Juries

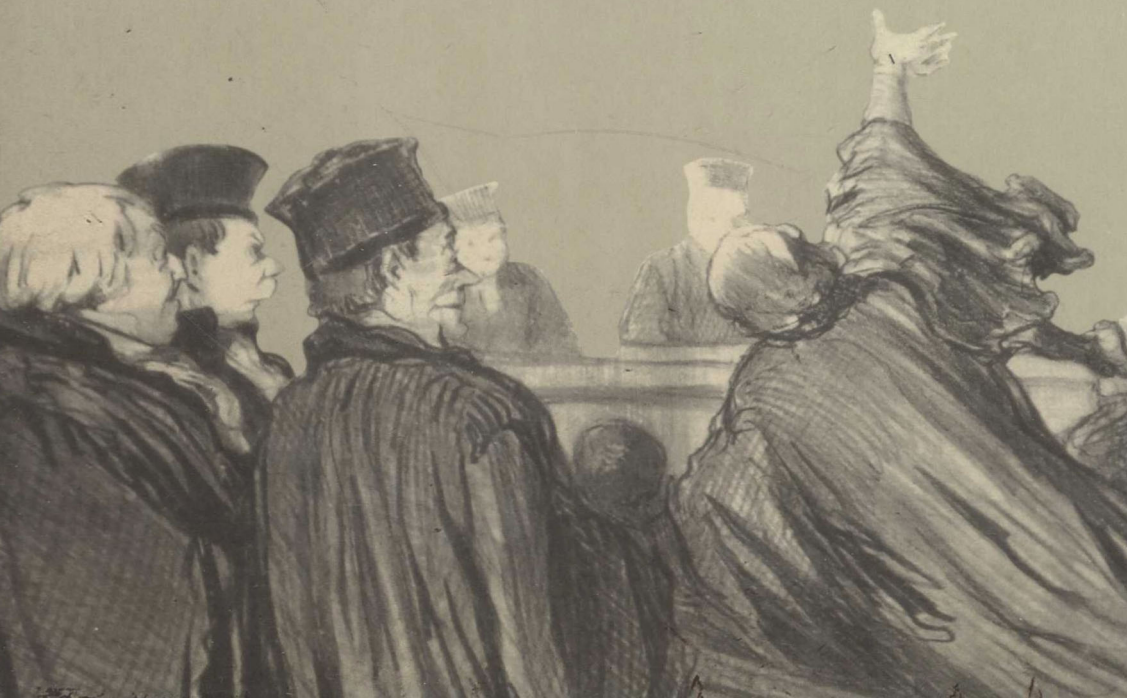
AND THE TRANSFORMATION OF

Criminal Justice in France

IN THE NINETEENTH

& TWENTIETH CENTURIES

JAMES M. DONOVAN



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in the Nineteenth & Twentieth Centuries

JAMES M. DONOVAN

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TABLES

ACKNOWLEDGMENTS

A number of individuals and institutions over the years have in some way contributed to or have helped to make possible the genesis and completion of this book. As a graduate student at New Mexico State University in the mid-1970s, I first became interested in the subject of criminality in nineteenth-century France when the late Edgar Leon Newman, my master's thesis advisor, suggested the topic of crime, revolution, and collective violence in France from 1825 through 1852. A few years later, when I was a doctoral student at Syracuse University, Cissie Fairchilds encouraged me to write an article on the behavior of French juries in the nineteenth century. As a consequence, by the early 1980s, my research agenda had come to focus on crime and justice in France in the nineteenth and twentieth centuries. After a series of papers and published articles, I became convinced of the importance of juries in changing the French penal system in the course of the nineteenth and twentieth centuries.

For this reason, I began work on the present book in 1998. Much of the research was done at the New York Public Library and at the Library of Congress. Penn State provided the necessary assistance through research grants and through the university's interlibrary loan system. I would also like to thank the College of the Liberal Arts at Penn State for providing financial support for the publication of the book.

