

**The Place of the Explained Verdict in the English Criminal Justice System**

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### Glossary of terms

ECJS.....English Criminal Justice System

UKHL.....United Kingdom House of Lords

CA.....Court of Appeal

ECHR.....European Convention on Human Rights and Fundamental Freedoms

QC.....Queens Counsel

HL.....House of Lords

KB.....King's Bench Division

QB.....Queen's Bench Division

LSE.....London School of Economics

UN.....United Nations

UK.....United Kingdom

USA.....United States of America

A-G.....Attorney General

ICTR..... International Criminal Tribunal for Rwanda

Cmnd.....Command Papers

ICRC.....International Committee of The Red Cross

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My Marshalling experience with Judge Goschalk at St. Albans Crown Court provided some very helpful insight into the judiciary's perspective of trial by jury. His fellow judges were equally astute in making suggestions that ultimately assisted the development of the hypothesis. I learned from them that justice is better served by a randomly chosen group of lay people but that judicial guidance is a necessary ingredient of such an exercise.

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<sup>1</sup> Anthony Bradney is Professor of Law formerly of the University of Leicester.

<sup>2</sup> Professor Patricia Leighton is currently the Jean Monet Professor of Law at the University of Glamorgan and visiting professor at the College of Europe, Brugge.

In light of superior legal thinking on the issue, I approach the subject with some apprehension and an acute awareness of my own limitations. The task is as onerous as it is evolutionary and I have benefited immensely from my intellectual superiors in this pursuit. Yet, the rigours of the challenge demand juxtaposing arguments and robust analysis. I have attempted to present both here. The success of the attempt, however, is moot.

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**'It is the nature of man to rise to greatness where greatness is expected of him'.**

**Steinbeck, John, (1902-1968) American Author, Pulitzer and Nobel Prize Winner.**

## Abstract

Lay participation in the criminal justice process in the form of a jury is a celebrated phenomenon throughout the common law jurisdictions. While not claiming credit for its origin, England, as the latent cradle of the modern jury, disseminated this mode of trial to a great part of the world through colonization. Yet, trial by jury does not enjoy constitutional protection under English law. The system has been under severe criticism, curtailment and considerable pressure in recent times, perhaps far more than in other countries. Critics have demanded reform or outright abolition and supporters have opposed the demands just as vehemently and any reform achieved has been piecemeal and reluctant. The furore has helped to galvanise robust and extensive intellectual debate on the subject. It has also spurred extensive academic research. Trial by jury remains central to a tiny but significant part of the Criminal Justice System. Yet, the jury, unlike other decision-making bodies, retains the power to deliver a verdict that is unique by its lack of an explanation. The issue does not sit comfortably with those who would have the system abolished or pray fair trials. The matter is traced to antiquity and the modern democracy struggles to articulate jury accountability.

This paper, the first to investigate the place of an explained verdict in the English Criminal Justice System, explores the competence of the jury to articulate an explanation for its verdict.

In that pursuit, the paper engages in an analysis of the current state of jury trials in relevant legal and academic literature. It also engages in a comparative analysis of other jurisdictions and finds it instructive and prudent to draw extensively from the legal and social scientific experiences and experiments in selected parts of the world including the new quasi-jury systems in Europe. It explores the literature of legal scholarship and the social sciences and investigates the human psychology of decision-making based on selected text. Finally, it articulates the argument embodied in the hypothesis and the challenges facing its findings. The thesis concludes by examining the implications for its conclusions and sets the stage for areas of further research.

## **The Hypothesis: The Place of the Explained Verdict in the ECJS**

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There are, essentially, three objectives this work seeks to achieve:

1. To identify whether or not an explained verdict is a legitimate expectation of a modern democracy in its criminal trials.
2. To determine whether or not the jury is competent to produce that explained verdict given the nuances of a trial, its composition and mode of deliberation.
3. To determine the extent of fairness of a trial in the absence of an explained verdict.

The determination of these questions has led to a discovery of two essential phenomena in our criminal trial process. The first is the jury continuum which argues that a jury trial, far from being an isolated event in legal history, is more of a continuum which links historical, legal and social events using lay participation to complete the loop. The reason curve is a point in the continuum where the extraordinary occurs allowing for a more logical rounding of the continuum. The argument is that whereas a trial's progression is predicted at present on the sense that a verdict is expected to be a choice between 'guilty and not guilty', the reason curve provides an outcome that cannot be predicted. The jury is expected to choose between two verdicts which are known. The contents of a post-verdict explanation are altogether unpredictable. This reason curve, at which point, a measured, intellectual and engaged insight into the criminal justice system is expounded, provides an island rich with both understanding and fairness for the participants of the trial.

### **The Legal and Historical Continuum.**

There are three practical areas of study that fed the hypothesis. The first area concerns group dynamics in decision science (whether or not a collegiate body such as a jury, under the prevailing trial conditions, is capable of articulating an explanation for its verdict). This is linked to the question whether an explained verdict is or should be an essential component of the modern criminal trial. This would depend on whether or not the jury, under different conditions, can articulate an explanation for its verdict.<sup>3</sup>

The second concerns the socio-psychological effect of those group dynamics on the juror relative to decision making and post verdict explanation. What is its implication on lay participation in the criminal trial process? Both are designed to explore and articulate the place for the explained verdict in the English CJS.

The third concerns the dynamics of deliberation and the reason curve in decision-making. It argues, from an intellectual and social scientific perspective, that a jury trial is an ill-structured romanticised process in which the juror is forced to employ inductive reasoning techniques to arrive at a verdict. The adversarial setting of the trial and the passivity of the jury make the discovery of the truth of a matter largely an issue for pure and personal speculation thus stifling the objective pursuit of certainty as an end in itself. Jurors weigh the evidence as presented, juxtapose it against their own personal experiences, employ the story model or Bayesian<sup>4</sup> (rule of thumb) model of decision making and deliver a general verdict.

