Rita James Simon

The Jury & the Defense of Insanity

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Transaction Publishers
New Brunswick (U.S.A.) and London (U.K.)

Originally published in 1967 by Little, Brown and Company.

This book is printed on acid-free paper that meets the American National Standard for Permanence of Paper for Printed Library Materials.

Library of Congress Catalog Number: 98–17014
ISBN: 0–7658–0447–6
Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Simon, Rita James.
The jury and the defense of insanity / Rita James Simon.
p. cm.
Originally published : Boston : Little, Brown, 1967.
Includes bibliographical references and index.
ISBN 0-7658–0447-6 (pbk. : alk. paper)
1. Insanity—Jurisprudence—United States. 2. Jury—United States. I. Title.
KF9242.S5 1998
345.73'04—dc21 98-17014
CIP

PREFACE

Rita James Simon's book on the jury and the defense of insanity in criminal cases is a result of the large-scale study of the American jury system undertaken at the University of Chicago Law School pursuant to a grant from the Ford Foundation and a special grant from the National Institute of Mental Health. We are pleased to add the book to that special shelf containing *Delay in the Court* (1959) and the *American Jury* (1966).

The study reports in depth on a series of jury *experiments.* It occupies a key place in the over-all Jury Project and demonstrates the richness of the Project's methods. If we may quote ourselves from the preface to *The American Jury:*

"One strength of the project was that it permitted multiple lines of inquiry. Aside from studying judge-jury differences by surveying the totality of the jury's business, we conducted experiments on sharply defined issues, such as the jury's handling of the defense of insanity, the impact of insurance, the response to the contributory negligence rule; conducted post-trial interviews, both in extended free-flowing conversations and with structured questionnaires; and examined jury selection procedures and voir dire strategies. We also conducted opinion polls on the jury among judges, lawyers, and the community at large. And we made the investigation of the costs of the jury system which led to *Delay in the Court.*"

The chance to use a variety of approaches enables us to corroborate findings and thus escape the unavoidable limitations of a single research method. Experiments on human institutions are rare, and, as a rule, highly artificial. The jury experiments are distinguished by an exceptional degree of realism involving real jurors in a real court, allowing us to have confidence in the validity of their results.

For the study of the jury, the experimental method has some major consequences. First, it makes it possible literally to try the same case over and over again to different juries and thus gives content to the notion that the outcome of a trial is but one in a series of possible outcomes and that it remains to some extent a matter of chance, depending on which jury hears the case. Second, it makes it possible to experiment in the precise sense of the sciences by injecting deliberate variations into the trial record to test what effect, if any, they have on the verdict. Mrs. Simon thus was able to learn how verdicts change if the testimony of expert psychiatric witnesses is varied in quality or, more centrally, if the traditional *M'Naghten* instructions on insanity are replaced by the instructions developed in the controversial *Durham* case.

The experimental method also gives the student of the jury access to important new aspects of his topic. We can, this time with propriety, record jury deliberations and thus place under scientific scrutiny the small group dynamics of the deliberation process — how the jury talks and thinks. We can also trace the relationships between the backgrounds of individual jurors and the ways they vote, thus testing the trial lawyer's hunches as to who makes "a good juror" for given purposes. And, finally, access to jury deliberations discloses a good deal about the popular sense of justice with respect to insanity and crime.

The two books, the Simon study and the Kalven-Zeisel study, intersect in a striking way. The broad survey, which was the foundation for *The American Jury,* rests on 3576 different cases. This experimental study rests essentially on two cases. Behind this contrast in numbers lies a fundamental point of method. The weakness of the survey is that it never tells us enough about the individual case; the weakness of the experiment is that it never tells us enough about other cases, and thus limits the possibility of generalization. This difference is particularly acute in the social sciences, where the multitude of relevant factors is so complex.

A special word should be said about the contribution of Fred S. Strodtbeck to this book. He developed, as a workable

method, the experimental jury technique on which the book relies so heavily; he guided the design, the data collection, and the early stages of the analysis. Under his supervision the Project has done other experimental sequences; it is hoped to report these out at some future date.

Given the vagaries of Project organization and career plans, it has been Mrs. Simon's task to write up her study away from the University of Chicago, with only occasional advice and counsel. To a distinctive degree, the book represents her own personal effort and achievement.

The book adds to our knowledge about the jury, and is the first systematic study of how the jury behaves behind the closed doors of the jury room. But for us the fascination is that it permits us to be spectators at close range as the common man struggles with the perennial perplexities of personal responsibility.

