"Wretches Hang That Jury-men May Dine"

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One of the most famous sayings in English comes from Alexander Pope's poem The Rape of the Lock *(1714): "Wretches hang that Jury-men may Dine." Those words have been widely quoted by lawyers, judges, literati, and laymen to condemn hasty, ill-considered verdicts and to express anxieties about juries and the judicial system itself. Even though nowadays Pope is usually credited with having invented a bit of fanciful hyperbole for comic or satiric effect, the aphorism epitomizes a long tradition in English common law that forbade deliberating jurors' eating or drinking before announcing their verdict. Statements of the common-law principle, in judicial rulings and commentaries, from the thirteenth century through the eighteenth, tended to fall into formulaic patterns, as they listed the amenities that jurors were to forgo and gradually developed practical means of ameliorating or circumventing the harsher aspects of the prohibition.*

On August 8, 2006, "lawyers for a man convicted of beating a former girlfriend to death with a lead pipe argued before the Ohio Supreme Court . . . that their client should be spared the death penalty, partly because jurors were not allowed to smoke while deliberating. 'A capital trial is supposed to be a considered process,' said . . . one of the lawyers. 'Jurors shouldn't be trying to speed up the process so they can go outside and smoke a Kool cigarette'" (Maag, 2006:A13). In April 2001, defense counsel appealed a decision by a U.S. District Court on the grounds that the judge erred in his "Allen charge" encouraging a jury to break its deadlock. Counsel claimed the court "did not ask the jurors questions such as whether they wanted a break for dinner." However, the Tenth Circuit Court of Appeals denied the appeal (*United States v. Arney*, 2001).

A century-and-a-half earlier, the Mississippi High Court of Errors and Appeals affirmed a trial court's judgment, even though the bailiff had told the jury, after eighteen hours of deliberation, "they should have nothing more to eat and no water to drink unless they decided one way or the other" (*Pope & Jacobs v. State*, 1858). Five years before that, in contrast, the Iowa Supreme Court reversed a trial court's verdict because a deputy sheriff and bailiff had informed the jury that it would be kept "from Saturday evening until Monday morning without anything to eat, unless they would agree upon their verdict" (*Cole v. Swann*, 1853). Recently, in a complicated suit and countersuit involving a vehicular homicide in Illinois, according to a 1999 news report, "Two alternate jurors said jury members were tired and hungry and may have rushed their decision" ("Man Convicted," 1999:B2).

It might seem that, among all the challenges that administrators of courts face, the comfort and provisioning of juries could be attended to simply and efficiently. However, the record of English and American jurisprudence suggests otherwise. The

suspicion that juries reach hasty or otherwise unfair verdicts because they have been denied a sufficiency of food, drink, or even tobacco has a long and persistent history. As formulated in traditional phrasing, such deprivations become a legal and literary motif, a sort of byword representing a wide range of abuses, miscarriages of justice, doubts and anxieties about the fairness or efficacy of the judicial system itself. The motif impinges on a variety of related concerns, not all of which can be examined in this essay: What—currently and historically—are the "rights," as well as obligations, of jurors themselves in their role of ensuring the rights of defendants and the proper application of the law? How susceptible are jurors, in their desire for physical comforts, to injudicious behavior, not only in arriving at ill-considered verdicts but even in succumbing to outside influences, to inappropriate pressure from other jurors, or to threats from domineering judges?

Even though it is popular nowadays, in vocal sectors of American society, to vilify our judicial system—including juries, judges, and (of course) lawyers—as a mechanism that coddles criminals, undermines public safety, and subverts the obvious will of the people, at most points in the history of Anglo-American jurisprudence the same system has been extolled, rather, as our last, best defense against the tyranny of rulers or oppression by mob-minded majorities. Typical in its sentiment, if not in its eloquence, was the rhapsody by Sir William Blackstone (1723-89). For him, "trial by the peers of every Englishman" is "the grand bulwark of his liberties . . . secured to him by the great charter. . . . [T]he liberties of England cannot but subsist, so long as this *palladium* remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it by introducing new and arbitrary methods of trial" (Blackstone, 1765-69, vol. 4:341-43). That "great charter," Magna Carta (signed in 1215), decreed that persons accused of crimes may not be deprived of life, liberty, or property "unless by the lawful judgment of their peers" ("*nisi per legale judicium parum suorum*"). In Blackstone's day, and in other more "normal" times, historically speaking, popular complaints tended to focus, rather, on what was perceived as the excessive or capriciously applied rigor of the law.

Such a time was 1714 in England, when one of the most famous poems in the language appeared in print: Alexander Pope's *Rape of the Lock*, an extended satire on feminine vanity, social pretensions, and a variety of other follies and vices of the world. The best-known couplet, out of 397 in the poem, has nothing directly to do with the events or subject of the ironic epic. It is just a facetiously elaborate way of designating the time of day as afternoon:

> The hungry Judges soon the Sentence sign,
> And Wretches hang that Jury-men may Dine (Pope, 1963:227).

Obviously, something about the phrasing, and the idea encapsulated in the phrasing, has struck a responsive chord in the culture's sympathy and imagination. For if the judicial system fails to protect individual citizens, then who is safe? And if jurors are

not permitted to deliberate carefully and, at times, slowly, how can the very concept of judgment by one's peers function fairly?

The present essay, written mainly from the standpoint of what we might call historical philology, or what some recent scholars in the field term "phraseology" or "idiomatology," surveys the development over several centuries of certain judicial rules and practices in England and America—those related to the provisioning (or deprivation) of juries—and especially the *expression* of those rules and practices in patterned phrasings of various times. After illustrating how Alexander Pope's words themselves have been quoted in jurisprudential discourse, we shall identify other prior and subsequent formulations of the idea that Pope versified, observe the common-law status of the idea itself, and sketch the evolution of the idea and its wording in early reports of English and American court cases. As reported, many details of those cases are curious and amusing, but some of the cases themselves held profound implications for the role of courts in guaranteeing individual liberties.