As I approached completion of the first draft, Gregg Roeber, chair of Penn State's history department, suggested submitting the manuscript to the University of North Carolina Press Studies in Legal History series. I sent an abstract to Thomas Green, the Studies in Legal History editor responsible for non-American manuscripts. Tom's response was positive. It has been my good fortune to work with Tom, who has spent many hours making numerous excellent suggestions through a number of versions, which eventually resulted in a much better book. For this I am very grateful. Jim Whitman of the Yale Law School and Robert Allen of Stephen F. Austin State University both read the manuscript in its entirety and made many fine suggestions. Finally, I want to express my deep gratitude to my wife, Betty, for the support and encouragement she provided and for the sacrifices she made to help the book become a reality.

CONTENTS

INTRODUCTION

The institution of trial by jury is intimately connected with democracy. It is based on the assumption that ordinary citizens are capable of administering justice, just as they are capable of choosing their political leaders. Juries, by virtue of their relative independence, have also often been important protectors of the people's liberties. In France, Britain, and the United States, they have frequently acquitted persons accused of political, press, or speech offenses, to the chagrin of the authorities.[1]

"Jury nullification"—being defined as the exercise of jury discretion in favor of a defendant whom the panel nevertheless believes committed the act for which he or she has been charged[2]—has also been at times applied to the far larger numbers of persons tried for nonpolitical (or "routine") felonies. This does not mean that juries necessarily disregard evidence. But in other cases, juries may react against the strict letter of the law. In political cases, jury nullification usually grows out of political motives (resistance to tyranny, defense of a free press, opposition to the regime in power, and the like). In the case of routine felonies, it usually arises from the jury's belief that the penalties prescribed by law for certain offenses are too severe or from the panel's sympathy with some types of offenders or with offenders in particular circumstances. Jury decisions in routine felony cases also embody changing moral and social norms.

The aim of this book is to combine a broad political-institutional approach to the subject of jury behavior with an "internalist" legal approach that focuses on the technicalities of jury trial. One is a necessary corrective to the other. Historians who have focused on the broad political-institutional aspects have often had a strong bias in favor of class-based explanations of jury behavior. For example, those who have studied jury trial in nineteenth-century France have frequently claimed that conviction rates for property crimes were much higher than for violent crimes because nearly all jurors were bourgeois and were therefore especially tough on those criminals who threatened property. These historians cite as evidence overall judicial statistics on conviction rates for property crimes and violent crimes and data on the occupations of jurors. But a more careful look at the judicial statistics

and a close examination of contemporary legal sources show that there were other reasons as well for the differential having to do with legal issues, trial procedures, problems of evidence, and the subtle dynamics of jury trial. In fact, close study of these sources shows that bourgeois jurors were often surprisingly sympathetic to accused persons from the masses.

However, too great a focus on the legalistic internalist approach can also lead to distortions of perspective. For instance, contemporary jurists in nineteenth- and twentieth-century France usually saw "correctionalization"—that is, the downgrading of *crimes* (felonies), tried by the juries of the *cours d'assises* (courts of assizes), to *délits* (misdemeanors), which were tried by the three-judge panels of the *tribunaux correctionnels* (correctional courts)—as an administrative measure aimed at reducing the expense, cumbersomeness, and "incompetence" of jury trial in favor of a more rapid, streamlined, and efficacious procedure. But jurists paid little attention to the political reasons for correctionalization, especially under Napoleon III, who undermined jury trial in his pursuance of an authoritarian agenda.

A combination of broad political and internalist legal approaches is especially fruitful for understanding the behavior of juries in France since the Revolution. Until the middle of the twentieth century, the central dilemma there was the tendency of juries to acquit in cases where members of the legal profession believed it was appropriate to convict. In other instances, juries convicted persons on lesser charges than the most serious ones brought by the prosecution, again in cases where jurists thought that the evidence justified a different verdict. Something close to a consensus existed among legal writers (including officials of the Ministry of Justice) that juries were reacting against the harsh penalties prescribed by the Napoleonic *Code pénal*. It appears that in these cases, the panels were exercising a form of jury nullification.

