



Spring 1983

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## Recommended Citation

Ireland, Robert M. (1983) "The Nineteenth-Century Criminal Jury: Kentucky in the Context of the American Experience," *The Kentucky Review*: Vol. 4 : No. 3 , Article 5.

Available at: <https://uknowledge.uky.edu/kentucky-review/vol4/iss3/5>

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## The Nineteenth-Century Criminal Jury: Kentucky in the Context of the American Experience

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Robert M. Ireland

In many ways the petit jury formed the most crucial element of the criminal justice system of nineteenth-century America. While in matters of civil law juries steadily lost power to trial judges, in matters of criminal law they generally gained. Historians have made much of the development which saw judges gradually establish the right to give juries theoretically binding instructions in criminal trials. During the first half of the century juries in many states successfully maintained the right to act as the judges of both the law and the facts of criminal cases. Thereafter many state appellate courts, spurred on by Lemuel Shaw's controversial yet highly influential opinion in *Commonwealth v. Porter* in 1845, began to claim for trial judges the right to determine the law of the case. Bitter debate accompanied some of these efforts, as, for example, in Massachusetts, where reformers attempted unsuccessfully in 1853 to repeal the *Porter* decision by constitutional amendment. Kentucky accomplished by statute what Shaw had done by judicial decision. After the Constitutional Convention of 1849 rejected a proposed provision in the new charter which would have expressly given to the jury the right to act as judge of law as well as fact, the drafters of the criminal code of practice of 1854 gave judges the right to instruct juries in writing. Yet while the Court of Appeals held in 1858 that judges were the determiners of the law in criminal cases, it also recognized that juries had the power to ignore instructions and determine the law for themselves. The evidence suggests that they freely did this, both in the nation as a whole and in Kentucky in particular. In addition, legislatures and constitutional conventions throughout the nineteenth century gradually took from trial judges in many states their right to comment on the weight of the evidence, a power that gave them much greater influence over juries than did the right to instruct. On balance, nineteenth-century criminal juries gained

power at the expense of judges, which meant that they had more control than ever over the fate of criminal defendants.<sup>1</sup>

To some, the greater control of juries over criminal verdicts helped produce a climate of permissiveness towards criminals, especially murderers. "The constantly increasing difficulty of procuring convictions on indictment for murder, when there is no real doubt of the guilt of the accused, is another encouragement to the commission of capital offenses," proclaimed the *New Englander* in 1844, sounding a theme common to commentators on the jury system in many states during the nineteenth century. Following the acquittal of a notorious criminal indicted for assault with intent to kill, a St. Louis judge in 1896 ordered the defendant's burglary tools returned to him and announced that there was not "much use in maintaining courts when juries return such verdicts." New Yorkers continually chided criminal juries of their state for ignoring the instructions of judges and reaching verdicts contrary to the logic of the case. In 1858 the *New York Times* described the verdict of a jury which found a killer of a constable guilty of first-degree manslaughter as "the most absurd as is possible to imagine. . . . they might as well have brought in a verdict for horse-stealing." Three years later the *North American Review* contended that another New York jury had "disregarded" its oath in finding a mother, who had drowned her newborn baby, guilty only of second-degree manslaughter, a crime which required the perpetrator to have killed in a fit of passion. The same journal marvelled at a jury's inconsistency in a trial of a brother and sister for the murder of the sister's husband. Although both seemed equally guilty, the jury found the brother guilty of first-degree murder and the sister only of second-degree manslaughter. According to "T.M.C." (probably Thomas McIntyre Cooley, the famous Michigan legal scholar and jurist), writing in the *American Law Register*, criminal jury verdicts in the nation as a whole fit well within the "curious," "absurd," and "erroneous" mold of New York.<sup>2</sup>

The independence of juries in Kentucky likewise contributed to its homicide problem, in the opinion of many observers. Reflecting in 1879 on his long sojourn in the state from 1830 to 1868, Bishop Benjamin B. Smith concluded that "no jury can anywhere be found who will bring in a verdict of guilty of anything worse than 'done in a state of delirium' or in 'self-defense,' or in effect justifiable homicide." "Time and time again" Smith had seen "the verdict of

justifiable homicide brought in cases which by we of New England and the North would be considered cold-blooded murder." The ever-critical *Louisville Commercial* found the state's jury system to be "rotten and corrupt" with particular weakness towards accused murderers. In 1879 the *Lexington Transcript* condemned the system's "leniency," a sentiment echoed by many of the state's other newspapers. Two years later the *Kentucky Yeoman* proclaimed an oft-repeated assumption that juries were much harder on horse-thieves than murderers. In 1882, A.E. Wilson, a Louisville attorney, pronounced juries soft on killers, while two years later Asher Caruth, commonwealth's attorney for Jefferson County, in a closing statement to a jury stated that previous juries had "disgraced" the county by allowing "red-handed murderers to go scot-free. . . ." About the same time, a state senator proclaimed that "popular confidence in juries had been seriously jeopardized. . . ." A delegate to the Constitutional Convention of 1890-1891 concluded that juries had done more to undermine public confidence in the state's criminal justice system than almost any other single influence.<sup>3</sup>