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<sup>3</sup> Such conditions would include some of the findings of recent researches articulated by Auld LJ. in *Criminal Courts Review* (2001) at <http://www.criminal-courts-review.org.uk> and other social scientific developments.

<sup>4</sup> Bayes's Theorem is a simple mathematical formula used for calculating conditional probabilities. It figures prominently in subjectivist or Bayesian approaches to epistemology, statistics, and inductive logic. Subjectivists, who maintain that rational belief is governed by the laws of probability, lean heavily on conditional probabilities in their theories of evidence and their models of empirical learning. Bayes's Theorem is central to these enterprises both because it simplifies the calculation of conditional probabilities and because it clarifies significant features of subjectivist position. Indeed, the Theorem's central insight — that a hypothesis is confirmed by any body data that its truth renders probable — is the cornerstone of all subjectivist methodology. <http://plato.stanford.edu/entries/bayes-theorem/>

This verdict, supposedly conceived outside the ambit of legal interference and objective scrutiny, is never definitive but rather more or less probable. There is always the possibility that new evidence or a different thought influence, process or information could have an impact on the probabilities. Certainty therefore, remains subjective in the absence of an articulated response. This might explain why some judges disagree with juries in cases where previous criminal convictions are only known to the judge quite apart from the principle of judicial notice<sup>5</sup> which is extended to the jury but only as part of the cryptic verdict. As it stands, this cryptic verdict is the climax of the trial and thus, largely, an end to the historical event barring appeals. The argument of this paper is that an informed jury trial would be reflective of the concepts of jury continuum and the reason curve. A jury continuum refers to an appreciation of the fact that a trial is more of a cyclical process rich with experience with ripples beyond the end of the trial for those involved than an event in time. In other words, the philosophy of a jury trial is a child of history and legal precedents that beget precedents as touching its legal academics and resonates amongst the players as touching its utility. Therefore, what this paper calls jury continuum and the reason curve become very important parts of the trial process if the system is to remain relevant to future trials. Seen in the context of past, present and future, precedents and utility, a jury trial, it is submitted, takes on the real image of substance and the verdict, a real catalyst. The ripple effect gives credence to the continuum and reason defines the curve.

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<sup>5</sup> See generally Choo, Andrew L-T, (2006), Evidence, Oxford University Press at pp. 365-37: Judicial notice refers to facts which a judge can be called upon to receive and to act upon either from his general knowledge of them or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer' – Commonwealth Shipping Representatives v P&O Branch Service [1923] AC 191, 212.

Choo goes on to articulate occasions when the Court of Appeal has held that a judge and indeed magistrates were expected and would be called upon to invoke the doctrine as a guide to reaching a decision. The interesting point of this doctrine is that in spite of it, judges are not deterred from



Jurors, Glanville Williams argues,<sup>6</sup> are not first-rate intellectual machines and the institution therefore, is incapable of withstanding scrutiny on account of its perceived incompetence. That incompetence, this paper argues, is attributable to the system being treated, perhaps by virtue of the anonymity of its composition, as an isolated event rather than part of a continuum and the singular absence of the reason curve.

To discover what benefits the English Criminal Justice System stands to gain from an explained verdict, we need to see a trial and the following verdict in terms argued here. If that is the case, should there be a manifest place for the reign of conscience in a modern criminal trial when individual liberty is at stake? An exposition of the jury continuum and the reason curve would assist our understanding of the argument. Both theories argue that the Criminal Justice System would benefit from a discovery of the pulse at the centre of every trial which ultimately drives the system because when learning takes place, attitude shifts to reflect that learning. In a continuum, it is impossible to ignore what has been before or neglect self-mental propulsion. At the same time, the survival of a continuum depends as much on its drive as on what it discovers while contemplating the past and the future. However, to plot the right path, even a continuum has guidelines that must be strictly followed. That is the gravamen of this argument – that guidelines are essential to our purpose and accountability is paramount.

There is a further point. It is interesting that the threshold for criminal liability is 'proof beyond a reasonable doubt' - indicating the artificiality or fictional nature of the verdict and the mechanism that gives birth to it. This is not to conclude that the setting is designed to mislead or perjure however.

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delivering reasoned verdicts in bench trials. The difficulty with lay assessors in this regard only needs to be stated to be appreciated without the format guidelines articulated by this thesis.

Merely that it is a necessary construct and as the name implies, is a speculation on the plethora of possibilities available in a given case. Thus, doubt, as an ever-present concept, occupies a special place.

Doubt is defined as 'a feeling of uncertainty or a lack of full proof'.<sup>7</sup> The implication is that in the absence of full proof (presumably, verifiable and documentary) of innocence or guilt, our trial system employs conjecture as the basis for the determination of truth – drawing largely from the experience, common sense and prejudices of the ordinary man - but denying an explanation of that conclusion on the basis that the decision maker is intellectually incompetent or avowedly divine by virtue of random selection. The definition for reasonable doubt has never been successfully articulated<sup>8</sup> and the courts remain wary of defining a word or phrase they consider in common use, preferring instead, to leave it to the understanding and determination of the jury.<sup>9</sup>

Objectivity thus gives way to compromise and recognises that truth or certainty, as an objective pursuit, is a function of time and circumstance.

The question raised by this pursuit becomes cogent.

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<sup>6</sup> Williams, Glanville, *supra*

<sup>7</sup> The Oxford Encyclopedic Dictionary, edited by Hawkins and Allen (1991) at page 429.