THE APPROPRIATION OF POPE'S COUPLET

The words from *The Rape of the Lock* were quoted in 2000, without attribution, in the online newsletter of the National Coalition to Abolish the Death Penalty, concerning a capital case in Arkansas: "On Friday evening [in 1986], after an exhaustive 68-minute deliberation, the jury set Michael's penalty at death and got home to enjoy the weekend. 'Wretches hang,' the English used to say, 'that jurymen may dine'" ("Arkansas: Michael O'Rourke"). The writer seems unaware that the traditional saying has a *literary* source. In a 1999 decision of the U.S. Court of Appeals for the Armed Forces reversing a court-martial conviction, a concurring judge quoted Pope, this time attributing the lines, by verse number, in a footnote:

> In ruling on the continuance request, the [trial] judge seemed to be more concerned with delay and his perceived lateness of the request than the substance of the motion. Speed in the trial process has its place but fairness and justice are far more important factors. I am reminded of an old judicial rhyme:
>
> > The hungry judges soon the sentence sign, and wretches hang that jurymen may dine (*United States v. Weisbeck*, 1999).

Pope is also quoted in a 1980 opinion of the U.S. Court of Appeals for the First Circuit. A criminal case had been sent to the original petit jury at 2:00 on a Friday afternoon. At 5:00 the judge received a note that the jury was deadlocked. The court's inquiry into provisions for supper revealed that all nearby dining facilities were crowded and that a delay of two to three hours would be required to bring sandwiches to the jury room, so at 6:15 the judge declared a mistrial. Overturning the district court's decision, the court of appeals dismissed the indictment on the grounds of freedom from double jeopardy: "A prospective delay, even a long one, in obtaining supper is not of

such consequence. It is no longer the case that 'wretches hang that jurymen may dine.' A. Pope, The Rape of the Lock, III, l.21" (*United States v. Hotz*, 1980).

In 1948 the Supreme Court of North Carolina declined to overturn the conviction of a man who had been indicted on a charge of rape eight days after the alleged crime, with his trial commencing the very next day. Although the decision was upheld, the court, giving no attribution, said,

> Nevertheless, a word of caution may not be altogether beside the mark. . . . The prompt trial of criminal actions is to be encouraged. But in keeping clear of the law's delays, courts should not try cases with such speed as to raise a suspicion that "wretches hang that jurymen may dine" (*State v. Gibson*, 1948).

In 1979, the North Carolina Court of Appeals, quoting the 1948 caution, including the unattributed words from Pope, overturned a judgment of "guilty" in a case in which the defense had been allowed just seventeen days to prepare for trial (*State v. Moore*, 1979).

Pope's wording, then, has come to function not only as a literary allusion but also as a kind of *proverb*; for instance, a dyspeptic book reviewer, writing anonymously in 1859, had

> a word now to say about our boasted "trial by jury." That palladium of liberty! See what comes of it. Its advocates declare its virtue to reside in the *unanimity* of the jury . . . —how is it attempted to secure it? By torture. By absolute pain of starvation. . . . Is it not manifest that the result is to give the superiority to strength of stomach, not of head? And so to verify the adage of Pope –
>
> > "And wretches hang that jurymen may dine."
>
> Alas! The proverb is not musty. Ask those who practice in the criminal courts of this country ("Government of the Papal States," 1859:382).

A century earlier, in 1752, the Earl of Orrery had quoted the aphorism—without attributing it to Pope—in a similar application:

> The method of trials by juries, is generally looked upon as one of the most excellent branches of our constitution. . . . The point, most liable to objection, is the power, which any one, or more of the twelve, have to starve the rest into a compliance with their opinion; so that the verdict may possibly be given by strength of constitution, not by conviction of conscience: "*and wretches hang that jurymen may dine*" (Orrery, 1752:245-47).

In 1791 Pope's couplet, unattributed, found its way into a discussion of capital punishment:

> Is it not absurd . . . that the laws which detest and punish homicide, should, in order to prevent murder, publicly commit murder themselves? What must men think when they see wise magistrates and grave ministers of justice, with indifference and tranquility, dragging a criminal to death, and whilst a wretch trembles with agony . . . the judge, who has condemned him, . . . quits his tribunal to enjoy the comforts and pleasures of life.
>
> "The hungry judges soon the sentence sign,
> "And wretches hang that jurymen may dine" (Ritson, 1791:xxvi).

As an aphorism—or proverb or adage—Pope's line is always applied in a reverse or ironic way, positing a situation which, however customary, is undesirable. Naturally, courts should strive to avoid the situation—to avoid even the *appearance* of condoning it.

Nonetheless, we now live in a time when popular sympathy for—or imaginative identification with—victims of crimes often supersedes the value placed on protecting the rights of defendants, whether accused justly or not. Two of the most crucial concepts in criminal law, the presumption of innocence and the jury's exercise of reasonable doubt, are widely challenged. Michael Tigar (1999:188) notes, "Something has made the people impatient with the idea of providing full and fair trials for those accused of heinous crimes. When, in such a trial, the defendant is not convicted of everything the state has alleged, there is an outcry that justice has not been served." Reformers often advocate relaxing the unanimity requirement for criminal-jury verdicts; they evidently assume that more convictions would, and should, ensue. Even modest reform proposals of the sort speak of helping "to restore public confidence in the judicial system," which is now being "subjected to greater and greater ridicule by the public" (Morehead, 1998:935, n.18). It is hard to see how that language can urge anything other than the convicting, more often and more expeditiously, of defendants whom "the public" *already knows* to be guilty! Richard H. Menard, Jr., warns "that 10 or 11 jurors who are persuaded that a defendant is guilty will not listen to counter-arguments if it means being late for dinner" (Menard, 2001:195). However (to reiterate), the current prevailing prejudice against not-guilty verdicts in general, and against the system of judges and juries that permits such verdicts, runs counter to what we have called the "normal" situation since the time of Magna Carta, when the public looked askance at quick verdicts of "guilty," suspecting ignoble motives like weak-willed jurors' desire to dine.