A variety of causes accounted for the deficiencies in the jury systems of Kentucky and the nation. To begin with, the method of gathering jurors had shortcomings both in form and execution. Kentucky's jury-gathering apparatus appears to have been typical. Until 1836 sheriffs depended solely upon bystanders who were supposed to be housekeepers "possessed of a visible estate, real or personal, of the value of twenty pounds at least." Governor John Breathitt, among others, found this method "not well adapted to a correct administration of the law," noting that it forced the sheriff to "summon those with whom he . . . chanced to meet," some of whom were "brought into the court in a state unfit for business." In response to such criticisms, the legislature adopted a new system in 1836 wherein the sheriff was required to summon thirty "discreet citizens of the county, possessing the qualifications required by the existing laws. . . ." In 1837 the legislature reduced the number to be summoned to twenty-four and in 1838 it created three jury commissioners per county to make an initial selection of one hundred residents from which twenty-four names would be selected and given to the sheriff via the clerk. In 1852 a new statute specified that the trial judge could dismiss the first twenty-four summoned after one week's service, to be replaced by a new group of twenty-four drawn from the original pool of one hundred.<sup>4</sup>

Although Governor Charles A. Wickliffe announced shortly after

the reforms of 1836-1838 that they had proved "highly beneficial to the administration of justice," subsequent comment suggests continued dissatisfaction with the system. An investigative story by the *Louisville Evening Post* in 1879 revealed shortcomings probably all too commonplace within the state as a whole. The *Post* accused the sheriff of Jefferson County of shirking his duty by failing to summon the persons whose names were given to him by the jury commissioners and relying instead on bystanders to form the jury panel. Twenty-eight of the thirty persons to be summoned by the sheriff had been excused for cause, according to court records. When the *Post* contacted five of those supposedly excused, four of them stated that they had never been contacted by the sheriff. According to the *Commercial* the habit of the "responsible householder" to refuse to obey his jury summonses and to pay "the small fine cheerfully" augmented the tendency of the system to rely on bystanders of an inferior calibre.<sup>5</sup>

Kentucky's problems with the implementation of her jury laws apparently fit within the mainstream of the nation's nineteenth-century experience. The *Times* continually complained of evasions of jury duty by the respectable citizens of New York City, leaving the panels to be filled by drunks, crooks, and the unemployed. At first evaders simply ignored summonses and paid a nominal fine if detected. When the legislature attempted to toughen laws following the Civil War, a large number of those called continued to avoid service through a variety of ploys including the bribery of court officials. Repeated attempts to tighten the laws brought only new methods of evasion. Would-be jurors complained of poor pay and lost time on the job. Those seeking better juries chided businessmen and others of the so-called responsible classes for evading an obligation of citizenship, and criticized the competence of jury commissioners and other officials.<sup>6</sup>

Similar problems afflicted the jury systems of Illinois, Ohio, Missouri, Mississippi, New Jersey, Massachusetts, and if the reports of two leading lawyers can be believed, most of the other states of the nation. A large number of the respectable citizens of Chicago held a meeting in September 1872 to discuss the defects of the criminal justice system. Charles Reed, the state's attorney for the area, told the gathering that one of the major reasons for the inability of government to secure convictions of murderers and other hardened criminals was the failure of its own kind to serve on juries. Businessmen and others of the "sober and discreet"

citizenry went to great lengths to avoid jury duty. In 1868 a foreign traveller in Missouri reported being commandeered for jury service despite his lack of residency, because the natives traditionally avoided the duty whenever possible. Judge R.A. Hill of Mississippi wrote to the editors of the *Central Law Journal* in 1874 that the method of selecting jurors in his state had proved defective, with sheriffs and their deputies routinely selecting loafers and other professional jurors instead of more responsible men. In 1876 the *Times* reported that New Jersey had adopted a commissioner plan of jury selection, but that this had proved to be no more satisfactory than the old method of relying on sheriffs to do the choosing. According to a writer in the *North American Review*, professionals and businessmen seldom appeared on the jury lists of Massachusetts, and, when they did, they usually obtained excuses from serving. Leading lawyers discussing the problem in the *Albany Law Journal* and *American Law Review* (in 1885 and 1896 respectively) revealed a national inattention to jury service.<sup>7</sup>

Evasion of service constituted only one of the defects of Kentucky's jury system in the opinion of law-and-order advocates. The difficulty of convicting murderers increased because the prosecution had no peremptory challenges until 1854 and only five thereafter, while the defense had twenty. During the first half of the century the legislature rejected all attempts to give a small number of challenges to the prosecution. The most complete debate on the issue occurred at the Constitutional Convention of 1849, where reformers insisted that permitting a few peremptory challenges to the prosecution would help prevent packed juries. Ben Hardin, with the most experience in criminal trials of any delegate, asserted that "men are placed upon the jury, sometimes upon their mere allegation that they have formed no opinion in the case, and who go there predetermined to acquit the accused." Another declared that the absence of peremptory challenges for the prosecution made it particularly difficult to convict men of property for murder, while a colleague described a system without such privileges as a "farce." Archibald Dixon, himself a veteran of many criminal trials, attempted to counter such arguments by contending that the commonwealth already had too many advantages over the defense and did not need any more. He remembered defending a "miserable Negro" indicted for the attempted rape and murder of a white woman and certain to be convicted and hanged if a fair jury could not be obtained. Dixon got his jury, but believed that he could not

have if the prosecution had possessed five peremptory challenges. Undeterred by Dixon's urgings but not wishing to get bogged down in a numbers game, the delegates simply provided that the legislature could "pass laws . . . regulating the right of challenge of jurors in criminal cases."<sup>8</sup>

The Code of 1854 did not still the cry of would-be reformers who submitted that the prosecution needed more than five peremptory challenges to cleanse the jury system. Juries, especially those in homicide trials, continued to be polluted with professional jurors, courthouse bums, and other low lifes, according to observers. More equality between prosecution and defense was needed to insure competent jurors, especially in the mountain counties where honest men allegedly were not plentiful. Despite these pleas and an epidemic of homicide, the legislature defeated all attempts to increase the number of peremptory challenges accorded the prosecution.<sup>9</sup>