But as Thomas A. Green notes, the term "jury nullification" needs to be carefully qualified.[3] It took various forms, though they were not always clearly distinguishable from each other. One form was rejection of the substantive law itself—that is, where the jury acquits an accused person because the panel believes the act he or she is accused of should not be defined by law as a crime. At least in France during the nineteenth and twentieth centuries, this form of nullification was mostly limited to political cases and usually grew out of resistance to laws seen as tyrannical or from defense of freedom of speech and press or opposition to the government. But far more common was sanction nullification, which was normally applicable to the much larger number of nonpolitical or "routine" felonies (homicide, infan-

ticide, theft, rape, and the like). In sanction nullification, the jury does not reject the law the defendant is accused of violating but either acquits or—in what this book defines as jury devices for leniency—finds the defendant not guilty of the most serious offense charged but guilty of a lesser included offense. There are two kinds of sanction nullification. One is a systemic refusal to convict at a high level for certain kinds of offenses, and the other is rejection of sanctions in a given case due to specific considerations (for example, sympathy for a particular defendant) where juries are otherwise generally willing to convict.

It is with the general rejection of sanctions that this book is chiefly concerned. One caution is that sometimes it cannot be known when juries objected to the law itself or to the level of sanction or to both. For instance, in homicide cases before 1832, juries often seem to have opposed the sanction (the death penalty), but they might also have done so because they believed there had been extenuating circumstances that the law did not then recognize.

The preponderance of evidence shows that sanction nullification was the predominant form of jury nullification in France during the nineteenth and twentieth centuries. Certainly, that was what contemporary jurists believed. For two centuries, the authorities dealt with jury resistance to sanctions through a series of legal and administrative reforms that on one hand granted to juries more extensive legal powers in the imposition of punishment and on the other hand removed more cases from their purview and ultimately destroyed their independence. Yet the important point about the French example is that it shows how through nullification, juries can profoundly modify the operation of the criminal justice system in ways never originally intended.

This had been true in England—the birthplace of the modern jury system—from the time the criminal trial jury was introduced there following the church's decree in 1215 forbidding priests to bless trials by ordeal.[4] From the thirteenth century through the early nineteenth and beyond, juries in that country often engaged in nullification either through outright acquittals or through jury devices for leniency.[5]

Jury nullification remained a central feature of the English criminal justice system until the parliamentary reforms of the 1830–40 era abolished capital punishment for many of the less serious felonies. Thereafter, jury mitigation of penalties became a far less common practice, and it largely passed from public consciousness, save in celebrated cases.[6] Until modern times, it also largely passed from the consciousness of most historians, who,

when they dealt with the concept of jury nullification at all, generally focused on its application to political cases, as examples of resistance to the authorities.[7]

In the last few decades, however, the rich history of jury discretion in England has been rediscovered by historians, and a considerable literature on it has been developed. Several historiographical trends have been responsible for this rediscovery. They include the rise since the late 1960s of social history, of "history from below," which among other things is concerned with what the actions of those who violated the criminal laws reveal about the wider society.[8] Then in the 1970s, "labeling" theory, borrowed from sociology, became influential. It held that an act was not "deviant" or criminal because of its own quality but rather because of the application by others of rules and penalties to the "offender."[9] Some social historians were influenced by British sociologists who revived Marxist theories of the state, with their "questions about how, why, and whether the state was the tool of a particular class."[10] Moreover, legal historians, who focus on changes in the law and in the legal system, began to do more research on the operation of the criminal justice system in the eighteenth century. All of these historiographical trends encouraged not only the study of crime but also the study of the machinery of justice.[11]