The analogous "hungry-judge" syndrome resulting in precipitous decrees is less often mentioned today. After all, judges possess the authority to recess a trial or to dine themselves while the jury deliberates. Besides, as one of Pope's nineteenth-century editors, John Wilson Croker, who had "read law" in the London Inns of Court, pontificating on that "repulsive and unfounded couplet" from *The Rape of the Lock*, noted humorlessly, "Judges never sign sentences, and if a juryman is in haste to dine it is at least as easy to acquit as to condemn" (Croker, Elwin, and Courthope, 1871-89, vol. 2:159). But poetry must not be taken altogether literally; the famous couplet gives voice to a popular suspicion that convictions are too frequent and too quick.

The "old judicial rhyme" can be applied broadly and figuratively to other kinds of official decisions, hastily and unfairly arrived at, that harmfully affect an individual. Such is the nature of many proverbs and other fixed or formulaic expressions: They can be used narrowly and literally, or generally and metaphorically. (We can exclaim "When it rains, it pours!" in reference either to bad weather or to good fortune; "A watched pot never boils" can express impatience about pasta preparation or about many things outside the kitchen.) In America as early as 1791, one William Duer, "late contractor for the Western Army," remonstrated against congressional allegations of improprieties and dereliction in his provisioning of soldiers:

> [T]he report was foisted in the last day of the session, when many members were absent, and the imagination of the few present so much on the wing homewards as to prevent the exercise of that cool reflection which in general marks the proceedings of that respectable body: "Thus wretches hang, that Jurymen may dine" (Duer, 1791).

THE SUSPICION APART FROM POPE'S COUPLET

Although Pope's phrasing of 1714 proved especially memorable, the cynical view of hasty and hungry judicial decisions has long existed separate from the satirical aphorism. In 1680 Sir John Hawles, lawyer and member of Parliament, gave an extended denunciation of abuses in jury proceedings:

> 'Tis frequent, that when Juries are withdrawn that they may consult of their *Verdict*, they soon forget that Solemn Oath they took, and that *mighty Charge* of the Life and Liberty of men, and their Estates, whereof then they are made Judge. . . . [P]resently the *Foreman* or one or two that call themselves *Antient* Jury-men (though in truth they never *knew* what belongs to the place more than a common *School-Boy*) rashly deliver their *Opinions*, and *all the rest* in respect to their supposed *Gravity* and *Experience*, or because they have the biggest *Estates*, or to avoid the trouble of *disputing* the Point, or to prevent the spoiling of *Dinner* by delay, or some such *weighty* Reason, forthwith agree *blind fold* (Hawles, 1680:35-36).

The desire "to prevent the spoiling of *Dinner* by delay" typifies the sorts of impatience and thoughtlessness that undermine the fairness of jury trials. Notwithstanding the stridency and sarcasm of Hawles's words, we can detect a very different attitude, perhaps a different ideology, from what is commonly heard in recent critiques of judicial proceedings, such as the remonstrations of Judge Harold Rothwax (1996) and his voluble allies on talk radio, who seem to regard lengthy, complex, vigorous, painstakingly thorough jury deliberations and other established judicial procedures as inimical to the exacting of justice. Hawles, in contrast, was pleading for *more careful* deliberative behavior on the part of juries, inevitably requiring a *longer time* spent in the jury room, with *more extensive* conversations or debates among jurors holding diverse views and

assessments of the reliability of witnesses and the quality of evidence presented at trial. In many cases, such deliberations would extend past the customary hour for jurors' dinner.

The critique of judicial conduct in civil as well as criminal trials near mealtime crops up in nineteenth-century fiction, both British and American. In some instances, there may be heard echoes of Pope. This, for example, appears in James Fenimore Cooper's novel *The Monikins* (1835):

> Matters were now beginning to look serious for poor Noah, when a page came skipping in[to the courtroom], to say that the wedding was about to take place, and that if his comrades wished to witness it, they must sentence the prisoner without delay. Many a man, it is said, has been hanged, in order that the judge might dine (Cooper, 1891-93, vol. 7:355).

There, of course, the focus is on Pope's hungry judge. In Charles Dickens's *Pickwick Papers* (1837), attention returns to the jurors:

> "I wonder what the foreman of the jury, whoever he'll be, has got for breakfast," said Mr. Snodgrass.". . .
>
> "Ah!" said Perker, "I hope he's got a good one . . . . A good, contented, well-breakfasted juryman, is a capital thing to get hold of. Discontented or hungry jurymen, my dear Sir, always find for the plaintiff" (Dickens, 1986:509).

Even in Herman Melville's *Mardi* (1849), hunger compromises the thoughtfulness of a jury's deliberativeness:

> "What! are twelve wise men more wise than one? or will twelve fools, put together, make one sage? Are twelve honest men more honest than one? or twelve knaves less knavish than one? . . . If upon a thing dubious, there be little unanimity in the conflicting opinions of one man's mind, how expect it in the uproar of twelve puzzled brains? though much unanimity be found in twelve hungry stomachs" (Melville, 1970:184).

The idea of jurymen making rash decisions on the basis of their stomachs can be found in English literature before Pope's poem; certainly the poet did not himself invent the situation or even originate its satiric presentation. The earliest literary instance on record occurs in Thomas Middleton's play *A Trick to Catch the Old One*, 1608:

> I know a knave at first sight, thou Inconscionable Raskall, thou that goest upon middlesex Juryes, and will make hast to give up thy verdit, because thou wilt not loose thy dinner (Middleton, 1968:75).