Those outside Kentucky voiced similar complaints about the failure of their state legislators to provide an adequate number of peremptory challenges to the prosecution. The *New Englander* declared in 1844 that the criminal defendant could exclude from the jury "all whose love of justice and firmness of purpose he has reason to fear," while the absence of the privilege to the prosecution enabled him to bring onto the jury "some conscientious but obstinate dunce, whose mind he can imbue with the doctrine of reasonable doubt." A. Oakey Hall, district attorney for New York City, contended in 1855 that as few as two peremptory challenges for the prosecution would help prevent the defense from putting its friends on the jury, an all-too-frequent practice under the existing system. When examined for bias, the friends simply denied any, leaving the prosecutor without grounds to object. Hall also called for a reduction in the number of challenges given the defense, describing twenty as "excessive." William Howard Taft led the fight in Ohio in 1884 to equalize the distribution of challenges, submitting that giving the defense twenty-three and the prosecution only two "allowed the defendant's counsel to eliminate from all panels every man of force and character and standing in the community, and to assemble a collection in the jury box of nondescripts of no character, weak and amenable to every breeze of emotion, however maudlin or irrelevant to the issue." Such a condition made it very difficult to convict murderers, he added. A writer to the *American Law Register* in 1877 implied that the

disparity that existed in Kentucky, New York, and Ohio prevailed in many other states and called for more equality. Some states such as New Jersey and New York responded to such efforts and equalized, but most others did not, prompting critics to renew their attempts in the early twentieth century.<sup>10</sup>

Peremptory challenges permitted the defense to strike jurors without having to prove they were unfit. Additionally the defense, together with the prosecution, had an unlimited right to disqualify prospective jurors for cause by demonstrating that they were prejudiced. The prior opinion rule made this task all too easy for the defense. John Marshall in the Burr treason trial had been one of the first American jurists to put in writing a requirement that potential jurors be free from fixed opinions about the guilt or innocence of the defendant. The New York Supreme Court extended this principle much further in the case of *People v. Mather* decided in 1830. In that case the court held that a prospective juror was disqualified if he had formed an impression of the guilt or innocence of the defendant from reading the newspapers, even though his opinion was not fixed and might be changed as a result of evidence introduced at the trial. Even though subsequent cases seemed to suggest that the opinion formed must have been fixed and not simply be an impression, trial courts in a number of states, including Kentucky, often invoked the most extreme version of the *Mather* case, allowing disqualification for any opinion formed from the reading of a newspaper.<sup>11</sup>

The results of the prior opinion rule in New York apparently typified those in many other states. During the anti-rent trials, only ten jurors qualified out of the first 4000 examined. In the second trial of the *Bodine* case, prospective jurors eagerly purchased copies of any newspaper containing accounts of the crime and some who could not acquire them went to lawyers to obtain information on the case in order to be disqualified from service. Some years later in the *Friery* case only eleven of the first 565 men summoned qualified for service, while in the McFarland murder trial nearly 700 were called before a jury was formed. In the midst of this, A. Oakey Hall declared that either newspapers would have to be abolished or intelligent men could never serve on juries. Kentuckians found that the rule worked the same hardships on them, Judge Benjamin F. Buckner stating that "skillful lawyers" could weed out most if not all who had read about a case and the *Stanford Journal* concluding that "none but the most ignorant and often the most vicious



elements of society" were eligible for juries in the commonwealth. A writer in the *American Law Register* declared in 1877 that the rule "in some of the states brought serious discredit upon the administration of justice" and "derision" on the intelligent juror.<sup>12</sup>

Such a permanent condition of ineligibility produced a clamor for change of the law. Between 1864 and 1880 a number of states, including Indiana, Ohio, Connecticut, New Hampshire, New York, Iowa, Pennsylvania, Michigan, Illinois, and Maryland, by statute and court decision abolished or substantially altered the rule so that a prospective juror could serve on a jury even if he had formed an opinion about the guilt or innocence of the defendant from reading the newspapers, if he swore that he would base his decision in the case solely on the evidence presented therein. Kentucky followed suit in 1888 by amending the Criminal Code of Practice to read that no one would be disqualified from jury service if he had formed a opinion from "newspaper statements (about the truth of which he has expressed no opinion)" as long as he swore to render an impartial verdict in accordance with the law and evidence, if the court was satisfied with the truth of such statement.<sup>13</sup>

The number of peremptory challenges accorded the defense, the emergence of the prior opinion rule, and the reluctance of responsible men to serve meant that jury packing was possible in most states and flourished in at least some. Defendants, their allies, and perhaps their lawyers on occasion made sure that individuals sympathetic to their cause were available as bystanders to serve on the jury when the regular panel had been exhausted. Even if the defense did not deliberately seek to place venal men on the jury, the so-called professional jurors, the courthouse loungers with little visible means of support who needed the paltry jury fees to survive, were readily available for service and too often formed a part of the jury. As the defense exercised special vigilance in cases of homicide, juries in these trials most often were populated by loungers or packed jurors or both.<sup>14</sup>

