JURY TRIALS

by

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and

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It goes without saying that the views expressed in this book remain ours alone and should not be taken as the views of the

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JOHN BALDWIN
MICHAEL MCCONVILLE

Birmingham 1978

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JURY LORE AND JURY LEARNING

IT is customary to begin books on the jury by referring to the extravagant views that have been expressed over the centuries about that institution. Juries, it seems, provoke comments which are frequently little short of hysterical. One would in fact be hard put to it to locate within the immense literature on juries a truly moderate expression of opinion on the subject. Opponents and defenders seem to have been locked in a bitter struggle in which everyone takes sides. Despite this controversy, which has in recent years intensified, the jury system remains the corner-stone of the criminal trial both in England and in the United States. It is the existence of the jury which in large measure explains many of the procedures (that might at first sight seem archaic) that fashion the trial process and, even though only a small minority of defendants in criminal trials opt for trial by jury,[1] the right to jury trial is still regarded as fundamental in all cases involving major criminal charges.[2]

The reason the jury generates such strong antipathy in certain quarters is not hard to find. Indeed, the very conception of a jury might be thought absurd. Twelve individuals, often with no prior contact with the courts, are chosen at random to listen to evidence (sometimes of a highly technical nature) and to decide upon matters affecting the reputation and liberty of those charged with criminal offences. They are given no training for this task, they deliberate in secret, they return a verdict without giving reasons, and they are responsible to their own conscience but to no one else. After the trial they melt away into the community from which they are drawn. Put in this way, the vilification that has sometimes been poured on the jury is

[1] Most defendants, both in England and in the United States, plead guilty and the vast majority of cases are in any event disposed of in the lower courts without a jury.

[2] If an accused in England pleads not guilty in the Crown Court (the higher criminal trial court), he must be tried by jury. The position in the United States is more complex: see Simon and Marshall (1972).

readily understood. Oppenheimer (1937), for instance, argues as follows:

> We commonly strive to assemble 12 persons colossally ignorant of all practical matters, fill their vacuous heads with law which they cannot comprehend, obfuscate their seldom intellects with testimony which they are incompetent to analyse or unable to remember, permit partisan lawyers to bewilder them with their meaningless sophistry, then lock them up until the most obstinate of their number coerce the others into submission or drive them into open revolt. (p. 142.)

The attacks that have been launched against the jury have been at all times countered with equal passion by its defenders. According to Blackstone, for example, trial by jury

> ... ever has been, and I trust ever will be, looked upon as the glory of English law . . . The liberties of England cannot but subsist so long as this palladium remains sacred and inviolate. (iii.379, iv.350, 17th edition, 1830.)

Other supporters of the jury argue that it is the safeguard of liberty,[3] that it is an essential check on unpopular laws,[4] that it is the best means for establishing truth,[5] and that it introduces into the law an element of community sentiment and fairness.[6] Critics claim that the jury is not, nor ever has been, any protection against oppressive government,[7] that it sometimes shows a wilful disregard for the law,[8] that it lacks practical expertise and introduces as much prejudice as good sense into its decisions.[9]

[3] Thus, for example, Lord Devlin (1956), in a celebrated passage, writes: '. . . no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.' (p. 164.)

[4] See Humphreys (1946) at p. 159, and Kadish and Kadish (1971).

[5] Lord du Parcq (1948) said, for instance, 'When questions of fact have to be decided, there is no tribunal to equal a jury, directed by the cold impartial judge.' (p. 10.)

[6] 'A jury can do justice where a judge, who has to follow the law, sometimes may not', Lord Birkett, *The Times*, 14 June 1958. See also Forsyth (1852) at pp. 430–1; Pound (1910) at p. 36; and Wigmore (1929) at p. 170.

[7] Jennings (1959) wrote that 'a jury is small protection for minority opinion' (p. 268); see also Jackson (1945) at p. 92 *et seq.*; Williams (1963) at p. 260; and Note, *Yale Law Journal* (1970).

[8] See Frank (1930) at p. 172, and Newman (1955).

[9] A distinguished lawyer is quoted by Frank (1949) as saying: 'Our own boasted trial by jury, which affirms that all grades of capacity above drivelling idiocy are alike fitted for the exalted office of sifting truth from error, may excite the derision of future times.' (pp. 138–9.)