In a sermon preached in 1630, the great poet and cleric John Donne looked forward to the time when God alone—who cannot suffer from hunger!—will judge him:

> I shall not be tried by a Jury, that had rather I suffered, then they fasted, rather I lost my life, then they lost a meale. Nor tryed by Peeres, where Honour shall be the Bible. But I shall be tryed by the King himselfe . . . and that King shall be the King of Kings (Donne, 1953-62, vol. 9:229-30).

The following "case" is described by a character in Aphra Behn's comedy *The Revenge*, 1680:

> [A] Cloak was stolen, that Cloak he had. The Justice was in Drink that committed him, the Judges severe and in haste, the Jury hungry, and so the Knave was cast [i.e., "condemned" or "convicted of a crime"] (Behn, 1992-96, vol. 6:211).

The examples could be multiplied. By Pope's time, not only the stereotype of the famished jury but also the satiric image of the "hungry judge," therefore a hasty and injudicious one, had already achieved something like proverbial status, a stock figure for comparison with other sorts of negligent or impatient individuals. For instance, from a comedy by William Wycherley, 1667:

> You may talk, young Lawyer, but I shall no more mind you, than a hungry Judge does a Cause, after the Clock has struck One (Wycherley, 1979:393).

From a comedy by William Congreve, 1695:

> I have dispach'd some half a Dozen Duns ["dunners" for payment of debts], with as much Dexterity as a hungry Judge do's Causes at Dinner-time (Congreve, 1923, vol. 2:102).

That commonplace continued to appear after the publication of *The Rape of the Lock* in 1714, often without any apparent influence of Pope's poem. From a narrative poem by William Somervile, 1727:

> No hungry Judge nods o'er the Laws,
> But hastens to decide the Cause (Somervile, 1727:381).

From a poem by Samuel Bowden, 1754, perhaps borrowing Pope's rhyme:

> When Lawyers are hungry—'tis a merciless sign,
> Poor criminals hang—for fat judges to dine (Bowden, 1754:114).

In regard to hungry judges, we must notice a remarkable situation: Of all the world's poets, Pope is preeminent for his virtuoso mastery of the *couplet*, a two-part unit, obviously, the second line symmetrical with the first, the two rhyming lines together often possessing an aphoristic quality—the concise and witty expression of single salient point:

> The hungry Judges soon the Sentence sign,
> And Wretches hang that Jury-men may Dine.

Yet so frequently, as quoted out of its context, Pope's couplet is reduced to just its second line. We may wonder whether some "elite" stratum of literate and lawyerly culture tacitly, perhaps unconsciously, edits out the blame that Pope assigned to judges, leaving jurymen—representing the common populace—to carry the onus for judicial unfairness and cruelty!

THE COMMON LAW BACKGROUND

The relation of hunger to the deliberative conduct of juries, the situation that has attracted so much notice over the past three centuries, has an actual basis in English common law. The ancient customary practice, which eventually came to be regarded as a requirement of law, was for juries, upon being "sworn"—that is, receiving their charge—to be sequestered, pending their verdict, without food or drink.

The record begins in the year 1293: When a jury reported to the court a finding that was deemed unsatisfactory, the judge charged the jurors either to reach an acceptable conclusion or "you will stay shut up without food or drink till tomorrow morning" ("*ou vus demorrez sanz manger et beyre jekes demeyn matyn enclos*" in the Law French of the *Year Book*) (Horwood, 1866-74:273). In 1310 when a jury was unable to agree, the judge instructed one "Johan Aleyn," apparently a court officer resembling a bailiff, to put the jurors in a house (or room?—"*meson*") until the next Monday, not allowing them to eat or drink ("*Alez si les mettez en une meson tanqe lundy, e q'il n'eient manger ne beire*") (Maitland et al., 1903-88, vol. 4:188). In 1350 a judge went as far as to declare that jurors, sequestered without food and drink ("*sans manger et boier*") during their deliberations, become like prisoners or convicts ("*trespassors*") themselves (*Le Second Part*, 1619:sig. 4F4^{r}). The judgment in a 1411 case was contested on the grounds that jurors had eaten and drunk before declaring their verdict ("*ante veredictum suum dictum comederunt et biberunt*," in the Latin), even though they swore that they had reached their decision before partaking (Sayles, 1936-71, vol. 7:199-200). The "custodians" ("*custodes*") who had provided the food and drink ("*cibum et potum*") at the jurors' expense, as well as the jurors themselves, were fined.

The access of jurors to food and drink continued to be a contentious issue. It arose in a case from 1412, when the jurors were suspected of having partaken "*de manger ou de boyer*" (Year Books, 13 Henry IV, Hilary Term, plea #4:13). About 1413, a lawyer sought a writ for the restraint of a former juror who, having been fined on the motion of that lawyer because he ate and drank ("*mangeast et boest*") after the jury retired to deliberate, was now threatening to kill the lawyer (Baildon, 1896:79). The record of a civil case from 1444 interprets the rule to allow that jurors *may* eat and drink ("*prinderent manger et boier*") with the prior consent of the judge and of both parties, as long as they behave with moderation (Year Books, 20 Henry VI, Pasch Term, plea #8:24).