Critics deplored the tendency of stupid and corrupt men to dominate the juries of America, especially in trials of great importance. Even a delegate to the New York Constitutional Convention of 1846 who took a rather sanguine view of the jury process admitted that "very many of our courts are haunted, day after day, by dissolute loungers, waiting a chance to obtain a shilling by getting on a jury, whose integrity and judgment no man can confide in, and who are utterly unfit to decide either the law or

the facts of any case. . . ." In 1887 a New York judge lamented that in many cases the "slums seemed to have been dredged for the purpose of getting jurymen." In 1865 the *Times* pointed to an abuse "long sanctioned by the courts of this state" that permitted the defense to place allies on the jury in order to deadlock it; "after two or three trials of the farce, the man goes free." Professional jurors thrived in Chicago and the District of Columbia, where venal jurymen were so rampant that the attorney general ordered all important government cases tried in Maryland. A foreign traveller in Missouri reported participating in a jury deliberation that had difficulty resolving itself because two of the defendant's friends on the panel held out for an extremely lenient sentence. The *Times* alleged in 1876 that a company in Buffalo had been organized to furnish professional jurors for criminal trials in major cities in the East and Midwest, including Chicago, New York, Philadelphia, Boston, and Cincinnati.<sup>15</sup>

Involved as a lawyer and judge in criminal trials for over twenty years, Benjamin F. Buckner of Lexington, Kentucky, told a meeting of the state bar association in 1879 that as a rule the more serious the crime the less adequate the jurors. The president of that association, Judge John W. Barr, endorsed these sentiments in 1883 and deplored the tendency of sheriffs to place cronies and dishonest and corrupt bystanders on jury pools because it served their political interests and was easiest to do. The *Yeoman* estimated that nine-tenths of Kentucky's criminal juries were packed. Garret Davis, an experienced trial lawyer of antebellum Kentucky, in 1849 told of helping to prosecute in a case involving "one of the most diabolical and outrageous murders that was ever perpetrated." Despite Davis's efforts to the contrary, the defense placed five friends of the defendant on the jury, which found him guilty only of manslaughter. For some unspecified reason the judge granted a new trial; shortly thereafter the defendant escaped from jail never to be heard from again; and three of the former jurors were convicted of perjury in a rare example of justice. In the same year, a lawyer from Graves County alleged that bribery had made the criminal law of Kentucky "little better than a dead letter. . . . and set at liberty the veriest murderers and scoundrels that ever disgraced the shape of man. . . ." Ben Hardin remembered a client named Carter who was tried for murdering a wealthy boat owner and finally pardoned after four juries deadlocked on the question of his guilt. After the pardon, Hardin learned that Carter had packed

each jury with at least one of his paid friends.<sup>16</sup>

Although probably most defense lawyers did not knowingly participate in the packing of juries, they did actively seek to secure jurors likely to be sympathetic to the defendant. Joseph G. Baldwin recounted in his professional memoirs that antebellum defense lawyers from Mississippi and Alabama possessed great skill in the matter of securing favorable juries by carefully studying the "general character of the men, or from certain discoveries the defendant had been enabled to make in his mingling among 'his friends and the public generally.'" Usually "the sheriff, too, was a friendly man, and not inclined to omit a kind service that was likely to be remembered with gratitude at the next election."<sup>17</sup>

The process of jury selection in the 1883 trial of Phil Thompson, Jr., congressman from Harrodsburg, Kentucky, for the murder of Walter Davis furnishes an example of the success of jury packing. Because neither the public nor the private prosecutors in the case resided in Mercer County, they had little knowledge of the men examined for jury service. Certain of the defense counsel, on the other hand, lived in Harrodsburg and possessed great familiarity with the prospective jurors. One of them, Tom Bell, in the opinion of the reporter for the *Commercial*, seemed "to be a . . . well regulated directory to the lineage of every man in the county—a . . . family tree." Determined "from the beginning to secure a jury as favorable to their client as possible," lawyers for the defendant "vigorously examined" every candidate. The possession of only five peremptory challenges compared to twenty for the defense further handicapped the prosecution, which exhausted its supply early in the voir dire. The combination of too few peremptory challenges, too little knowledge of the panel, and too much homework by the defense produced a jury that was heavily stacked in favor of the defendant. The *Commercial* reporter described five of the jurors as friends of the defendant, three of them variously depicted as "a longtime friend," a "trusted friend," and "one of young Phil's staunchest supporters." Three others fought eagerly for the Confederacy in the Civil War, experience designed to help the defendant, who as a mere teenager had ridden with John Hunt Morgan. One of the three had the additionally helpful characteristic of being himself a celebrated gunfighter. Still another had fought with Thompson's father in the Mexican War and was known to keen observers to have been a veteran juror who was soft on criminals. A tenth had worked in the defendant's cooper shop in

Lexington, and his brother worked there at the time of the trial as foreman. So proficient was the defense and so unprepared the prosecution that one Isaac Pearson, described as a "trusted friend" of the defendant and a friend and client of his father, protested after being seated in the box following only one preliminary question, that he already had made up his mind about the defendant's guilt and wished on that account to be dismissed. But the judge ruled that the question of his fitness had been irrevocably settled and ordered him to take his seat. Not surprisingly the jury found the defendant not guilty after only a brief deliberation.<sup>18</sup>

Claiming that they were only seeking to counteract the mass of unfavorable publicity generated by their client's highly unpopular killing of Court of Appeals Judge John Elliott in 1879, attorneys for Thomas Buford before his first trial published and circulated a thirty-eight-page pamphlet designed to prove that their client was insane at the time of the homicide. In effect the publication embodied the essence of the argument from the defendant; namely, that a disappointing lawsuit "aroused within him that violent devil of insanity, never, from his earliest boyhood, entirely dormant within him, and which all who are acquainted with him and his family well know it was his exceedingly great misfortune to have honestly inherited." The trial judge threatened contempt proceedings if "the emotional pamphlet" were circulated during the term.<sup>19</sup>