<sup>8</sup> See generally *Commonwealth v Webster*, 59 Mass (5 Cush.) 295, 320 (1850) (per Lemuel Shaw, J) where it was held that 'Reasonable doubt is a term that often used, probably pretty well understood but not easily defined. It is not a mere possible doubt because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and considerations of all evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge'.

<sup>9</sup> See also Glanville Williams, *Criminal Law* 873 (2<sup>nd</sup> ed. 1961) who opined 'The gravamen of Lord Goddard's objection to the formula of 'reasonable doubt' seems to have been the muddle occasionally created by an impromptu effort to explain to a jury the meaning of this phrase. A simple solution would be to refrain from explaining it, relying on the common sense of the jury. As Barton J. said in an Australian case, 'one embarks on a dangerous sea if he attempts to define with precision a term which is in ordinary use with reference to this subject matter and which is usually stated to a jury without embellishment as a well understood expression'. However, some modes of embellishment seem to be unobjectionable. There is probably no harm in telling a jury, as some judges do, that a reasonable doubt is one for which a sensible reason can be supplied'.

Can a modern criminal trial condone the withholding of an explanation for a jury verdict and remain fair in the face of civil rights conventions? The matter begs further exploration. We shall return to these points later on in the work.

The debate spurred by recent manoeuvres on the jury system deserves investigation. In the advent of Human Rights Conventions and the international recognition for a need for reason in every public decision, there is a rejection of arbitrary commentary and decisions that cannot be sustained. In criminal trials, however, there is much weight given to the verdict of a jury. As Stephen observed, 'juries' verdicts are accepted more readily than those of judges'.<sup>10</sup> Yet, if one proceeds by the light of reason, there are formidable arguments against the jury system.<sup>11</sup> These formidable arguments will be explored as this paper develops. The arguments become even more focused as society's appetite and quest for transparency is heightened.

The gathering of evidence<sup>12</sup> has become a sophisticated and complex business even as the society becomes less homogenised. The advancement in the area of forensics has greatly affected the gathering and availability of evidence. This in turn, has a huge impact on what is presented to the trier of fact and how it is evaluated. This particular development suggests that the verdict of a jury is only as good as the evidence presented to it and the weight<sup>13</sup> given to that evidence upon which it is based. All indications are that acceptance of that verdict ought to be predicated upon the jury's articulation of its considerations.

<sup>10</sup> Stephen, James Fitzjames, 1829-1894, *A History of the Criminal Law of England*, vol. 1, London: MacMillan.

<sup>11</sup> Williams, G. (1963) *The proof Of Guilt, The Hamlyn Lectures 7<sup>th</sup> Series 3<sup>rd</sup> Ed.* Pp. 207-214

<sup>12</sup> 'Evidence is the information with which the matters requiring proof in a trial are proved', per Choo, Andrew, L-T (2006), *Evidence*. Oxford University Press at p.1

<sup>13</sup> 'Weight of evidence is the degree of probability (both intrinsically and inferentially) which is attached to it by the tribunal of fact once it is established to be relevant and admissible in law...' *DPP v Kilbourne* (1973) AC 729, 756 in Andrew Choo's 'Evidence', opp. Cited. At page 18, Choo draws

Jurors are chosen in a way that seeks to address the communal spirit in order to localise the matter, thus giving locus standi to those whom we believe have an interest in the outcome of the event.

There is much explanation as to why this is the case and why a jury's verdict is preferred, by the general public, above that of the judge. Yet that communal spirit is more imagined than real given the social divisions of the society.

Auld LJ described the jury as 'the jewel in the Crown of the Criminal Justice System'<sup>14</sup> although he could scarcely conceal his lack of enthusiasm for it.

The deliberation process and the articulation of decisions remain objects of deep curiosity to jury observers. Verdicts are often seen to be irrational, illogical and sometimes perverse in some quarters.<sup>15</sup> Others have denounced the system in equally strong terms arguing that 'there can be no room in the due process of criminal justice for the jury to import factors outside the ambit of evidence.'<sup>16</sup> Yet, in his seminal Hamlyn lecture, Sir Patrick Devlin, in describing the jury as the lamp that shows that freedom lives, went on to observe that the juries' ability to return a perverse verdict gives protection against laws which the ordinary man regards as harsh and oppressive.<sup>17</sup> That power granted it both by circumstance and judicial pronouncement belies the post-verdict explanations and excuses the cryptic nature of that verdict.

Sir Patrick's comments have since been held as a definitive statement on the latent powers the jury has to do as it sees fit with any given case since its acquittal is final and its conviction not always giving rise to a challenge. Inadvertently, it allows the jury to play a political role without a corresponding requirement for accountability.

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attention to Wigmore's description of the rules of weight or credibility as 'moral treason', citing 'Book Review' by J.H. Wigmore, (1909) 3 Illinois Law Review 477, 478.

<sup>14</sup> The Auld Review of the Criminal Courts of England & Wales, 2001

<sup>15</sup> Auld LJ. recommended that 'the jury be barred, by statute, if need be, from returning verdicts against the weight of evidence'.

<sup>16</sup> Luis Blom-Cooper writing in the Sunday Observer, 21 October 2001

'Perverse', in this context, serves as a euphemism for bad judgement or 'against the weight of evidence'. The phrase may be forgiven because a jury does not provide a reason.

Serving as a juror has been viewed, by some, as affording the citizen the chance to be part of the judicial process, thus maintaining public trust and confidence in the law.<sup>18</sup>

This view was aptly articulated by E.P. Thompson when he described the jury box as '...where the people come into the court: the judge watches and the jury watches back. A jury is where the bargain is struck.'<sup>19</sup>

Picking up on these comments, supporters maintain that the jury underpins the notion of the English as a law abiding group of people who maintain a link with democratic polity and thus control of the executive. Public opinion certainly suggests a high level of public confidence in the jury. Whether or not this is informed public opinion is quite a different matter.