One of the most striking features of this debate, at least until very recently, has been the basic lack of evidence adduced to support either side. Some of the questions at issue, such as that concerned with the jury as a protector of liberty, do not lend themselves to scientific inquiry. Arguments about such matters tend, therefore, to be based not upon what might be regarded as evidence but upon belief, opinion, hunch, or sheer prejudice. This in no small part explains the bitterness of the dispute and also its fundamental sterility. Other questions at issue, such as the competence of the jury as a fact-finding tribunal, seem to be questions on which evidence can be brought to bear and it is with such questions that we shall be concerned in this book. Some evidence, in the form of testimony derived from those observing jury trial or participating in it, has been amassed over the years and tends to demonstrate a general ability on the part of the jury as a trier of fact. Such material, based upon individual experience, does not allow generalizations to be safely made (except about those who have advanced the testimony) but the bulk of it points in one direction. For example, judges have been prone, virtually without exception, to assert that juries are extremely competent triers of fact. Thus, in England, Lord Halsbury (1903) said, 'As a rule, juries are, in my opinion, more generally right than judges', and recently Lord Salmon (1974) put the point even more forcefully:

> A perverse verdict wrongly acquitting a guilty man is naturally galling and discouraging, but such a verdict is, in my experience, very rare. During the seven years in which I was a judge of the Queen's Bench Division, I must have presided at hundreds of criminal trials all over the country. I doubt whether I had as many as six cases in which the jury failed to convict when I thought that they should have done so. Thinking about those cases afterwards, I concluded that in most of them, there was a good deal to be said for the jury's point of view. I do not believe that, after all, there is more than about two per cent of the men brought to trial who are wrongly acquitted. (p. 5.)

His confidence that judges and barristers in general would be overwhelmingly in favour of retaining juries[10] is supported by information gathered from judges by Lord Parker.[11] Sentiments

[10] Lord Salmon (1974) at p. 7.

[11] This information is reproduced by Kalven and Zeisel (1966) in Appendix C.

of a similar nature have been voiced elsewhere.[12] Speaking of his experience as a judge in Australia, for instance, Hale (1973) said that he had almost invariably found himself in basic agreement with the verdict of the jury. Indeed, on those occasions on which he would himself have reached a different verdict, he thought the jury had, with only one exception, reached a conclusion that was entirely open on the evidence. An American judge, Hartshorne (1949), took a more systematic interest in the jury. Over a twelve-year period, he kept a record of jury verdicts in civil and criminal cases over which he had presided, together with his own opinion on each verdict. On analysis, he concluded that the jury's verdict was unquestionably right in at least 85 per cent of all cases. A national poll of over a thousand trial judges in America by Kalven (1964) provided further evidence that judges viewed the performance of juries very favourably. All this must be taken as evidence, if only impressionistic evidence, that judicial confidence in the jury has been, and remains, on the whole extremely high.[13]

Limited surveys have been conducted in the United States using subjects who had actually sat on a jury but these exercises have tended to produce somewhat disparate results. Hunter (1935), for example, found that jurors often misunderstood the relevant legal concepts and rules or else did not apply them properly. Hervey's study (1947) also showed that almost 40 per cent of jurors said that they did not fully understand the judge's instructions to them. Other researchers have found considerable confusion in the minds of jurors.[14] Contradictory findings emerged in the report of Moffat (1945), who found that most jurors appeared to understand the judge's instructions with a

[12] The present Lord Chancellor, Lord Elwyn Jones, wrote that, in his long experience, he could remember only one case in which he had doubts about a conviction by a jury: *The Times*, 10 November 1973. Support for this position is to be found in numerous other sources: see particularly Nizer (1946); Elgrod and Lew (1973); Clarke (1975); Emmet (1974); Corboy (1975); and Joiner (1975).

[13] However, the most notable opponent of the jury was himself a judge—Jerome Frank. Frank (1930) said: 'The jury, then, are hopelessly incompetent as fact-finders. It is possible, by training, to improve the ability of our judges to pass upon facts more objectively. But no one can be fatuous enough to believe that the entire community can be so educated that a crowd of twelve men chosen at random can do, even moderately well, what painstaking judges now find it difficult to do . . . The jury makes the orderly administration of justice virtually impossible' (pp. 180–1.) Frank's views on trial by jury are summarized in Paul (1957).