During the trial of Matt Ward in 1854 for the murder of a Louisville schoolteacher who had whipped his little brother, advocates of the defendant's guilt asserted that his supporters had bribed or otherwise tampered with some of his jury. The *Louisville Daily Courier* thought it strange that the first juror seated was the twelfth examined, even though he was not among the first fifty men selected by the jury commissioners. It also claimed that some of the jurors were bribed, an allegation hotly denied by the jurors themselves. One of the prosecutors accused the Ward partisans of inviting substantial numbers of the residents of Hardin County, where the trial was held, to visit the defendant in jail in hopes he would arouse their sympathies. Supposedly the Baptist Church of Elizabethtown expelled one of the jurors after it was "conclusively proved that before the trial he had repeatedly expressed an opinion" on the innocence of the defendant.<sup>20</sup>

Only a few or even a single juror who sympathized with the defendant could hang a jury or at the least substantially affect its

verdict and sentence. In Kentucky, as in certain other states of the nineteenth century, juries determined both guilt and the punishment. Tried for murder in Jefferson County in 1879, Ed Claytor escaped with a conviction for manslaughter and a sentence of five years in the penitentiary because two jurors held out for acquittal before compromising with eight who voted for the death penalty and two who favored confinement for twenty years. In another murder case, one juror who favored acquittal forced eleven who favored conviction, a majority of them voting for hanging, to agree on a two-year prison term for manslaughter. When juries could agree on a guilty verdict their procedures for determining punishment often proved arbitrary, and their punishments inconsistent. More than one cynic accused juries of simply adding up the years of confinement each favored and then dividing by twelve. Benjamin F. Buckner, a circuit-court judge, recalled a jury that decided on a one-year prison term for a man convicted of stabbing with intent to kill. In the very next case another jury voted for a ten-year prison term for a man convicted of stealing a mule worth fifty dollars. The same jury gave a woman thirty days in jail for killing her husband and a woman who kept a disorderly house twelve months in jail.<sup>21</sup>

Stories abounded in other states about the erratic behavior of juries. A California jury reportedly decided a case by a hand of poker, while one in Missouri proceeded on the basis of a card game known as "seven up." A Minnesota jury allegedly used a large quantity of whiskey to facilitate its deliberations, while a Delaware panel was reportedly provided with little food and water for fifty-four hours to force it to reach a verdict in a murder case. A New York jury convicted a woman of second-degree murder, which required a finding of acting in sudden heat and passion, even though it was proved that she slowly poisoned her husband to death over a period of several weeks. All of this prompted some, including Buckner, to seek a change in the law to provide that the judge would determine the punishment. While some states adopted such a reform, Kentucky did not.<sup>22</sup>

Until 1873 death constituted the only penalty for a murder conviction in Kentucky, and this may have accounted for so many acquittals or convictions for manslaughter. In the opinion of the *Kentucky Yeoman* the mandatory death sentence constituted "one great cause why so many persons charged with murder are turned loose on the community after undergoing trial." Jurors who secretly

held doubts about capital punishment often hung juries, resulting in the eventual release of killers. The *Yeoman* believed that an amendment to the murder statute providing for an optional life imprisonment for those convicted of murder would increase the likelihood of such convictions. Some called for the abolition of the death penalty, contending that it was only invoked against poor whites and Negroes. Reportedly there had been only one hanging in Garrard County in twenty-six years, none in Jefferson County in thirty, and only one in Floyd County in eighty-five. Others called for the end of public hangings, submitting that they did not discourage killing but only made heroes out of ruthless killers and turned a solemn occasion into a carnival.<sup>23</sup>

The legislature did respond to criticisms of the adverse effect of the mandatory death penalty by providing in 1873 that upon finding a defendant guilty of murder a jury could impose either the death penalty or a life sentence in the penitentiary. But this revision apparently did not produce more murder convictions, for a group of legislators made a determined, albeit unsuccessful effort to revive the mandatory death penalty in 1882. Proponents of the revival argued that death constituted the only appropriate penalty for murder and that few convictions for murder and even fewer hangings had occurred since the reform of 1873. Opponents admitted that the homicide epidemic had not been deterred by the elimination of the mandatory death sentence, but contended that the fault lay not with the discretionary penalty provision but with permissive juries.<sup>24</sup>

Juries occupied a sacred place in the rhetoric of the American Revolution, a tradition that spilled over into the nineteenth century. However, the rise in crime and the alleged permissiveness of juries towards criminals, particularly murderers, prompted some to call for drastic changes in the jury system. The abolition of the prior opinion rule and the granting of peremptory challenges to the prosecution represented but two of the proposals advanced to correct abuses in the selection and operation of juries. Other, more radical solutions were offered, but seldom if ever adopted. Some chagrined advocates of law and order even endorsed the abolition of juries, calling them useless relics of the past. Judges, they claimed, possessed the training, expertise, and experience to make much more accurate and just decisions in criminal matters. Jurors, often semiliterate and disreputable, frequently arrived at illogical, sometimes corrupt verdicts unsupported by the evidence. But even

the severest critics of juries recognized the futility of such proposals and most acknowledged the importance of the institution to the preservation of American liberty. They proposed, instead, reforms that would insure better jurors and more rational verdicts.<sup>25</sup>

After 1852 certain Kentucky trial judges took advantage of a statute passed in that year which permitted them to rotate jury panels every week. In order to have an adequate number of jurors, judges ordered sheriffs to draw on the reserve lists compiled by jury commissioners. This plan also meant sheriffs would have less need to call upon bystanders to fill out incomplete panels. The *Owensboro Messenger* reported in 1882 that because of such a plan being adopted by the judge of the Daviess Circuit Court "the familiar faces of many old stagers are seen no more and their interest in court matters has suddenly ceased. . . . professional jurors are a thing of the past." Yet it is doubtful that rotation had much effect on homicide juries as most defense attorneys freely used peremptory challenges in order to exhaust the regular jury list.<sup>26</sup>