HARRY KALVEN, JR. HANS ZEISEL
The University of Chicago Law School

March 1967

ACKNOWLEDGMENTS

Many individuals and organizations helped make this study possible. The Ford Foundation and the National Institute of Mental Health provided the funds.* Members of the Jury Project staff at the Law School of the University of Chicago worked with me in preparing the transcript, recording the trials, and collecting the data. Those on the staff to whom I owe special debts of gratitude are Lee Hook for his statistical advice, Kathleen Beaufait for her help in supervising the field teams and for reading and discussing with me earlier drafts of the manuscript, and Charles Hawkins and Ellen Kolegar for their help in collecting and processing the data. Lauren Hickman and Margaret Parkman also helped collect data.

In his capacity as director of the Experimental Section of the Jury Project, Fred L. Strodtbeck provided immeasurable assistance and valuable advice. The idea of using real jurors and exposing them to recorded trials was his. He first employed this technique in a study of civil juries. Both Fred Strodtbeck and Harry Kalven, director of the Jury Project, reviewed earlier drafts of the manuscript. Especially after I began working on the final draft, Harry Kalven's advice and suggestions contributed a good deal toward making this a more readable manuscript. Hans Zeisel also read the manuscript and made many useful suggestions.

Members of the Sociology Departments at Washington University and the University of Minnesota were helpful in recommending graduate students who assisted me and others on the jury project when we were working in the courts in St. Louis and Minneapolis.

* National Institute of Mental Health research grant M2202(C2).

Other individuals to whom I owe debts of gratitude are Dr. Winfred Overholser, who helped select the incest trial as a vehicle for experimentation; Dr. Manfred Guttmacher, who assisted in the preparation of the model testimony; Judge David L. Bazelon and Justice Abe Fortas, who helped me better understand the legal context in which to place the Durham decision; and Judge John Biggs, Jr., for the information I received in conversations with him and from reading his book, *The Guilty Mind*. Much of the discussion in Chapter 1 (the legal history) is based on *The Guilty Mind*.

I especially want to thank Mike McGarry for being the most capable and efficient typist any author could wish for.

Finally, I owe two special debts of gratitude. One is to my husband for reading the manuscript innumerable times, for offering criticism and advice that were extremely valuable, and, most of all, for being patient and understanding during difficult periods. He showed an extraordinary willingness to continue to suggest ways for improving the text even after he saw many of his ideas brushed aside or ignored. I have no doubt that had I incorporated all of his suggestions the manuscript would have been much improved.

The other debt is to the subjects who participated in this study — the jurors. Without their cooperation and their willingness to participate fully in the task, this study would not have been possible. Much of the book is dedicated to showing the nature and quality of their participation, and in large measure the validity of this work is a reflection of the quality of their performance.

R. S.

April, 1967

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The Jury and The Defense of Insanity

Introduction to the Transaction Edition

When I read the introduction I wrote over thirty years ago to *The Jury and the Defense of Insanity* I was struck by how many of the issues raised then about the jury system are relevant and pertinent today. Issues about how motivated and competent juries are to do their job, about how well jurors understand and follow judges' instructions, their understanding of expert testimony, and the extent to which their own backgrounds and experiences bias them in favor of or against certain defendants or plaintiffs are issues that are still being debated today. And still, after a jury renders its verdict in a highly publicized trial, such as the trial of John Hinckley when the jury found him not guilty by reason of insanity in his attempted assassination of then President Ronald Reagan, and the not guilty verdict reported by the jury in the O.J. Simpson criminal trial, there are demands for doing away with the jury system. Over the years more countries have followed the British (India, Australia, Canada) in reducing or discarding the jury in civil and most criminal cases.

The Jury and the Defense of Insanity provides a rare opportunity to observe how jurors go about the process of deliberating and reaching a verdict by following them into the jury room and recording their deliberations. The introduction that follows, with minor editorial changes, is the one that appeared in the 1967 publication.

This book provides a legal and social psychological perspective on the American jury system. More particularly, it is a study of the jury's reactions to criminal cases involving the

defense of insanity. It is a legal study in that it is concerned with important legal questions: namely, rules of law, expert testimony, commitment procedures, and juror selection. It is a social psychological study because it focuses primarily on the factors that influence the opinions and decisions of individual jurors and juries as collective units. It examines (1) the relationship between the social psychology and economic background that jurors bring with them to the trial and the opinions they have about the case; (2) the information presented during the trial, especially the testimony of experts and the rules of law and verdicts; and (3) the relative influence of different persons on the jury in persuading others to accept their view of the case.

The study also examines the jury as an institution by noting how responsive it is to the expectations of the judiciary and of the larger community. The most basic of these expectations is that the jury will do its job and reach a decision. Hung juries are expensive and time consuming. In reaching its decision, the jury is expected to adhere to some generally prescribed rules of law about burden of proof, extent of proof, and weighing of testimony. The jury is also expected to use the substantive instructions applicable to the particular case and charge. The jury is expected to spend its time discussing the case, not listening to a baseball game, reading a newspaper, or talking about a coming political campaign. In our analysis of the jury as an institution, we report how the participants in the system respond to these various types of demands.