[14] See, for example, Wanamaker (1937), and Hoffman and Brodley (1952).

reasonable degree of clarity,[15] and that of Brand *et al.* (1947) who noted that there was almost unanimous agreement amongst jurors that the average juror was reasonably intelligent and honest and that trial by jury produced just results based primarily on the facts of the case. No clear picture, then, can be said to have emerged from these studies mainly because such limited attitude surveys in no way represent an assessment of the performance of the jury. Furthermore, since views have been sought only from individual jurors, it is not possible to make any evaluation of how the jury as a whole regarded its task. It is perhaps not surprising, then, that this kind of survey, now very much out of fashion, has tended to produce such a confused picture.[16]

The picture is a little clearer when one examines the social science evidence which, contrary to popular belief, now exists on an immense scale. It must immediately be noted, however, that most of the research so far conducted has been restricted in scope and is of variable quality. This has been mainly due to the unique difficulty that research on juries inevitably involves, namely that all researchers have been denied access to the very subject-matter under examination—the jury and its deliberations. It has not been possible for researchers to observe jury deliberations at first hand, or even, in England, to interview jurors after their service has been completed. This difficulty has forced researchers to adopt other approaches, some highly imaginative, but it must be remembered that each method employed is necessarily indirect and subject to severe limitations. The methods that have been used to examine the operation of the jury system fall into two main categories—those that have taken the views of other participants involved in the trial as yard-sticks by which to evaluate the verdicts of the jury and those that have relied on 'simulated' juries of one kind or another. It is worth examining the more important pieces of research that have been carried out based on each method and attempting some assessment of the contribution they have made to an understanding of the functioning of the jury.

[15] See also Grisham and Lawless (1973).

[16] A similar lack of agreement is also to be found in the autobiographical accounts of jury service written from time to time by individual jurors. There is a considerable body of material based on these views and the most important sources are Devons (1965); Head (1969); Connelly (1971); Kennebeck (1975); and Barber and Gordon (1976).

(1) Assessing the competence of juries by reference to the views of other participants in the trial

In any discussion of empirical research on juries, the natural starting-point is inevitably the monumental inquiries made in the late 1950s and 1960s by a team of researchers at the University of Chicago and, in particular, the research published under the title of *The American Jury* by Kalven and Zeisel (1966) which has been widely acclaimed a sociological classic.[17] This study, conducted on a scale unlikely to be equalled for decades, involved no fewer than 3,576 criminal trials[18] heard in courts throughout the United States. The researchers' approach, in its essentials, could scarcely have been simpler. It was to ascertain the views of judges presiding at these trials on the verdicts reached by the juries. The result was, briefly, that in about three-quarters of the cases the judge expressed himself in general agreement with the jury and, in those cases in which he disagreed, he was very likely to think that the jury had been unduly lenient towards the defendant in question. These results, which are probably better known and more widely quoted than any others in the whole field of socio-legal research, are derived from a massive research enterprise yet one which employs a curiously ham-fisted methodology. It would be foolish to dismiss the study because of this, but it is probably true to say that Kalven and Zeisel's study is now as noteworthy for the basic errors in its methodology as for any contribution it may have made to knowledge about juries. The errors in question have led one of the few critics of the book to observe, with some justification, that 'the bias of the respondents, compounded by the bias of the analysts, could result only in self-serving conclusions worded as confirmed proposi-

[17] Griew (1967), to take just one example, writes: '. . . I read [*The American Jury*] with enthusiasm and constant pleasure. The pattern of the argument is gently and lucidly unfolded before one's eyes . . . In this forest of evidence and argument it is well-nigh impossible either to lose one's way or to hit one's head against a tree. What is more, the sights by the way are a positive pleasure . . . It is nice to be able both to gobble the pages and to enjoy the taste as one does so.' (p. 557.) And later, 'The skill demonstrated throughout the research and analysis are such as to leave a mere lawyer limp with admiration. The Chicago Jury Project has set a standard that other inquiries into legal institutions will be proud to emulate.' (p. 574.)