Before the prior opinion rule was abolished, trial judges sometimes invoked a section of the Criminal Code of Practice adopted in 1854 which permitted them to use jurors residing in an adjoining county when they were "satisfied" that it would be "impracticable to obtain a jury free of bias in the county wherein the prosecution" was pending. Although delegates to the Constitutional Convention of 1849 rejected an attempt to put such a provision in the new constitution, the drafters of the 1854 code inserted it nonetheless. Judges occasionally invoked the provision with some success, as for example in Breathitt County in 1879 when 100 men from Magoffin County were called in order to form a jury in the trial of alleged murderers of the county judge. The fact that trial judges could only utilize outside jurors from adjoining counties restricted the effectiveness of the provision since these individuals would quite likely have read about notorious crimes committed near them. Surprisingly, the printed reports of the Court of Appeals contain no cases challenging the constitutionality of the provision even though the Constitution of 1850 guaranteed criminal defendants the right to a "speedy public trial by an impartial jury of the vicinage" and "vicinage" was commonly assumed to mean the county in which the trial was to be held.<sup>27</sup>

In an effort to prevent a few jurors from deadlocking a jury or forcing it into an illogical and lenient verdict, some supported a

reform permitting a non-unanimous verdict even in capital cases. The *New York Times* periodically advocated this change, suggesting a two-thirds or a three-fourths majority as possible formulae. A lawyer writing in the *Albany Law Journal* suggested allowing ten out of twelve to decide criminal cases, while noted criminal law scholar Seymour D. Thompson endorsed the three-fourths plan as long as the trial judge certified the verdict to be lawful and just. Occasionally, Kentuckians advanced such a scheme, but in Kentucky as elsewhere it never received serious consideration.<sup>28</sup>

Ironically, as debate raged about the merits of the jury and the need for reforms a seldom-discussed development was in many states rendering the system less significant. Following the Civil War in certain metropolitan areas and extending to all areas in some states by the end of the century, prosecutors began to plea bargain, with increasing numbers of defendants thereby bypassing trials, and in many states juries, altogether. Dissatisfaction with the jury system seems not to account for this phenomenon, but it obviously had the effect of diluting the jury's importance. In Kentucky this process proceeded more slowly and incompletely than in some other places, especially in homicide cases, which aroused the greatest outcry about permissive juries. An examination of the order books of the Jefferson County Circuit Court for the years 1871 to 1872 and 1874 through 1881 reveals only one guilty plea in 156 homicide cases, while only two occurred in Fayette County homicide cases from 1851 through 1890. None occurred in the homicide cases of Adair (1831-1890), Morgan (1859-1888), and Ohio (1831-1875, 1880-1890) counties for a collective total of 146 years. In their study of state criminal procedure in 1867, Enoch Wines and Theodore Dwight estimated that only one in twenty criminal defendants in Kentucky pleaded guilty.<sup>29</sup>

Throughout the nineteenth century Kentuckians and Americans in general agonized over the jury system. In some ways the institution represented the bulwark of American liberty. In other ways it seemed to signify the gradual corruption of the criminal justice mechanism. Afraid to abolish an integral part of due process, legislators tried through reform to insure that the jury would more frequently convict those guilty of heinous crimes such as murder. In this quest they were at best only partially successful. By the end of the century in at least some states the issue of reform was becoming less important as prosecutors were eroding the position of the jury through plea bargaining, although in Kentucky



this process was much more gradual and incomplete than in other places.

#### NOTES

<sup>1</sup>Mark DeWolfe Howe, "Juries as Judges of Criminal Law," *Harvard Law Review* 52 (1939): 582-616; *Commonwealth v. Porter*, 10 Metcalf 263 (1845); *Monthly Law Reporter* 15 (N.S. 5) (May 1852): 1-9; *Official Report of the Debates and Proceedings in the State Convention, Assembled May 4th, 1853, to Revise and Amend the Constitution of the Commonwealth of Massachusetts*, 3 vols. (Boston, 1853), 3:437; *Boston Post*, 30 July, 3, 5, 6, 11, 13 August, 26 October, 8 November 1853; *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Kentucky, 1849* (Frankfort, Ky., 1849), 395, 835-36, 1083-86 (hereinafter cited as *Ky. Debates (1849)*); *Commonwealth v. Van Tuyl*, Metcalf 1 (1858); Edson R. Sunderland, "The Inefficiency of the American Jury," *Michigan Law Review* 13 (1915): 302, 307-08.

<sup>2</sup>*New Englander* 2 (July 1844): 348; *St. Louis Globe-Democrat*, reported in *American Law Review* 30 (2 March 1896): 439; *New York Times*, 28 October 1858; *North American Review* 92 (April 1861): 307; T.M.C., "Some New Aspects of the Right of Trial by Jury," *American Law Register*, n.s., 16 (December 1877): 706.

<sup>3</sup>*New York World*, 16 June 1879; *Louisville Commercial*, 3 February 1870, 4 April 1882, 21 May 1884; *Lexington Transcript*, 7 January 1879; (Frankfort) *Kentucky Tri-Weekly Yeoman*, 9 August 1879, 6 September 1881; *Louisville Courier-Journal*, 4 November 1882; *Official Report of the Proceedings and Debates in the Convention Assembled . . . September, 1890 to . . . Change the Constitution of Kentucky*, 4 vols. (Frankfort, Ky., 1890), 1:1263 (hereinafter cited as *Ky. Debates (1890-1891)*).