This included discretion in the imposition of punishment. Historians of the criminal justice system in England found that juries before the early nineteenth century often mitigated penalties through their verdicts. In the 1980s and after, scholars such as Thomas Green, J. M. Beattie, Peter King, and John H. Langbein have shown that juries in England from the Middle Ages through the eighteenth century repeatedly rendered verdicts that reflected social norms and popular conceptions of justice that were not always in agreement with the law. Jury devices for leniency were especially common during the eighteenth century, when many property crimes had become punishable by death. Jurors frequently convicted property offenders of lesser crimes than those for which they were tried in order to save the necks of prisoners they thought did not deserve to die. Rather than fight juries, authorities in England accommodated themselves to the panels' standards of justice, either through recommendations for leniency from the bench or through changes in the law.[12]

Yet just as jury mitigation of the law was becoming a relatively infrequent phenomenon in England, it was beginning to play a very important role in the criminal justice system of France. Green's statement that from the time the jury system was introduced in England, "both jury-based mitigation

and a struggle to limit its reach were virtually inevitable"[13] was equally applicable to France after the jury was introduced there in 1791.[14]

Jury mitigation of punishment in France was facilitated by the fact that juries there answered a series of questions rather than rendered general verdicts. These questions included: Did the crime occur? Was the accused guilty of it? Did he or she intend to commit it? Were there aggravating circumstances or (after 1832) extenuating circumstances?[15] It would appear that since they answered a series of specific questions, jurors in France were less able than English ones to "bury" or conceal sanction nullification within a general verdict. But the answers to the specific questions were themselves sites for concealed sanction nullification, though the authorities were not fooled. For example, the Ministry of Justice claimed that in the early nineteenth century, juries often lightened penalties for the persons they convicted by answering "non" to the question of whether there were aggravating circumstances, even when these circumstances were very well proven.[16]

Again as in England, the authorities accommodated themselves to the juries' notions of justice through the bench's association with jury leniency in punishment and through statutes reducing penalties for certain crimes. But where in England the authorities eventually reduced jury recourse to extralegal mitigation of punishment by reforming sanctions, in France they sought to do so by granting to the panels a share in the power to determine penalties legally. An important act of 1832 allowed the panels to find legally mitigating circumstances (and therefore obliged the court to reduce the penalties) for persons found guilty of felonies. This reform was aimed at reducing acquittals and extralegal jury devices for leniency allegedly brought about by the panels' desire to spare culprits from the harsh and rigid punishments stipulated in the *Code pénal*. But the 1832 law did not require juries to give their reasoning,[17] and there is much evidence that they thereafter often used the law to practice sanction nullification through finding extenuating circumstances where they did not exist. In 1932, another law was passed giving to juries a direct and predominant share in determining the penalty. The result was that juries did much to replace an Enlightenment-inspired penal system of rigidly fixed punishments equally applicable to all offenders convicted of the same crime with a highly discretionary one that to some extent resembled that which had existed in England in the eighteenth century.

To American readers, a major means through which juries achieved this outcome—"partial verdicts"—may not seem a praiseworthy feature of the French justice system. They could be seen as providing lawyers with op-

portunities to manipulate juries for the defendants and are not a "norm" in the American justice system, in the sense that they are not openly encouraged in the courts. Certainly, to Anglo-American readers, the French system may appear perplexing. That partial verdicts were so common, open, and tolerated in France may seem surprising to them. But the key to understanding the French system is that its jury fact-finding procedure, with its series of questions rather than general verdicts, was designed to fit the level of punishment to what juries believed proved under French law. This gave the panels much leeway, especially after 1832 through the finding of legally mitigating circumstances. Such a system of fact-finding easily facilitated partial verdicts to achieve leniency in punishment. To some extent, the authorities tolerated this rather than reduced the severity of punishments through statutory law.