[18] As a separate part of the Chicago Jury Project, the researchers examined an even greater number of civil cases; see Zeisel, Kalven, and Buchholz (1959) and Zeisel (1960).

tions'[19] and another to argue that 'the jury debate remains almost as non-empirical as it was prior to the publication of *The American Jury*'.[20] The errors, which considerably reduce the value of the study, relate to the different questionnaires that Kalven and Zeisel administered to judges (inexplicably changed mid-way through the research);[21] the thoroughly unrepresentative nature of the sample of judges and cases employed;[22] the unfounded inferences they make on the basis of an extremely limited questionnaire,[23] and an unstated, but readily apparent, bias in favour of jury trial.[24] Though these criticisms of the book do not destroy the value of the statistical material that Kalven and Zeisel present, they do nevertheless act as timely correctives to the almost universal adulation that the book has received in legal circles. The response of Kalven and Zeisel to their critics has done nothing whatever to increase one's confidence in their conclusions: rather it has served to cast their study in an entirely new, and more limited, light. They write, for instance:

Ours was a study of a large and unknown territory. Somewhat romantically seen, it was not unlike a first expedition to the bottom of the sea. There is only one way to advance our knowledge and to

[19] Becker (1970) at p. 334.

[20] Walsh (1969) at p. 144.

[21] Kalven and Zeisel state that the second questionnaire, which was considerably longer than the first, built on the experience of the first 'after considerable experience with its analysis'. The results derived from each questionnaire were none the less pooled in their analysis. (On this, see the critique by Bottoms and Walker (1972)).

[22] Kalven and Zeisel argued that their sample of judges was representative, but this claim has been effectively refuted by Bottoms and Walker (1972) who demonstrated that there was a significant regional bias amongst the judges in the sample. Fifteen per cent of the judges who participated (and very many judges refused to participate) were responsible for a half of the questionnaires returned. Furthermore, significant variations amongst the types of offences included in the sample were noted by Bottoms and Walker; drugs offences were, for instance, considerably over-represented and burglary offences under-represented. Moreover, as Walsh (1969) has pointed out, almost complete reliance was placed on self-selection of cases by the participating judges and there was no control over the time period in which the cases were tried.

[23] Walsh (1969) argues that Kalven and Zeisel are seriously misleading in their interpretation of judges' answers to essentially descriptive questions, and their inferences, upon which the validity of their conclusions rests, unjustified given the nature of the information with which they were dealing.

[24] Becker (1970) refers to Kalven and Zeisel's 'thinly veiled reverence for juries' and their 'marked tendency . . . to interpret ambiguous data in favour of the jury' (p. 329). Their tendency to favour the continuance of the jury is apparent in a great deal of their other writing.

correct whatever wrong conclusions we may have reached: another expedition that will bring new data from the depths. (Kalven and Zeisel, 1972, p. 779.)

At the risk of mixing metaphors, it would appear that, after all, Kalven and Zeisel regarded their study as little more than a pilot exercise, employing methods that were far from systematic or rigorous. Though they do not say so in their book, it seems that their book was intended merely to point the way to further research. Measured according to this limited objective, there can be no real doubt about the value of their work, though one might be well advised to be suspicious of the judgment of certain legal commentators whose almost unbridled praise of the book when it first appeared now seems to have been largely misplaced.

Before discussing in greater detail the more general problems to which the particular approach adopted by Kalven and Zeisel gives rise, it is appropriate here to examine two other studies, both conducted by researchers in England, which have adopted the same basic method employed by Kalven and Zeisel. These studies are, first, that carried out under the auspices of the Oxford University Penal Research Unit by McCabe and Purves (1972) and, secondly, Zander's (1974a) inquiry concerned with rates of acquittal in London. It is worth noting in passing that researchers in England, unlike those in the United States, have been concerned exclusively with the straightforward policy question of whether too many defendants are being acquitted by juries.[25] It is interesting that this question is scarcely even raised in Kalven and Zeisel's book.

The study conducted by McCabe and Purves was apparently conceived as a pilot exercise.[26] Unfortunately, it is not easy to

[25] This question was raised most forcibly by Sir Robert Mark, the former Metropolitan Police Commissioner, in his much publicized Dimbleby lecture. In this provocative address, which caused a storm of controversy in legal circles, Mark said that: 'the proportion of those acquittals [by jury] relating to those whom experienced police officers believe to be guilty is too high to be acceptable . . . I wouldn't deny that sometimes common sense and humanity produce an acquittal which could not be justified in law, but this kind of case is much rarer than you might suppose. Much more frequent are the cases in which the defects and uncertainties in the system are ruthlessly exploited by the knowledgeable criminal and by his advisers.' (Mark, 1973, p. 10.)