However, most of these comments eulogise the jury as a system and do not concern themselves with the complexities of a modern system grappling with the increased demand for transparency and accountability from public figures and institutions. To that extent, these commentaries are, therefore, products of their time which must be juxtaposed with the real politic of the 21<sup>st</sup> Century. A reasoned judgment is expected from nearly all modern public decision-makers. The idea that a decision can be made by a public body without explanation therefore appears to be inconsistent with modern socio-political life.

The champions of this contemporary view such as Luis Blom-Cooper ask:

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<sup>17</sup> Devlin, P., 'Trial by Jury', Hamlyn Lectures (1965).

<sup>18</sup> Baroness Kennedy, QC. of the Shaws during a debate of the Criminal Justice (Mode of Trial) (N0. 2) Bill, House of Lords, 28 September 2000, Hansard, HL, col. 995.

<sup>19</sup> E. P. Thompson, New Society 1978.

‘Do serious commentators...really believe that a civilised system of justice should allow an unreasonable decision of any court to remain unchallenged merely on the grounds that it was made by a jury?’<sup>20</sup>

When explored, the answer might be startling not least because that is precisely the current situation, at any rate, in English criminal trials with few exceptions.

Even then, the course of appeal upon which a challenge might be based is onerous, vigorous and narrowly defined. However, the idea that a reasoned verdict and the jury system are incompatible is challenged in the chapters that follow.

Reason and accountability are central elements of the doctrine of stare decisis in our legal system. In that context, the presence of the jury and its workings appear anachronistic and the jury itself appears to be ‘an apotheosis of amateurism’.<sup>21</sup>

The debate as to whether or not to retain jury trial appears sterile given the developments in some other common law jurisdictions.<sup>22</sup> The question of accountability in the modern setting is argued to be equally fatal to the institution as can be seen from the use of the jury in some of these jurisdictions. We shall explore this further.

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<sup>20</sup> Luis Blom-Cooper in ‘Twelve Angry Men Can Be Wrong’, The Observer, Sunday October 21 2001.

<sup>21</sup> Luis Blom-Cooper, *ibid.*

<sup>22</sup> The Russian Federation, in 2003, introduced and has since made plans to extend jury trials throughout the Federation. Spain has also reintroduced jury trials in its criminal proceedings as has Belgium. The judicial systems in these countries do not quite allow the same latitude to juries in decision-making as obtains in England & Wales but instead, demand special verdicts from the juries.

## The Topic: The Jury System in The 21<sup>st</sup> Century.

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The jury, by definition, is a judge of facts and has, traditionally, not been required to explain its verdict.<sup>23</sup> Indeed, it has been argued that a change in this status may not be desirable given what it might reveal about the system and the institution. Given the nature of the trial process and the resources available to the jury, it is not so surprising that the jury is unable to explain its verdicts.<sup>24</sup> Auld LJ laments this position submitting that ‘we still subject them to archaic and artificial procedures that impede them in their task. They are given very little objective or conveniently summarised guidance at the start of the trial as to the issues they are to decide and as to what evidence is and is not agreed.’

The argument goes that explanations might endanger the validity of the verdict and thus increase the chances of appeal.<sup>25</sup> This is an interesting argument. However, it is an age of accountability characterised by an open political and judicial process that is almost universal. Furthermore, trial by jury has its roots in antiquity<sup>26</sup> when its role was significantly different from what it is today (a point I shall return to in subsequent chapters). In this context, can the jury, with its blatant lack of accountability be accommodated?

The jury has the right to make decisions but lacks the power to enforce those decisions.

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Spain goes the furthest in its requirement for a reasoned verdict. See Thaman, *infra*. This paper contends that this is a step in the right direction but does not go far enough.

<sup>23</sup> This applies in the UK, at any rate. Some jurisdictions, as mentioned, do require some sort of format response to questions posed by the judge to assist in decoding a jury verdict. History indicates however, that in the past, reasons have been required of juries and at times, they have voluntarily produced one albeit, always orally. See generally, Green, T. A (1985), ‘Verdict According to Conscience’: Perspectives on the English Criminal Trial Jury, 1200-1800. University of Chicago Press.

<sup>24</sup> The Auld Review of the Criminal Courts of England & Wales, 2001

<sup>25</sup> See Generally Cornish, W.R ‘The Jury’

<sup>26</sup> Green, T. A *ibid*.

In fact, it has no power except to deliver a general verdict and as Lord Mansfield observed in the Bishop of Asaph's case,<sup>27</sup> 'the power but not the right to return a verdict contrary to the weight of evidence.'

The recognised check on this power is divine – something extra-legal and quite outside the control of the court system or anyone else. Lord Mansfield further observed, 'it is a matter between them and their conscience.' This clearly has implications for the rule of law because a verdict against the weight of evidence may have huge impacts on the law.

However, it is a mechanism of the judicial system deriving its strength from its anonymity,<sup>28</sup> its legitimacy from random selection and the collective view that the trace of divinity expected to be present when disparate individuals of the local community come together is sufficient to justify an unreasoned verdict. It appears to pit hope against reason...yet, it appears to work precisely because it has become entrenched, institutionalised and lamentably, no one can articulate a better system.

In the 1% of criminal trials that is set before the jury, its role is crucial and acquittals are final. The convictions may or may not give rise to challenges. However, as most modern legal expectations have changed, can there be any justification for not explaining why a trial has resulted in a conviction especially where the evidence is hotly contested?

But the ECJS has always maintained a delicate balance between sweeping revolution and piecemeal innovative advancement.