No systematic analysis of how juries did so much to create a highly discretionary penal system in France in the course of the nineteenth and twentieth centuries has been undertaken before. Certainly, articles and portions of books have appeared that have dealt with aspects of jury behavior in France during certain periods and with respect to certain crimes (for example, abortion, infanticide, violent crimes, theft, political and press offenses, and so on).[18] But no comprehensive study of the influence of juries on punishment or on the transformation of penal law in France during the nineteenth and early twentieth centuries has yet been published.[19] This book is such a study.

It should not, however, be assumed that juries were always or necessarily barometers of public opinion in France. Jury decisions were probably less representative of public mores in some cases than in others. The composition of the panels was very unrepresentative of the population as a whole, due at least in part to the fact that jury service in France was rarely acknowledged in theory as a right, and was almost never so in practice, until 1980, when jurors were finally designated by lot from electoral lists under a system of full suffrage.[20] It was usually regarded as a judicial function to be carried out not by all citizens but only by those who were "bons jurés" or assumed to be most "capable" of judging, and this meant that most jurors were bourgeois. During much of the nineteenth century, only wealthy or well-to-do men—the *notables*—served on juries. Even when the *notables* no longer dominated the panels after about 1880, male bourgeois property-owners continued to account for most jurors. Therefore, it can be argued that juries reflected the opinions of these elites only, the same elites that until 1848 monopolized the franchise.

Yet they were elites that, when they sat on juries, were often merciful to

the generally lower-class people they tried. Upper- and middle-class jurors have not always been biased against or ferocious toward accused persons from the bottom levels of the social hierarchy, and they have often extended to them the benefits of sanction nullification. This is known from English experience. In England during the eighteenth century, property qualifications for jurors ensured that they came from at least the top half of the adult male population in terms of wealth, and much more likely from the top third or fourth.[21] Yet nearly all the people they tried came from segments of the population too poor to qualify for jury duty.[22] Jurors, however, often convicted defendants of lesser charges than the most serious ones brought by the prosecution for property crimes and thereby saved a significant number of lower-class defendants from the noose.

French jurors (at least before the end of the nineteenth century) came from an even more restricted group (less than 1 percent of the population during the era from 1815 through 1848). Yet they also delivered verdicts that mitigated the harshness of the law for many of the generally poor defendants.

Just why this was so is something of a mystery, especially in a country, such as France, where class conflict was so evident in the nineteenth century. Perhaps *notables* as jurors wanted to retain the goodwill of the masses in the provinces. Douglas Hay, writing of judges in eighteenth-century England, claims that they frequently granted pardons to persons condemned to death because popular opinion would not have tolerated the large number of executions that would have resulted from the strict application of the penal laws, and the "gentry were aware that their security depended on . . . belief in the justice of their rule."[23] Such a belief might have been behind certain jury decisions, too, in eighteenth-century England and nineteenth-century France.

But the analogy should not be taken too far. In nineteenth-century France, authority was much more contested than in eighteenth-century England. A more probable explanation for interclass jury sanction nullification in France is that *notables* as jurors were faced with the trials of individuals, not classes. Evidence from data on trial verdicts and the observations of contemporaries suggest that the *notables* who cheered the government's brutal suppression of the working-class insurrections in Paris and Lyon in 1831–34 and during the June Days uprising in Paris in 1848—rebellions that presumably so frightened the upper classes on the generalized political level—could be merciful as jurors when faced with individual defendants from the lower classes charged with routine felonies and whose particular circumstances rendered them worthy of mercy. For example, panels of

notables found extenuating circumstances for the overwhelming majority of persons they convicted of theft by a servant, though jurors came from the classes that customarily employed servants and were most exposed to this potential danger within their homes. Perhaps not surprisingly, they may have felt a degree of mercy for a servant who was faced with at least five years' imprisonment (when extenuating circumstances were not found) for stealing something of trivial value from his or her employer.