[26] This is not stated explicitly in their book but is made clear in the article by McCabe (1974) at p. 277, and in a letter to *The Times*, 19 August 1975.

make any evaluation of it since so few details of the methods used are provided by the authors. Questionnaires were submitted to counsel, solicitors, and sometimes to the judge in the case, though no information is given on how many of them actually returned the questionnaires for the 115 jury acquittals examined. However, it was apparently sufficient to allow the researchers to categorize the reasons for the acquittals. They candidly admit that the basis of their categories is subjective in that they made 'a guess at how the jury evaluated the information it was given' but it was a guess that was informed by discussions with police officers and the lawyers involved. Accepting these qualifications, their conclusion that generally 'the acquittal of a defendant was attributable to a single cause—the failure of the prosecution (normally the police) to provide enough information, or to present it in court in a way that would convince both judge and jury of the defendant's guilt' (p. 11) is still an extremely important one. More to the point, it is a conclusion which is directly contrary to the suggestion, most notably raised by senior police officers and in particular by Sir Robert Mark, that the rate of acquittal by jury is excessive.[27] According to the Oxford research, the principal reason for the acquittals was the weakness of the prosecution's case and not the result of any failing on the part of the jury properly to convict on the evidence. In the view of McCabe and Purves, only about one in eight acquittals by jury could be appropriately described as 'perverse' (by which they mean contrary to the law and the evidence). A particularly interesting question raised by McCabe and Purves relates to those cases (almost 40 per cent of all jury acquittals) that fall within their category of 'policy prosecutions' which, to use their terminology, occur when the police are pursuing social and peace-keeping policies, independently of gaining a conviction in a case. They note that, in their respondents' judgment, only four of 44 cases in this category were against the weight of the evidence, the remainder being 'pursued without real hope of conviction'. The problem that this raises, which the authors do not go into, is how to reconcile this statement with the fact that in all these cases the judge, by allowing the case to go to the

[27] See Association of Chief Police Officers' survey (1966); Metropolitan Police survey (1973); and Mark (1973).

jury, had decided that there was at least a prima facie case against the defendants in question. This does not by any means invalidate their classification but it is a question which deserves greater explanation and clarification than the authors provide.

The study carried out by Zander (1974a) was based upon the views expressed by defence and prosecution barristers in a consecutive series of 200 acquittals occurring in England's two busiest courts, the Central Criminal Court and the Inner London Crown Court. One purpose of the study was to examine in greater depth the findings of the Oxford research. This was particularly valuable since one of the main criticisms levelled against the Oxford study was that, being conducted in an area outside any major urban conurbation, it could not be taken as in any way representative of the country as a whole. The other, and main, purpose of Zander's study was to test the assertion put forward by Sir Robert Mark that professional criminals represent a significant proportion of all acquitted defendants and that they are more likely than other defendants to avoid conviction. We have ourselves been critical elsewhere of this research,[28] not only because of certain methodological limitations but also because of the definitions of 'professionalism' (based upon the length of a defendant's criminal record) and of 'serious' crime that are adopted. We are in consequence unconvinced that Zander's findings support his conclusion that professional criminals are wrongly acquitted only on rare occasions. In examining the question of acquittals in general, Zander developed a threefold classification (those directed by the judge, those that were 'perverse' or 'unexpected', and those that were 'understandable') based upon the information derived from the responses from barristers to his questionnaires. Such classifications are inevitably open to different interpretations, and we have raised questions about the way that certain acquittals were categorized as 'perverse'.[29] Having said that, it is important to note in the present context that Zander's study offers important support for McCabe and Purves (1972), particularly because he finds the proportion of 'perverse' jury acquittals to be exceptionally low.

[28] See Baldwin and Mc Conville (1974) and Zander's reply (1974b); see also Mack (1976), and Sanders (1977).

[29] See Baldwin and McConville (1974) at pp. 442–3.