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<sup>27</sup> King v Shipley (1783), 21 How. State Tr. 847.

<sup>28</sup> Devlin, P. op. cit.



The Diplock Court system in Northern Ireland has demonstrated that it is possible to try a case at first instance and deliver a reasoned judgment without jeopardising public confidence. Is this a credible alternative?<sup>29</sup>

By virtue of S. (8.1) Contempt of Court Act 1981, we are ignorant of the deliberation process<sup>30</sup> and the weight given to the evidence by the jury in the trial. The institution is a derivative tribunal. It should not be treated as an executive one. Are there any practical advantages to maintaining the status quo in a modern setting or do we couch our inertia for change with precatory words that may not withstand the light of reason or close scrutiny?

The medieval juries were largely self informing as they were composed of noblemen with verifiable local knowledge and were able to determine the innocence or otherwise of the accused. The modern jury, by contrast, is distinguished by its presumed ignorance of the facts of a case and in fact, is adversely affected by the rules of evidence which dictate that certain evidence be withheld from it.<sup>31</sup> The rules of evidence dictate that the jury must not be influenced by irrelevant or prejudicial evidence – the decision being made by the judge and counsels at their discretions. This matter questions the efficacy of the jury's oath to try the defendant according to the evidence. That evidence must be sifted in the absence of the jury before a decision is made as to whether or not to present it to the jury.

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<sup>29</sup> Many countries use bench trials only or a combination of judge and lay people. It must be understood however, that there are important safeguards to the Diplock Court system and that it is only used in extra-ordinary circumstances. The nature of Northern Irish politics makes the province a special case and there is an automatic right of appeal to the Northern Ireland Court of Appeal. In the recent past, there have been many calls for a normalization of the criminal trial process – a return to trial by jury not only as a political statement but also as the inheritance of a civilized society. See Jackson et al in 'The Jury System in Contemporary Ireland: In the Shadow of a Troubled Past' in Vidmar's 'World Jury Systems (Eds.) (2000), Oxford University Press at pp. 283-314.

<sup>30</sup> Williams has argued that the real reason for 'keeping the jury deliberation a secret is to preserve confidence in a system which more intimate knowledge may destroy'. 'Proof of Guilt'. Op.cit. pp 205.

<sup>31</sup> See generally Damaska, M. (1997), Evidence Law Adrift, Yale University Press.

Trial by jury may actually infringe Article 6 ECHR given the lack of reason.<sup>32</sup> This has not been tested in court.

However, the secrecy of jury deliberations which is antecedent to an unexplained verdict was cleared in Gregory.<sup>33</sup> But law evolves and a future challenge, drawing on some of the arguments presented in this paper and elsewhere, cannot be ruled out.

Research by Zander<sup>34</sup> et al found that a vast majority of the public supports the jury institution. The Times Newspaper, in its opinion poll in January 2002, claimed that a solid 84% of the public is behind the jury. In a survey carried out in 2002 of 903 people in Britain, these claims are substantiated.<sup>35</sup>

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<sup>32</sup> Sir. Louis Blom-Cooper, QC in 'Twelve Angry Men Can Be Wrong' The Observer, 21 October 2001. He argues that trial by jury 'may even be in breach of the European Convention since a fair trial demands a reasoned verdict'. Earlier, in The Independent, 25 August 2000, Robert Verkaik had submitted that 'Human Rights lawyers argue that verdicts are not in themselves reasoned judgments and that defendants are being denied justice if they are not told the reasons for their convictions'.

<sup>33</sup> Gregory v United Kingdom 25 EHRR 577, the European Court of Human Rights, at p 594, para. 4 where it was held that 'that the Court acknowledges that the rule governing the secrecy of jury deliberations is a crucial and legitimate feature of English trial law which serves to reinforce the jury's role as the ultimate arbiter of fact and to guarantee open and frank deliberations among jurors on the evidence which they have heard'.

<sup>34</sup> Zander, M. and Henderson, P., Crown Court Study (London: HMSO, 1993, Royal Commission on Criminal Justice, Research Study No.19).

<sup>35</sup> See the Department for Constitutional Affairs website at <http://www.dca.gov.uk/research/2002/9-02es.htm>. The British public may not be widely aware of the government's proposal to change the jury system in England, but they solidly oppose the idea once they hear a short description of it. They prefer to face a jury of 12 individuals than a judge alone or a judge aided by two magistrates. Key to understanding the public's opposition to the proposal is the fact that most of those surveyed believe a jury of 12 individuals is most likely to reflect their own and society's views and values.

- Respondents are most likely to have confidence in the police (81%) and juries (80%) than in other players in the justice system.
- Most think a jury of 12 individuals rather than a judge and two magistrates would be more likely to reflect their own (73%) and society at large's (80%) views and values.
- In fact, two thirds (64%) say that, should they appear as a defendant in court, they would prefer to have a jury of their peers rather than a judge and two magistrates or a judge alone decide their case.
- Although awareness of the government's proposal to change the jury system is low (78% have heard "not very much" or "nothing at all"), two thirds (66%) say they oppose the proposal after hearing a short factual description of it.
- One goal of the proposed change - cost savings - has little resonance with the public. Just 27% say they would favour a reduction in the number of jury trials if it would save taxpayers

The Bar Council, The Criminal Bar Association<sup>36</sup> and the Law Society<sup>37</sup> were united in denouncing the government's plans to 'ditch' or seriously curtail the right to trial by jury. The government has since altered its plans in the face of severe criticism. There are fresh proposals addressing the issue.

This thesis aims to articulate an objective response to the issues raised by the debate through a review and analysis of selected literature in legal and psychological fields.