Juries of *notables* also frequently were moved to mercy for the generally poor, unmarried, seduced, abandoned women accused of infanticide, who had so often been dismissed from their jobs, were usually without resources, whose options in dealing with illegitimate births were limited, and who were even prevented by law from getting any financial support from the fathers of their infants. Rarely did jurors, faced with these women as pitiable individuals, want to send them to the guillotine. Juries of *notables* in addition found first-time offenders accused of routine felonies in general often worthy of mercy.

Nor did governmental intrusion into the jury selection process significantly compromise the panels' independence from the authorities in the trials of political and press cases. The French were keenly aware of the political implications, and the potential for bias, when laws were proposed to change the qualifications of jurors or to change the officials who drew up the annual jury lists. This awareness was heightened by the fact that nearly every new regime changed the laws governing the selection of jurors to favor its supporters. Parliamentary debates of the nineteenth century clearly reflected this awareness. For instance, in the debate over the jury composition law of 1872, liberals in the National Assembly protested against the great authority the act gave to the judiciary in the drawing up of jury lists. This was because the liberals strongly distrusted a judiciary dominated by conservatives and assumed to be too much influenced by the prosecution and by the government.

Liberal fears of judicial bias against political and press defendants were not unfounded. A number of modern historians have claimed that the French judiciary of the nineteenth century was to a considerable degree politicized.[24] The judges of the bench were appointed by the minister of justice. Like most jurors (at least before the 1880s), most judges were well-to-do *notables*. They had to be. Both the *magistrature debout* (prosecutors and their assistants) and the *magistrature assise* (judges of the bench) were required to have law degrees and to have served for two years as *stagiaires* (trainees in a law office). Because study of the law was a lengthy process, scholarships were few, and *stagiaires* were usually unpaid, generally only

well-to-do men could provide their sons with legal training. Moreover, lower-level judges received meager salaries. That meant they had to have considerable outside incomes in order to maintain the standard of living expected of magistrates.[25] Unlike prosecutors, who enjoyed no security of tenure, judges of the bench were supposed to be irremovable according to laws of 1810 and 1852.[26] However, their irremovability was compromised from time to time when new regimes came to power and sought to purge, at least to a limited extent, the partisans of the preceding regime from the magistrature.[27] Judges also had to be politically well-connected to secure promotion.[28] This meant that in political cases, judges (who were mostly conservatives before the 1880s) were not always impartial.[29] Judges of the bench, much more than jurors, tended to take the government's side in political and press cases.[30]

But judges found it especially difficult to control juries in political and press cases. It was also remarkable how little the repeated attempts by succeeding regimes to change jury selection rules and procedures altered the juries' proclivity to nullify in political and press cases. The panels were indeed the "palladium of liberty," for they constituted the chief guardians of freedom of expression in France. Whenever juries were allowed to try persons for crimes of opinion (*délits politiques et de presse*)—during most of the Revolution, 1819–22, 1830–51, and after 1870—they either acquitted most of the defendants or (after 1880) convicted a slim majority, but at a rate still well below that for ordinary felonies. Historians have tried to explain the frequent acquittals for political and press offenses, but they have done so only for separate periods, or for several adjoining ones. They have also tended to see the acquittals as manifestations of opposition to the regime in power, for the authorities who drew up jury lists were by no means able to always exclude government opponents from juries.[31]

But no explanation has been provided for the consistency of jury behavior in political and press cases through every regime that allowed jurors to try them. One reason for the persistence of frequent acquittals may have been the relatively high social status of many of the persons accused of *délits politiques et de presse*—journalists, editors, printers, writers.[32] These were not ordinary thugs, and the bourgeois jurors were often lenient to bourgeois defendants. Several other possible reasons for the persistence were interrelated—the often vague nature of the charges in political and press cases, the frequent changes of regime, and the lack of legitimacy of successive governments.

During the nineteenth century, juries in political and press cases were expected to rule on such charges as "inciting hatred and contempt of the gov-