During Tudor times, courts continued to struggle with the common-law custom of depriving the jury of physical sustenance. The report of a case from 1499 notes

that if, contrary to their instructions, jurors have food and drink ("*les Jurors avoient manger et boire*"), they are subject to misdemeanor charges, and their verdict is void (Year Books, 14 Henry VII, Michaelmas Term, plea #3:1). In another case the same year, we read that the marshal is responsible for seeing that jurors, in accordance with their oath, refrain from eating and drinking, all day and night ("*ils ne mangeroient ne boiroient tout cela jour et nuiet*") (14 Henry VII, Michaelmas Term., plea #5:2). Still later, in 1499, some improbable occurrences during a trial led to extensive discussion of the rule: After the swearing of a jury, there arose such a thunderstorm ("*la avient tiel tempeste de thunder et de pluye*") that some of the frightened jurors fled, during which absence they drank with a "stranger" ("*bevere ove un estranger*"), who advised them that the defendant in the trial had the stronger case (14 Henry VII, Trinity Term, plea #4:29-31). Summoned back to the bar, the timorous and wayward jurors were then, as seems to have been the custom, confined to a "house" ("*commaundez a un meason*") to pursue their deliberations. The jury's aberrant behavior constituted grounds for appeal of the verdict, wherein the chief justice opined that although rainfall was a feeble pretext for the jurors' departure ("*le pluye fuit foible cause de departir*"), their verdict must be allowed. Further reviewing that same case the following year, one justice, even though he voted to uphold the verdict because it went against the defendant whose supportive friend had imbibed with the jurors, articulated a rationale for the law, as he now calls it, forbidding jurors' eating and drinking after they are sworn ("*de manger et boyer fuit prohibit par le ley*"). He said, first, that if they are permitted a sufficiency of food and drink, the jurors may prove reluctant ever to reach a decision, and, second, that jurors who eat and drink ("*mangerent et boierent*") will be biased in favor of whoever treated them to the refreshments (Hemmant, 1933-48, vol. 2:183-84). The jurors were fined.

In 1505, once again, a jury stood accused of taking food and drink ("*manger et bevere*") after being sworn but before announcing a verdict. One judge remarked contemptuously that the jurors had acted with base self-indulgence ("*ilz prent manger et boire pour leur sensuels appetits et desirs*") (Year Books, 29 Henry VII, Michaelmas Term, plea #8:3). The report of an odd case in 1538 in which the jury had eaten and drunk ("*auerount Maunger et Boyer*") shows the jurors walking from the site of their deliberation toward the courtroom—evidently at some distance away—when they (and here the report lapses from Law French into Latin) "*viderunt cyphum et inde biberunt*": "they saw a cup and then they drank," the *cup* being, we conjecture, a hanging sign that identifies a tavern or alehouse (Dyer, 1585:fol. 37^{v}; the given word for "cup" or "goblet," Latin *cyphum*, is exceedingly rare, and it would normally be spelled *scyphum*).

We might pause here to wonder what precisely was meant by "drink" in the early records and rules—what substance, in addition to solid foodstuffs, jurors were being denied. From ancient times forward, words for "drink" in European languages, both nouns and verbs, have had dual significations: they refer to *any* liquid but also, more specifically, designate alcoholic beverages. On the other hand, before the nineteenth century, no particular moral or religious stigma attached to the consumption

of alcohol in moderate quantities, even in "puritan" communities; the potable form of fermented grain or fruit was mostly regarded as a staple food (a source of calories, available at all seasons), less as a mind-altering, inhibition-loosening potion. Only rarely do the records suggest that "drink" was forbidden to ensure the mental acuity of jurors while they cogitated. The occasional mentions of *temperance* or *moderation* would refer equally to restraint in the consumption of food. We might surmise, therefore, that the "drink" withheld from jurors was water as well as wine or ale.

By the time of Queen Elizabeth, the reports had become increasingly specific about the substances to which jurors were gaining illicit access. In 1563, according to the judge, a juror ate a pear and drank a draft of ale ("*il auoit Mange vn piere, et boyer vn haust de seruoise*") (Dyer, 1585:fol. 218[r]). In 1566, recounting a case from the reign of Henry VII, William Rastell detailed in Latin how certain members of a jury were discovered to have on their persons some comfits ("*cmfets*" [sic]; that is, *confectionibus*), others dragée ("*dregge*"), others sugar candy ("*sugarcandie*"!), others raisins ("*rayso[n]s*"; as with *sugarcandie*, the English word is barely Latinized here), others plum preserves (or perhaps candied plums: "*conserua prunarum*"), and others dates ("*dactulis*"). Despite the ample inventory of available snacks, the jurors had not actually eaten or drunk ("*no[n] comederu[n]t nec biberunt*") (Rastell, 1566:fol. 251[r]). A juror in a 1557 trial likewise had a sweet tooth; he was caught redhanded, according to a report in Latin, with a small container of candied barberries ("*pixis de Barberis conservat[is]*"), some sugar called "sugar candy" ("*Saccarum vocat[um] sugar Candy*"), and sweet roots called "licorice" ("*dulces Radices vocat[ae] Lickoras*"); for the misdemeanor he was committed to prison (Plowden, 1594:fol. 519[r]).

In the notable case of *Munson* (or *Mounson*) *v. West* in 1587, which concerned a disputed inheritance and also claims of trespass, the jury had deliberated

> a long time without concluding any thing; and the officers of the Court who attended them seeing their delay, Searched the Jurours if they had any thing about them to eat; upon which search it was found, that some of them had figs, and others pippins. . . . [T]wo of them did confesse that they had eaten figs before they had agreed of their verdict: and three other of them confessed, That they had Pippins, but did not eat of them, and that they did it without the knowledge or Will of any of the Parties (Leonard, 1658:132-33).

Another English account of the same trial offers more—and somewhat different—details; among the jurors,

> one had Cheese, and another had Pruens, and another had Pippins, and another had an Orange, but he which had the Orange swore that he brought it onely for the smell, and therefore he was excused; and he which had the Pruens, had given half a Pruen to one of his companions, which eat it, and he which had Cheese had eat thereof, therefore all those which had Victuals, were fined 40 s. and they which had eaten at 5 l. every of them, and all committed to the Fleet [Prison] (Gouldsborough, 1653:93).

After several judicial reviews of the trial, "the verdict was holden to be good notwithstanding the misdemeanour aforesaid," at which point one reporter cites five precedent cases, "where it was holden" that "the eating and drinking of the Jury at their own costs is but fineable, but if it be at the costs of any of the parties, the verdict is void" (Leonard, 1658:133).