<sup>4</sup>*Journal of the Senate of Kentucky, 1832-1833*, 16-17 (hereinafter cited as S.J.); S.J., 1833-1834, 20; Preston S. Loughborough, *Kentucky Laws, Statutes, . . . of a Public and Permanent Nature Passed since 1834* (Frankfort, Ky., 1842), 353, 359-60, 367-71; C.A. Wickliffe, S. Turner, and S.S. Nicholas, *The Revised Statutes of Kentucky* (Frankfort, Ky., 1852), 430-31.

<sup>5</sup>S.J., 1839-1840, 29-30; *Louisville Evening Post*, 4 February 1879; *Louisville Commercial*, 31 August 1885.

<sup>6</sup>*New York Times*, 9 April, 9 November 1859, 24 September, 12 November 1867, 12 February, 10 June, 25 July 1869, 10 February, 13 May 1870, 1 June 1871, 16 April 1872, 11 March, 6 December 1873, 9 January 1875, 21 July 1876, 12 February 1883, 13 June 1887. *New York Nation*, as reported in *Central Law Journal* 23 (24 September 1886): 290-91.

<sup>7</sup>*New York Times*, 13 September 1872, 3 February 1876, 31 December 1877; *All the Year Round* 20 (10 October 1868): 431-32; R.A. Hill to Editors, 13 October 1874, *Central Law Journal* 1 (23 October 1874): 532-

33; Robert C. Pitman, "Juries and Jurymen," *North American Review* 139 (July 1884): 4-7; S. Stewart Whitehouse, "Trial by Jury, As It Is and As It Should Be," *Albany Law Journal* 31 (20 June 1885): 504-07; *American Law Review* 30 (May-June 1896): 436-40.

<sup>8</sup>William Littell, *The Statute Law of Kentucky. . .*, 5 vols. (Frankfort, Ky., 1809-19), 1:469-70; S.J., 1845-1846, 88, 158, 237; *Journal of the House of Representatives of Kentucky, 1848*, 196 (hereinafter cited as H.J.); S.J., 1848, 296-97; *Frankfort Convention*, 13 February, 3 April 1847; *Louisville Daily Journal*, 2 October 1849; *Ky. Debates (1849)*, 674-79, 688-92.

<sup>9</sup>*Louisville Commercial*, 9 April 1879, 29 June 1883, 20 January 1886; S.J., 1883-1884, 834, 909; H.J., 1883-1884, 1140-41; H.J., 1885-1886, 240-45.

<sup>10</sup>*New Englander* 2 (July 1844): 348; *New York Times*, 15 December 1855, 8 May 1873; William Howard Taft, "Administration of Criminal Law," *Yale Law Journal* 15 (1905): 14; T.M.C., "Some New Aspects of the Right of Trial by Jury," 706-07; Lester B. Orfield, *Criminal Procedure From Arrest to Appeal* (New York, 1947), 407-08; *New York Statutes, 1873*, chap. 427, p. 681.

<sup>11</sup>Joseph M. Hassett, "A Jury's Pre-Trial Knowledge in Historical Perspective: The Distinction Between Pre-Trial Information and 'Prejudicial' Publicity," *Law and Contemporary Problems* 43 (Autumn 1980): 162; *People v. Mather*, 4 Wendell 229 (1830); *People v. Bodine*, 1 Denio 280 (1844); *People v. Honeyman*, 3 Denio 121 (1846); *Albany Law Journal* 1 (30 April 1870): 327-28.

<sup>12</sup>*Albany Law Journal* 5 (10 February 1872): 82; *New York Times*, 15 December 1855, 28 January 1865, 7 April 1870; *Louisville Commercial*, 9 April 1879; *Stanford Journal*, as reported in *Louisville Commercial*, 10 December 1883; T.M.C., "Some New Aspects of the Right of Trial by Jury," 707.

<sup>13</sup>*American Law Register*, n.s., 20 (1881): 117-25; *Fahnestock v. Stock*, 23 Indiana 231 (1864); *Morgan v. State*, 31 Indiana 193 (1869); *Cooper v. State*, 16 Ohio State 328 (1865); Act of 10 February 1872, 69 *Ohio Laws* 11; *Frazier v. State*, 23 Ohio State 551 (1873); *State v. Wilson*, 38 Connecticut 126 (1871); *State v. Pike*, 49 New Hampshire 399 (1870); *New York Statutes, 1872*, chap. 475; *Pender v. People*, 18 Hun. 560 (1879); *New York Times*, 11 January 1873, 15 April 1880; *State v. Lawrence*, 38 Iowa 51 (1873); *Debates of the Convention to Amend the Constitution of Pennsylvania: Convened at Harrisburg, November 12, 1872. . .*, 9 vols. (Harrisburg, Pa., 1872), 1:185-86, 288; *Staup v. Commonwealth*, 74 Penn. St. 458 (1873); *Ulrich v. People*, 39 Michigan 245 (1878); *Illinois Rev. Statutes, 1874*, chap. 633, sec. 14; *Wilson v. People*, 94 Illinois 299 (1880); *Waters v. State*, 7 Washington Law Reports 344 (1874); John D. Carroll, *Criminal Code of Practice* (Louisville, 1889), 71.

<sup>14</sup>Whitehouse, "Trial by Jury," 504-07.

<sup>15</sup>*Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York* (Albany, 1846), 111; *New York Times*, 31 December 1858, 28 January 1865, 15 September 1875, 10 March 1876, 28 July 1884, 13 March, 14 June 1887; *All the Year Round* 20 (10 October 1868): 431-32; Whitehouse, "Trial By Jury," 504-07.