## **Methodology**

### **The scope of the research**

I consider it prudent to say a word or two about the consulted material. In any academic pursuit of the sort engaged in here, of necessity, one must acquaint oneself with the most authoritative writings on the subject. This is a condition not only for obtaining the most up to date opinion but also to ensuring that one does not wallow in ignorance of history or self deception in the face of modern development. It is also vital to extend the scope of the review in order to entertain, even if one discards some of the opinions expressed, a wide range of scrutinising thoughts of the subject.

To that extent, this paper has consulted a wide bank of academic and legal writings in the public domain across a vast foray of jurisdictions ranging from the UK to the US,

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money. In fact, seven in ten (69%) would oppose the change in order to preserve their current right to a jury trial.

- Other reasons that highlight why the public opposes the proposed reform include the findings that most of those surveyed trust juries to come to the right decision (85%), believe they get a fairer trial from a jury than from a judge (82%), and that the quality of the justice system is better when it includes jury trials as often as possible (81%).

<sup>36</sup> Response to the Criminal Justice White Paper 'Justice for All'. October 2002 at [www.barcouncil.org.uk/documents](http://www.barcouncil.org.uk/documents) 'We support the retention of trial by jury in all cases. Juries are representative of society as a whole. The involvement of the citizen in the criminal justice system, serving on a jury underlines society's connection with its own laws. The collective wisdom and experience of a jury can never be matched by a judge sitting alone'.

<sup>37</sup> Jury Trial Survey Report (2002) prepared by SWRWORLDWIDE for The Law Society and the Bar Council at [www.lawsociety.org.uk](http://www.lawsociety.org.uk)

Africa and Europe. It has also benefited from legal press writers in England and the US and consulted some internet websites where opinions are expressed and shared. A full index of the consulted material is included.

In addition, in order to adequately research the subject, I received permission from my supervisor and took the advantage to explore research into human psychology as presented by the Social Sciences. Legal academic or judicial writings are limited in their ability to produce empirical evidence as to human behaviour. These are restricted to descriptive legal philosophy that relies largely on second-guessing the subject's behaviour from legal pleadings.

Thus, as loaded with dry logic as these commentaries are, they are necessarily held hostage by the lack of empirical legitimacy since they are based on legal history, purely objective assessment and highly speculative in nature. Social Science, by contrast, is the more practical. Its observations develop into hypothesis that is then tested through experiments. This is not to submit that its conclusions are invariably correct but that it provides a platform for evaluating the efficacy of a speculation and judicial commentary. Nonetheless, for reasons of brevity and coherence, not all consulted material has been included in this paper. Anyone reading this work will not fail to notice the absence of some eminent authors and their works. I have, of necessity, made the choice to exclude some works. That task has been fraught with challenges.

In developing the hypothesis for this research, the external quest was to explore why the ECJS did not require an explained verdict, whether the reasons for it are sustainable and are valid in the 21<sup>st</sup> Century, the implications of a reversed position and whether or not the tribunal of fact can be made competent. There was no direct answer.

Instead, one had to read into the circumstances surrounding medieval trial by jury and extrapolate from this position, the essence of a verdict in a modern criminal trial. Legal writing, in abstract, could not answer the question conclusively without allusions to certain legal rules.

These included rules of evidence and more startlingly, rules of procedure which for too long, it is argued, have been befuddled by inertia. Social science, on the other hand, provides a scientific platform for exploring the human decision making process. By so doing, it provides some understanding into how we reason and how we respond to various stimuli. Like legal academic writing, its answers are no more definitive or certain and in fact, evolve with time and new thinking. However, they provide a more measurable approach and a system for a constant evaluation of what we do and why we do it. Social science is thus dynamic. Law, by contrast, is reactive and extremely reluctant at that. Furthermore, social sciences allow for the development of what I have called the jury continuum and the reason curve. These, as noted, are theories that allow the understanding of the role of the jury in a present continuous story while energising the progression of that story with reason.

Left to legal scholarship, the jury's verdict is a matter for its conscience and the complexity and sophistication of human decision-making relative to the reason curve would have very little but slow bearing on this. With the advent of social science, one may be forgiven for paraphrasing John Rawls that there is very little logic in maintaining a particular way of life when the reason for its existence can no longer be articulated. Thus, the demands of a modern democracy are taken into account by constantly challenging the status quo. The reason curve allows this to happen.

As Burns<sup>38</sup> suggests, 'one of the fixed points of the social scientific study of the trial is that the juror makes his or her decision after an intense encounter with the evidence and it is this evidence in the case, more than any other factor, that determines the outcome'.

Taken to its logical conclusion then, social science more readily addresses not only the presence of this evidence but its potential to be present too. This galvanises the quest for social legal reform. This reform identifies with the reason curve not in any isolated way but represents an acknowledgment that reason and reform are inextricably linked.

In subsequent chapters, we shall explore the relationship between the evidence and the other nuances and how these affect both the jury continuum and the reason curve. We shall also explore why these affect the legal and historical social cycle, the jury's ability to explain a verdict and why it should do so.

The original methodology for this research included field work involving those in the legal arena. It consisted of interviewing some Crown Court Judges, Ushers, ex-jurors and some members of the public with judicious questions about the jury. However, on further reflection and in consultation with my primary supervisor Dr. Brooke, it became evident that permission would be needed from the highest judicial office in England & Wales. It also soon became clear that given the restrictions of S. 8 Contempt of Court Act 1981, the chances of obtaining such permission were very slim indeed. Encouraged by Dr. Brooke, this paper is completely based on literature review, critical analysis of the published work and personal opinion from Vidmar of Duke University USA who has written extensively on the subject of Trial by jury.