During Stuart times, the issue persisted. In 1624 some jurors were fined for the mere possession of "Sweet-meats," a judge declaring that "it is a very great misdemeanour" (Godbolt, 1652:354). In 1683 a verdict was set aside because a jury "had Bottles of Wine brought them before they had given their Verdict" (Ventris, 1696:124-25). In 1715 the plaintiff in a civil action appealed for a retrial on the grounds that "the defendant treated the jury, and that the jury were drunk" (Randolph, 1996:36).

In all of those cases, and many others, the English courts carefully weighed both the circumstances—how the jurors' possession or consumption of food or drink might have affected their verdict—and the common-law prohibition, reiterated, defined, and modified by ever-more-numerous citations of prior cases, against jurors' eating or drinking at all during their deliberations in determining whether, then, the verdict itself should be declared void, or individual jurors or court officers should be punished by fine or imprisonment. In 1716, two years after Pope's *Rape of the Lock* was published, the shorthand diary of Sir Dudley Ryder, lord chief justice of the King's Bench, made this notation: "At dinner Mr. Mayo talked about the hardship of English juries, that they might not eat or drink till they brought in their verdict and agreed every man. By this means honest [persons] are forced to bring in their verdict contrary to their conscience and oath" (Ryder, 1939:320).

Like much of common law, the English custom found its way into the statutes of Colonial America. An enactment for Virginia in 1645 required "jurors to be kept from food and releife till they have agreed vpon their verdict according to the custome practised in England" (20 Charles I, act #10; in Hening, 1823, vol. 1:303). According to a 1663 act for Virginia, "whenever a jury is sent out, an officer sworn to that purpose shall keep them from meat and drink vntill they have agreed on their verdict" (14 Charles II, act #27; in Hening, 1823, vol. 2:74).

The prohibition received emphasis not only in the pronouncements of law and in reports of court cases but also in the textbooks studied by aspiring lawyers. The most widely used law book in the English-speaking world before the advent of Blackstone's revered *Commentaries on the Laws of England* in the 1760s was Christopher Saint German's dialogues popularly known as *Doctor and Student*, which appeared in dozens of editions through the sixteenth, seventeenth, and eighteenth centuries. Published in Latin in 1528 and in English in 1530-32, the book consists of questions posed Socratically by a "doctor," that is, a teacher, and answered by his astute and well-read student, interspersed with inquiries by the student and answers by the teacher. The doctor asks, in light of the fact that "mete and drynke is prohibyt theym [the jury],"

whether a conscientious holdout juror, as we would call him, might finally be "dryuen to that poynte that eyther he must assent to theym [the other jurors] and gyue the verdyte agaynst hys owne knowlege and agaynst his owne conscyence/or dye for lack of meat [i.e., food]/how may that lawe than stande with conscyence that wyll dryue an innocent [person] to the extremytye to be either forsworn or to be famysshed and dye for lack of meat[?]" (Saint German, 1974:292-93). In reply, the law student shrewdly notes the many circumstances that can mitigate the prohibition:

> I take not the law of the realme to be that a Jurye after they be sworn may not ete nor drinke tyl they be agreed of a verdyt: but trouth it is there is a maxym and an olde custome in the law that they shall not ete nor drynk after they be sworn tyl they haue gyuen theyr verdyt without the assent & lycence of the Justyce.

The student then, in best lawyerly fashion, refers to precedents justifying, for example, the giving of a juror stricken with illness "mete and drynke and also suche other thynges as be necessary for him." Even with a deadlocked jury, "the Justyces maye in that case suffre them haue bothe mete & drynke for a tyme to se whether they wyl agre" (St. German, 1974:293).

The student's phrase "there is a maxym and an olde custome in the lawe" should be noted. Near the beginning of Saint German's first dialogue, the four bases of common law ("*fundamenta legis Anglie*") are delineated, in this order: 1) the law of reason ("*lex rationis*"); 2) the law of God ("*lex diuina*"); 3) "dyuers generall Customes (["*consuetudinibus generalibus*"] of olde tyme vsed through all the realme"; and 4) "dyuers pryncyples that be called by those learned in the lawe maxyms ["*maximae*"]/The which haue ben alwayes taken for the law in this realm" (Saint German, 1974:31-67).

Calling a principle a *maxim*, especially as thus distinguished from a *custom*, implies not only that an idea or practice has been established by ancient and customary usage but that the phrasing itself has become standardized—not narrowly fixed, necessarily, but varying only within limits of a formulaic structure. To say that a deliberating jury is forbidden, in the now familiar phrasing, to "eat or drink" ("*manger ou boire*," "*comedere aut bibere* [or *potare*]") or to have "food or drink" ("*le manger ou le boire*," "*cibum aut potionem*," "*panem aut potem*"), follows a verbal formula, but an exceedingly simple one to be called a *maxim*. However, toward the middle of the sixteenth century, a more complex and interesting *four*-term formula began to appear. Sir Thomas Smith's *De Republica Anglorum* (1583), a detailed and laudatory account of English customs and institutions, discusses the role of a jury. After the judge sends "the xij men" (a designation Smith prefers to the term *jury*) to deliberate, "Then there is a baylife charged with them to keepe them in a chamber not farre off without bread, drinke, light, or fire vntill they be agreed, that is, till they all agree vppon one verdite concerning the same issue" (Smith, 1583:62). Recapitulating later in the treatise, Smith alters the four-item list:

> And there is a bailife to waite vpon them, and to see that no man doe speake with them, and that they haue neither bread, drinke, meate, ne fire brought to them, but there to remaine in a chamber together till they agree. . . . The enquests [i.e., jurors] haue no sooner agreed vpon their charge one way or other, but they tell the Bailife, and pray to be heard, and considering that they be themselues all this while as prisoners as I saide before, it is no maruell, though they make expedition (Smith, 1583:81-82).

