition, the plague must have aggravated these problems by drastically reducing the population—thus reducing both the pool of potential jurors and the number of suspects tried—without reducing the number of hundreds.

Not surprisingly, coroners, bailiffs, assize recognitors, and others with independent reasons to attend jail delivery came to constitute a disproportionate fraction of jurors.⁶⁸ There were not enough of these, however, to fully staff juries of all the relevant hundreds, so judges and sheriffs had to improvise. Pugh, Post, and Powell documented the strategies they employed. Given the dynamics of juror recruitment at jail delivery, one should not be surprised at the difficulty of assembling jurors with local knowledge. If anything, it is surprising that sheriffs were able to recruit juries that were largely hundred-based for so long. One might have thought that the system described by Powell—juries composed of men from several hundreds trying suspects from multiple hundreds—would have appeared a century earlier.

The problem created by the frequency of jail-delivery sessions was compounded by the exclusion of presenting jurors from the trial jury. As *Britton* and the *Year Book* report quoted above show, defendants in the late thirteenth century had the right to challenge jurors who had indicted them. In 1352, this protection was enacted into statute.⁶⁹ Although the purpose of this change was clear (to ensure a fair trial), like the introduction of jail delivery, it had an unintended effect: barring twelve of the most knowledgeable people, the presenting jury, from service on the trial jury.

These developments suggest that, as the Middle Ages drew to a close, juries contained fewer informed members. They do not prove, however, that the late medieval jury was no longer self-informing, or that it relied principally on evidence presented in court by parties or witnesses. Powell pointed out that jurors from the hundred were partly replaced by officials,

68. Powell, *supra* note 9, at 88–94.

69. 25 Edw. 3, stat. 5, c. 3.

such as coroners, hundred bailiffs, and constables.⁷⁰ Because of their involvement in pretrial processes, these jurors came to court with significant information about suspects. In addition, fourteenth-century jail-delivery juries still consisted overwhelmingly of men from the hundred, and fifteenth-century juries usually contained several from the relevant hundred. It is hard to imagine that these jurors would not have heard local views on guilt or innocence.⁷¹ Perhaps they were already acquainted with the suspect and the alleged crime from gossip or from discussions at local courts, where the suspect may have been presented or indicted.

In addition, jurors from the hundred could have discussed the case with neighbors, officials, and others with information about the crime and the suspect's character. Since relatively few suspects from a given hundred were tried at a jail delivery, a juror's fact-finding burden would not have been large. In fact, a conscientious juror, cognizant that his verdict would have life or death consequences, would have been highly motivated to acquire relevant information. He then could have shared it with fellow jurors who, because they resided farther from the relevant events, could not gather evidence on their own. As noted earlier, self-informing is a matter of degree. A jury with only one or a few informed jurors is less self-informing than one composed exclusively of those from the immediate vicinity of the crime. It may, nevertheless, be self-informing in the sense that jury verdicts could have been based primarily on what at least one juror knew before coming to court rather than on evidence presented by parties or witnesses.

On the other hand, when juries come to contain so few members with independent information, it is easy to see how pressure would build for more in-court presentation of evidence. Jurors might be reluctant to convict based solely on the word of a single fellow juror. They might want to hear directly from those with first-hand knowledge. In addition, an accuser or witness who was unable to persuade a neighbor juror might travel to jail delivery himself to try to sway those who came from farther away. In this way, as jurors came less and less frequently from the hundred, prosecutors and witnesses might have come to play a larger role, and self-informed jurors a smaller one.

70. Powell, *supra* note 9, at 88-94.

71. See Green, *supra* note 15, at 369.

VI. CONCLUSION

This Article has tried to suggest and support a moderate position: The thirteenth-century jury was self-informing, but it sometimes heard witnesses at trial. As Green put it, the self-informing jury was not “a mythical beast.”⁷² Jurors were recruited from both the hundred and the neighboring villages and thus knew an enormous amount about cases before they came to court. Sometimes they also heard testimony, but such testimony was usually unnecessary. It was frequently testimony by officials and almost always about collateral matters. As a result, what distinguishes the medieval from the modern jury is not that one heard witnesses and the other never did. Rather, it is that medieval jurors came to court with extensive knowledge about the case and the defendant. They heard testimony, but they heard much less, and what they heard was less important.

72. *Id.* at 370.