Most of us are impressed with the role that the criminal jury has played historically in the development of Anglo-Saxon democracy. But few of us know very much about how a jury actually goes about deciding to acquit or convict a person accused of a crime. A unique quality of this research is that it describes how the jury determines its verdicts by following the jurors from the courtroom into the jury room. Inside the jury room, it listens to the jury consider the evidence, the experts' opinions, the circumstances surrounding the crime,

and the rules of law. It compares the opinions that an individual juror has about the trial with the juror's social background, his personality, and his participation in the deliberation. It also tries to evaluate the importance of the institutional setting, namely, the courtroom, and the assumption of the role of juror on the individual opinions and on the collective decision.

Criticism of the jury[1]

The jury system is important in our society for symbolic as well as for practical reasons. It is important symbolically because it represents a basic democratic belief in the intelligence of its citizenry to decide and to rule. It is important realistically because it makes decisions that affect major institutions and that may affect you and me.

The roots of the American jury system are traceable to ninth-century France and later to England when it was imported by William the Conqueror. In its earliest form in England and in France, a jury was a group of the defendant's neighbors who were expected to answer questions as both witnesses and triers of fact.

In its earliest days on American soil, especially prior to Independence, the jury was the champion of the popular cause. In the words of Jerome Frank, a critic of the modern jury system,[2] "the jury was considered . . . as a bulwark against oppressive government, acclaimed as essential to individual liberty and democracy." After the Revolution, the right to trial by jury was guaranteed by our federal Constitution and by the constitutions of the separate states. So it remains today.

But over the past century, particularly in the last three decades, the jury has been used less and less frequently. In En-

[1] For a summary of the debate over the strengths and weaknesses of the jury system see Kalven, The Dignity of the Civil Jury, 50 Va. L. Rev. 1055 (1964), and Kalven and Zeisel, The American Jury (1966); also see Broeder, The Functions of the Jury, 21, U. Of Chi. L. Rev. 390 (1954).

[2] Frank, Courts on Trial 108 (1963).

gland it has been virtually abandoned in civil actions and is used only in major criminal cases. In the United States it is used much more widely but is subject to ever-increasing criticism. Since the results of our study are generally favorable to the jury, we think it appropriate to highlight some of the major criticisms that have been offered against the jury.

At the core of the criticism is the belief that the jury does not determine its verdict on the basis of the evidence and that the members of the jury do not have the special skills and training that are needed to make a rational decision about the kinds of disputes with which they are confronted. Some critics of the jury urge its replacement by a body of persons selected on the basis of their expert knowledge of the particular issues raised by a given case, or by a bench trial in which the judge would be free to seek the advice and guidance of experts.

Some critics would replace the jury only when the complexities of a contract dispute, an antitrust action, or the medical questions involved in a plea of insanity case are to their minds beyond the purview of the general public. But those who would abolish all jury trials argue that the application of law is too difficult for laymen. They believe that the court's instructions to the jury concerning the rule of law, the testimony of expert witnesses, and the distinction between evidence and opinion are beyond the comprehension of a jury, and that the jurors come into the courtroom too burdened with the weight of their own business to listen to evidence.

In 1954, Carl Becker, a noted historian and student of American institutions, had this to say about the jury system:

> Trial by jury as a method of determining facts is antiquated and inherently absurd—so much so that no lawyer, judge, scholar, prescription-clerk, cook, or mechanic in a garage would ever think of a moment of employing that method for determining the facts in any situation that concerned him.[3]

[3] Id. At 124.

In 1937, Osborn, a noted legal scholar and observer of many jury trials, wrote:

> When a groups of twelve men, on seats a little higher then than the spectators, but not quite so high as the judge, are casually observed it may appear from their attitude that they are thinking only about the case going on before them. The truth is that for much of the time there are twelve wandering minds in that silent group, bodily present but mentally far away. Some of them are thinking of sadly neglected business affairs, others of happy or unhappy family matters, and after the second or third day and especially after the second or third week, there is the garden, the house-painting, the new automobile, the prospective vacation, the girl who is soon to be married and the hundred and one other things that come to the mind of one who is only partly interested in the tedious proceeding going on before him. There is probably more wool-gathering in jury boxes than in any other place on earth. . . . It is plainly said by those whose opinions command the utmost respect that the administration of the law in this land is on a lower plane than other phases of government and is unworthy of the civilization it poorly serves.[4]

Another group of critics do not focus their objections on the institution per se or on the formal procedure by which it is expected to reach its decision but on the method of selecting persons for jury service and on the personnel that composes the typical jury. They observe that in many localities persons who are officially exempt from jury service or who are most easily excused to perform effectively. For example, professional men and women are exempted from jury duty in almost every jurisdiction.

One critic noted that:

> The democratic process itself seems designed to ensure the legislative exemption of persons most capable of resolving factual disputes. Jury service often involves bearing economic

[4] Ibid.