Next to Saint German's *Doctor and Student* and Blackstone's *Commentaries*, probably the most influential law book in England has been Sir Edward Coke's *Institutes of the Lawes of England* (1628-44). Coke states, "By the Law of England a Jurie after there Euidence giuen vpon the Issus, ought to bee kept together in some conuenient place, without meat or drinke, fire or candle, which some Bookes call an imprisonment" (Coke, 1628:fol. 227^{v}). In 1651 Henry Robinson gave still another sequencing of the four terms: "The keeping the Jury without fire, light, bread or drinke, as the Law requires, may possibly make the major part of them, if not all, agree upon a verdict contrary to their consciences to be freed from any of these exigencies" (Robinson, 1651:3).

However, it was the wording of Coke's locution, "without meat, drink, fire or candle," that became something of legal maxim—a commonplace expression of the standard inventory of conveniences of which a jury may be, or should be, lawfully deprived. Sir Matthew Hale (d. 1676), former chief justice of the Court of the King's Bench, in his posthumous *Historia placitorum Coronae* ("History of Pleas of the Crown") asserted, "The jury must be kept together without meat, drink, fire, or candle, till they are agreed" (Hale, 1736, vol. 2:297). The phrase even found its way outside the field of law; in a 1690 comedy by John Crowne, a coachman complains to his employer, Lady Pinch-Gut, "I h' been starv'd in your service. . . . You allow us neither Meat, Drink Fire nor Candle" (Crowne, 1690:21).

By the eighteenth century, the rigor of the rule was beginning to relax somewhat. In 1702, a judge declared, "If a jury in an inferior court will not agree on their verdict, the way is, as in other courts, to keep them without meat, drink, fire, or candle, till they agree, and the steward may from time to time adjourn the court till they do agree" (Salkeld, 1795, vol. 3, sig. R8^{r}). In 1710 a commentator noted, "The Court may give the Jury Leave to eat some small Matter, and to drink at the Bar, after some Evidence is given to them, if the Plaintiff and Defendant will consent unto it: *But they may not eat or drink out of Court, nor have Fire or Candle*" (Lilly, 1710, vol. 2:25). Blackstone himself, in 1768, reiterated and justified the maxim:

> The jury, after the proofs are summed up, unless the case be very clear, withdraw from the bar to consider of their verdict: and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed (Blackstone, 1765-69, vol. 3:375-76).

As late as 1831, the Supreme Court of Pennsylvania was still echoing the old four-term maxim, if only to note an appropriate variance from it. In a capital-murder verdict under review, the jury had been held for some thirty-eight hours "by order of the [trial] court without meat or drink, but had the use of fire and candles" (*Commonwealth v. Clue*, 1831). Even today, some courts in America, like ones in the north Georgia jurisdiction with which the authors are most familiar, forbid jurors to eat or to drink anything except water while they are deliberating, although other conveniences such as heat, light, and toilet facilities are routinely provided, and recesses for meals, often at the court's expense, normally occur, as well as overnight recesses except in extraordinary cases.

Perhaps the most famous application of the maxim in its four-term form, with an interesting variation from, or updating of, the sequence "without meat, drink, fire, or candle," occurred during the 1670s, in a landmark confrontation between civil liberties and government coercion in which the role of judicial procedure itself as the proper guarantor against tyranny came into dispute. In 1670 officers of the crown and its agency the Church of England barred the doors of a newly built Quaker meeting house on Gracechurch Street in London, whereupon twenty-six-year-old William Penn and his associate William Mead preached to a large crowd of worshippers and onlookers in the street. Penn and Mead were charged with conspiring to "unlawfully and tumultuously . . . assemble and congregate" a crowd, "to the disturbance of the Peace of the said Lord the King" (*The Peoples Antient and Just Liberties*, 1670:6).

At issue were not only freedom of speech, freedom of assembly, and freedom of religion but also the rights of criminal defendants and the prerogatives of juries. When the judges insisted that Mead answer their questions, he responded, "It is a [M]axim in your own law, *nemo tenetur accusare seipsum*, which if it be not true Latine, I am sure that it is true English, That no man is bound to accuse himself" (p. 10; "Maxim" is misprinted as "Naxim"). Penn demanded a written copy of the indictment, which he was refused. Later in the trial he proclaimed derisively, "The Question is not whether I am guilty of this Indictment, but whether this Indictment be legal; it is too general, and imperfect an Answer, to say it is the common law, unless we knew both where, and what it is: For where there is no Law, there is no Transgression, and that Law, which is not in being, is so far from being Common, that it is no Law at all" (p. 11). Both defendants quoted Coke's *Institutes* to the jury, and they were rebuked by the judges for encouraging the jurors to consider matters of law and not merely the facts of the case. Over the next four days, the jury returned as many as six verdicts, each in turn being rejected by the court. In one return, Penn and Mead were found "guilty of speaking in Gratious Street" but not of speaking unlawfully; with this verdict, the jury would have "nullified" the law as the judges had declared it to them. Another verdict absurdly found Penn guilty of conspiracy but Mead not guilty, whereupon Penn noted mockingly, "[I]t consequently follows, that I am clear since you have indicted us of a Conspiracy, and I could not possibly conspire alone" (p. 19).

Increasingly exasperated, the judges on three occasions threatened to "starve" the jurors. The most pointed threat was:

> Gentlemen, You shall not be dismisst till we have a Verdict that the Court will accept; and you shall be lockt up, without Meat, Drink, Fire, and Tobacco; you shall not think thus to abuse the Court; we will have a Verdict, by the help of God, or you shall starve for it (p. 17).