<sup>16</sup>(Frankfort) *Kentucky Tri-Weekly Yeoman*, 3 April 1883; *Louisville Commercial*, 9 April 1879, 29 June 1883; *Ky. Debates* (1849), 676, 680-81, 687-88.

<sup>17</sup>Joseph G. Baldwin, *The Flush Times of Alabama and Mississippi* . . . (San Francisco, 1895), 58.

<sup>18</sup>*Louisville Commercial*, 9-11 May 1883.

<sup>19</sup>*The Buford-Elliott Tragedy: With a Brief Sketch of the Life of Colonel Thomas Buford* . . . By a Member of the Frankfort Bar and Former Journalist (n.p., n.d.); *Louisville Courier-Journal*, 9 July 1879.

<sup>20</sup>*Louisville Daily Courier*, 20 May, 22 June, 4 July 1853; George Cole, rep., *Trial of Matt F. Ward, for the Murder of Prof. W.H.G. Butler* . . . (Louisville, 1854), 122.

<sup>21</sup>M.C. Johnson, James Harlan, and J.W. Stevenson, *Criminal Code of Practice* (Frankfort, Ky., 1854), sec. 254; Richard A. Buckner and Joshua F. Bullitt, *Criminal Code of Practice* (1877), sec. 256; *Louisville Commercial*, 16 February 1879, 29 January 1884; *Ky. Debates* (1890-1891) 4:4796; Benjamin F. Buckner, "The True Lawyer . . . Law Reform," *Kentucky Law Journal* 2 (August 1882): 70; (Frankfort) *Kentucky Tri-Weekly Yeoman*, 22 February 1881.

<sup>22</sup>*New York Times*, 11 January 1873, 2 June, 1 December 1874, 2 May 1875, 19 January 1879; *All the Year Round* 20 (10 October 1868): 431-32; Buckner, "The True Lawyer . . . Law Reform," 70.

<sup>23</sup>Richard H. Stanton, *The Revised Statutes of Kentucky*. . . (2 vols.; Cincinnati, 1867), 1:376; (Frankfort) *Kentucky Daily Yeoman*, 5 April 1873; *Louisville Commercial*, 26 March 1873, 9 April 1879, 14 October 1882, 15 June 1884, 18 April 1885.

<sup>24</sup>Edward I. Bullock, James M. Nesbitt, and George W. Craddock, *The General Statutes of the Commonwealth of Kentucky* (Frankfort, Ky., 1873), 322; (Frankfort) *Kentucky Daily Yeoman*, 11 January 1882.

<sup>25</sup>*North American Review* 92 (April 1861): 304-09; 162 (May 1896): 67-73; *New York Times*, 2, 4 August 1883; *American Law Review* 30 (May-June 1896): 436-40; Henry A. Harman, "Is the Jury System a Failure?," *American Law Register* 22 (February 1883): 81-84; *Ky. Debates* (1890-1891) 2:3018.

<sup>26</sup>*Owensboro Messenger*, reported in *Kentucky Law Journal* 2 (July 1882): 99.

<sup>27</sup>*Ky. Debates* (1849), 798-99; M.C. Johnson, James Harlan, and J.W. Stevenson, *Criminal Code of Practice* (Frankfort, Ky., 1854), sec. 195;

*Louisville Commercial*, 25 February 1879; *Constitution of 1850*, art. XIII, sec. 12; *Ky. Debates (1890-1891)*, 1:450-51.

<sup>28</sup>*New York Times*, 28 October, 31 December 1858, 25 September 1867, 1 June 1871, 23 February 1879; Whitehouse, "Trial by Jury," 504-07; *American Law Review* 30 (May-June 1896): 437; *Louisville Commercial*, 28 March 1881; *Maysville Republican*, reported in *Louisville Commercial*, 2 February 1886; *Ky. Debates (1849)*, 794-95.

<sup>29</sup>Samuel Walker, *Popular Justice: A History of American Criminal Justice* (New York, 1980), 112-15; "Historical Perspectives—Plea Bargaining and Its History," *Law and Society Review* 13 (1979): 211-82; Jefferson County Circuit Court Order Books, 1871-1872 (1873 missing), 1874-1881, Kentucky State Archives, Frankfort, Kentucky; Fayette County Circuit Court Order Books, 1851-1890, Fayette County Courthouse; Adair County Circuit Court Order Books, 1831-1890 (microfilm, Special Collections, King Library North, University of Kentucky); Morgan County Circuit Court Order Books, 1859-1888 (microfilm, Special Collections, King Library North, University of Kentucky); Ohio County Circuit Court Order Books, 1831-1875, 1880-1890 (microfilm, Special Collections, King Library North, University of Kentucky). Plea bargaining is traditionally defined as "the process by which the defendant relinquishes his right to go to trial in exchange for a reduction in charge and/or sentence." Milton Heumann, "A Note on Plea Bargaining and Case Pressure," *Law and Society Review* 9 (1975): 515. It is impossible to know if every guilty plea is the result of plea bargaining in the traditional sense, but such pleas are usually the best evidence of this process in the nineteenth century. Some defendants may have been reluctant to negotiate with Kentucky prosecutors because the jury determined punishment even on a guilty plea. Defendants (or their lawyers) may have reasoned that a group of laymen involved in the system for only a few weeks was more unpredictable than a single sitting judge whose predilections presumably could be ascertained over a period of time. Apparently some nineteenth-century defendants engaged in what modern analysts describe as "implicit plea bargaining" in that they pleaded guilty without negotiating with the prosecutor solely in the hope that the jury would impose a lighter punishment. In 1884 the commonwealth's attorney for Jefferson County complained that this strategy too often worked. *Louisville Commercial*, 22 May 1884.