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<sup>38</sup> Burns, R. P. (1999). *A Theory of The Trial*, Princeton University Press. p.35

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## Literature Evaluation

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The research commenced by reviewing legal history dealing with the advent of trial by jury following the demise of other methods of trial. Many of the great works on the English Criminal Justice System were consulted. This research was sparked, in part, by the Auld Report. As such, its position has been studied and analysed for the current thinking on the jury system although events have since overtaken that review.

Although the study is primarily about the jury in English and Wales, International academic opinion was also researched. The UK lacks research on trial by jury as a result of the Contempt of Court Act 1981. By contrast, there is much academic and social scientific literature in the US, Canada, Europe, Australia and many other jurisdictions that do not impose a blanket ban on what is perceived to be intrusive research of the system. This paper explored extensively a review of research in the fields of law and social sciences in some of these jurisdictions in order to articulate its argument.

### News Media

The press has always represented a vocal constituency in any debate. Many distinguished journalists, academic writers and even members of the judiciary have used this medium to voice their opinion. The press is thus an invaluable medium for commentary on trial by jury. Research in this area was designed to discover the agenda setting mentality of the press and how this affects the perception of the ECJS relative to trial by jury.

## Comparative Analysis

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This considered the use of jurors in other common law jurisdictions and those outside of it. I explore the extent to which the system exists and in what fashion it survives. The relative constitutional basis for its existence in the USA, Canada, Australia, South Africa, Spain, Russia, Belgium and Scotland was juxtaposed. No attempt was made to conduct an exhaustive review of these jurisdictions and in some cases, such as the Spanish Constitution, I have had to rely on a translated version borrowed from both the British Library and from Vidmar's Book on World Jury Systems featuring Thaman's contribution on Europe's Emerging Democracies.

Finally, article 6 of the ECHR was explored along with International Human Rights Conventions, judgments of the House of Lords, other English Courts, European Court of Human Rights, legal and academic commentary on the conflict of the system with trial ideology. The consulted materials appear as footnotes using the numbering system.

### Structure

The paper is divided into four sections.

Section One looks at the origins of trial by jury, investigates its constitutional basis and articulates the nature of the jury and the nuances that affect trial verdicts.

Section Two explores the social scientific research of the nuances of jury trial.

Section Three presents the theory that there is a place for the explained verdict in the CJS and concludes with proposals that might assist the delivery of reasoned verdicts.

Section Four considers International Conventions and conclusions of the thesis, states the areas for further research and lists a number of books for further reading.



These sections are further divided into chapters and sub headings that offer detailed analysis of the points and issues raised by the literature review. The opinions of the writers and experts are further scrutinised with judicial opinions and development.

## Section One: Chapter One – Introduction

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The philosophical question raised by this paper is this: what kind of jury system do we want – one that reflects its past, one that remains what it is or one that can be what it can be? The moral question is equally potent: to what extent is a trial fair when the reason for a verdict is absent? Even more fundamentally, should our criminal trial system attempt to balance the contrasting demands of fairness, accountability and procedure taking into account our cultural heritage?

Furthermore, can the judge's commentary after a verdict be taken to sufficiently approximate a jury's reason as to render it unnecessary? All these questions have a direct effect on the finality of a trial or perception of it.

This thesis makes no claims to provide infallible answers to these questions. However, the paper is about the place of the explained verdict in the English Criminal Justice System. It is not about the pursuit of certainty, moral or otherwise although it argues that in the absence of the qualifying virtues, a modern jury's verdict, given the prevailing demands, lacks legitimacy and undermines the principle of certainty.

It recognises the elusive nature of legal certainty and the exhausting but largely unrewarding task that it is. Indeed, a criminal trial is not, avowedly, an exercise in the pursuit of certainty anymore than a Sunday service in a Church is a testament to a divine certainty. The philosophers of the past, from Hume to Bentham, Mill to Webb did not argue for the singular pursuit of certainty. They, instead, argued for a platform for pursuing an alternative approach to certainty and presented an intellectual argument in which certainty, though demonstrably elusive, remains a potent and legitimate curiosity whose goal may be approximated through the pursuit of justifiable coherence.

This coherence, in our context, refers to the transparency of the jury's role in the form of an explained verdict. While this may not lead to the desired certainty with regards to the outcome, it nonetheless provides a measure of coherence and clarity upon which any future research or reformation could be based.

Ultimately driven by moral preoccupations, the concept of transparency and fairness rather than metaphysical convictions, I adopt a practical approach to the challenges of truth seeking. Yet, as a matter of observation, the pursuit of certainty or a silhouette of it and therefore finality in a criminal case, characterises our criminal trials. The entire drama is devoted to what can be proved as if the objective contains the totality of the immovable truth. Finality, embodied by the seemingly unequivocal and unambiguous verdict of the jury, barring the intervention of the appeal process, adversely, in most cases, affects and determines what can be regarded as fairness and certainty. Jurists and philosophers recognise that the best we can weather, within the available systems of trial, adversarial or inquisitorial, is to approximate the truth as we understand it and according to admissible evidence. By definition, this would nullify an objective and robust pursuit of certainty making its discovery subject to time and circumstance. Thus, as Damaska<sup>39</sup> argues, 'we excuse certain inherent deficiencies expeditiously in order to conjure and not to injure the spirit of 'finality' and therefore simulated certainty'.

A criminal trial, an artificial setting during which the drama of eloquent oracular arguments is played out before a passive audience tasked with the ultimate decision, is, to all intents and purposes, not an exercise in the pursuit of certainty or the discovery of truth.

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<sup>39</sup> Damaska, M. (1997) 'Evidence Law Adrift', Yale University Press.