Now, it will be noticed, a new kind of refreshment has joined the list of normal comforts that can be withheld from jurors: tobacco, which had only recently become a fashionable indulgence in London. As if to preserve the maximal integrity of the four-term formula, *candle* has been nudged off the list to make room for *tobacco*. The account of the trial of Penn and Mead refers to still another convenience denied the jurors, but of which the older reports (perhaps out of delicacy) omit any mention: "The Court swore several persons, to keep the Iury all night, without Meat, Drink, Fire, or any other accommodation; they had not so much as a Chamber-pot, though desired" (p. 18).

Finally, the court held the jurors in contempt and sent them, along with the two defendants, to prison. That decree occasioned a separate court case that was equally important in the evolution of civil liberties and of the jury system, commonly known as *Bushell's Case*. Edward Bushell, one of the jurors in the trial of Penn and Mead, was the individual whom the judges identified as the jury's ringleader, although not its official foreman, and his name has clung to the habeas corpus appeal of the incarcerated jurors. In 1671, the court of common pleas ordered the release of the imprisoned jurors, declaring, in effect, that jurors could not be lawfully prosecuted or punished merely on account of the court's disapproval of their verdict.

At the end of the century, an American trial shows that the latest version of the four-term maxim had traveled across the Atlantic, with an English legal maxim being exchanged for American tobacco. In 1692 George Keith, a schismatic Quaker, along with three others, went on trial in Philadelphia, charged with seditious libel for producing certain pamphlets—for "Uttering & Spreading a Malitious and Seditious Paper . . . tending to the Disturbance of the Peace and Subversion of the present Government" and for encouraging "all manner of wickedness" (*New England's Spirit of Persecution*, 1693:4, 6, 9, 35). In hopes of shaming the Quaker magistrates and Quaker jury, Keith cited as a precedent or parallel the famous case of Penn and Mead. Angered by the acquittal of William Bradford, the printer of the pamphlets (Keith, their author, was convicted), the judges "sent forth" the jury, which had already deliberated forty-eight hours, with "an Officer commanded to keep them without Meat, Drink, Fire or Tobacco" (p. 36). The offending pamphlets were principally critical of "mainstream" Quakerism, and the sitting judges at the trial were Quaker ministers; Keith did not fail to note the disastrous consequences of such a comingling of church and state.

Not until 1870 did the English Parliament, by statute, make explicit that the prohibition against jurors' eating and drinking before a verdict was not absolute—

that the decorum of the jury room and the process of deliberation itself could still be maintained without the jury members' famishing. The obvious expedient, which had already evolved in common law, was to suspend the deliberations or adjourn the court and permit jurors to retire to a different location temporarily for food, drink, and other amenities. Here is the 1870 act of Parliament:

> Jurors, after having been sworn, may, [at] the discretion of the judge, be allowed at any time before giving their verdict the use of a fire when out of court, and be allowed reasonable refreshment, such refreshment to be procured at their own expense (1870, 33 & 34 Victoria, c. 77 §; in *Public General Statutes*, 1870:489).

CONCLUSION

Let us bring to an end this tour through legal, literary, and linguistic history—the tradition of certain attitudes toward, and sayings about, juries and their procedures—with some wise insights by the chief justice of the court of common pleas, Sir John Vaughan, whose lengthy and closely argued opinion (writing for the court) in the 1671 habeas corpus appeal of William Penn and William Mead survives (Vaughan, 1677:135-58). With their implicit faith in the fairness, justice, and good sense of common juries, Vaughan's declarations still resonate above the clamor of reformers hoping to ensure more and speedier convictions. The ruling explains why a jury's determination must prevail, even against the doubts of trial judges, even if the judges are convinced that the jury has usurped the province of "law" as distinct from "fact": The knowledge of the facts of a case must, in reality, *precede* the determination of applicable law. So, if a judge "by his own Judgment first resolve upon any Tryal of what the Fact is, and so knowing the Fact, shall then resolve what the Law is, and order the *Jury* penally to find accordingly," then "what either necessary or convenient use can be fancied of *Juries*, or to continue Tryals by them at all?" (Vaughan, 1677:143.) Under those assumptions, "Every man sees that the *Jury* is but a troublesome delay, great charge, and of no use in determining right and wrong, and therefore the Tryals by them may be better abolished than continued." However, Justice Vaughan warns, abolishing or extensively altering the system of trial by jury would be "a strange new-found conclusion" to an institution "so celebrated for so many hundreds of years." Although he was not explicit on the point, we may infer that the court's provision of reasonable amenities for the comfort of deliberating jurors must play a small but significant role in the proper functioning of a trial by one's peers, that "palladium" of justice that Blackstone extolled, "the grand bulwark" of our liberties.

The principal, limited aim of this historical survey has been to note how an old and seemingly odd—if not almost trivial or silly—rule of jurisprudential conduct acquired something of a life of its own, giving rise to certain traditional, formulaic expressions. As the content and application of the rule itself evolved, so too did the phrasing as the motif appears in legal and literary contexts. Perhaps because the actu-

al rationale for the rule, which is distinctively English, has never been wholly clear—whether to encourage efficiency in jurors' deliberations, to shield jurors from corrupting influences, to preserve decorum in the jury room, maybe even to save the court the expense of provisioning jurors—the rule itself fell under suspicion, and it came to exemplify a variety of actual or potential abuses of the judicial system and represent popular anxieties about that system: the possibility of hasty, ill-considered jury verdicts that would violate a citizen's right to a full and fair trial, or the power of overbearing, biased judges to coerce a verdict from jurors, themselves just ordinary citizens who become temporary prisoners of the court. Eventually those anxieties coalesced in the brilliant satiric aphorism by Alexander Pope, which, in turn, itself became something like a proverb or maxim epitomizing not only abuses of the common-law rule but also other sorts of malfeasance: lazy, self-indulgent, thoughtless, unjust behavior that can have deadly consequences. **jsj**

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