As Langbein argues, 'the rhetoric of English criminal procedure claimed that truth-seeking was the objective, but the institution of criminal justice had not been organised to seek the truth effectively and that truth, (is) was a by-product of the adversarial system'.<sup>40</sup> For all the dressage of the participants, a trial is nothing short of a speculative odyssey where legal sanctions conspire with collective acquiescence to provide an artificial verdict<sup>41</sup> whose genesis is conveniently shrouded in the ignominy of muted private and protected deliberations. The reality is painfully hidden between the frosty niceties of the legal world and the delivered unreasoned verdict. The main protagonist – the jury – is viewed with a certain disdain for want of mental prowess and yet willed to display divine abilities. Yet, the oracle's ambiguous verdict and the deliberation process leading to it are eulogised as being unambiguous thus allowing it an artificially uncontested position, even by the appellate courts.<sup>42</sup> This deprives both the system and the other players a coherent base upon which to build reformation in the event that it was needed. In the wake of this, for answers, we arrange trials to test the evidence and for proof, we refer to the outcome as though it were certainty.

This thesis is about furthering our understanding of the jury and jury decision-making, whether or not they can postulate an articulated explanation for the verdict given the

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<sup>40</sup> Langbein, J. H. (2003), *The Origins of Adversary Criminal Trial*, pp 331-333

<sup>41</sup> This is so called because a verdict that emerges in such an artificial setting can hardly be taken to be a definitive statement of truth. The verdict is a mixture of what has been proved to be the stronger story (as opposed to what has been discovered to be the truth) and the jury's supposedly collective conscience. The interpretation of evidence by lawyers masks the truth. Truth, itself, reposes in the twilight zone of discovery and interpretation. Langbein maintains that to the extent that truth emerged, it was not by design but was a by-product of the adversarial contest.

<sup>42</sup> 'Judges of great experience and distinction have held that it is never permissible to admit evidence of what happened during the deliberations of the jury'. See: *R v Thompson* [1962] 1 All ER 65, 66, per Lord Parker CJ; *Ellis v Deheer* [1922] 2 KB 113, 117 - 118, per Bankes LJ; at p 121, per Atkin LJ; *Attorney General v New Statesman and National Publishing Company Ltd* [1981] QB 1,10, per Lord Widgery CJ; *R v Miah* [1997] 2 Cr App R 12, 18 - 19, per Kennedy LJ; *Roylance v General Medical Council (No 2)* [2000] 1 AC 311, 324B, per Lord Clyde; *R v Qureshi* [2002] 1 WLR 518, per Kennedy LJ

nuances of the ECJS. It is also about exploring ways to approximate the citizen's legitimate expectation with the pseudo reality of a public trial.

To that extent, the arguments presented here do not claim infallibility but seek to act as a catalyst for further serious debate on the efficacy of the delivery of reasoned verdicts and broadly, on the way the ECJS operates in this regard. It is perhaps difficult to explain why we would expect a reasoned verdict from a single judge, trained or otherwise, whose prejudices are just as likely to warp his judgement and yet deny it from a panel of lay judges on the basis that they are so randomly chosen from people of average ignorance that they are now disqualified by that distinction and unlikely to articulate a reasoned judgment.

This is all the more baffling when we consider that we do not test them for their abilities nor do we allow them to demonstrate it in any other way beyond the single response in the form of an oath.

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In his attack on the institution of the jury in 1975, Sir Robert Mark, Commissioner of the Metropolitan Police observed:

'If the one person in the criminal justice process most fitted by education, training and experience to decide the issue, namely the judge, is to be denied that right (to determine alone whether the accused is guilty), how much more illogical is it to confer upon any one of twelve randomly selected jurymen, least fitted by deafness, stupidity, prejudice or of a hundred other reasons'.<sup>43</sup> However, no proof exists that a particular jury is intellectually deficient prior to the trial or otherwise.

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<sup>43</sup> The Office of Constable, (1978), Peter Duff and Mark Findlay, *The Politics of Jury Reform in the Jury Under Attack*, 213-14 (1988).

Certainty, in this case, is a construct of willed or self-imposed ignorance of the skill of the jury and blind belief in its collective ability to divine an unambiguous cryptic verdict even when saddled with its supposed level of ignorance.

Perhaps the last word belongs to Steinbeck who observed that it is the nature of man to rise to greatness where greatness is expected of him.<sup>44</sup> That expectation, however, must be assisted. In other words, the jury must be better managed. We must develop and implement a trial court structure driven by the principles of total quality management, utilizing management skills to enhance access to information and promote effective case management.

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## Chapter Two - The Issues

In all criminal trials of a sufficient seriousness in England & Wales, the matter is set before a judge and a jury, the latter being locally chosen at random from the electoral role. At common law, a jury's role, which is derivative, has been reduced to purely that of a fact finder. It is required only to answer as to whether or not the facts in issue have been proved. It is neither required to nor does it give an explanation for its verdict. This, it has been argued, is due to jury mental incompetence or, according to Devlin, to deprive the oracle of ambiguity. Beyond these rules and sentiments, a jury's competence to articulate reasons for its verdict has not been explored beyond anecdotal speculation. To the extent that its verdict is cryptic and the trial process largely oracular,<sup>45</sup> a researched understanding of jury verdict explanation beyond speculative writings and findings from mock juries would assist an understanding of

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<sup>44</sup> John Steinbeck, (1902- 1968) American Author, Pulitzer and Noble Prize Winner

<sup>45</sup> Jurors are generally not provided with transcripts of trial evidence and speeches and are expected to remember the issues at trial. Only in recent times have the ECJ allowed jurors to take notes during trials which they must leave behind after the case. This is not purely voluntary and not a requirement.

the process. An exposition of jury deliberation which may lead to a better understanding of jury decision-making is prohibited by English law.<sup>46</sup>

The lack of an explained verdict is frequently attacked as constituting unfairness to a defendant. This is often cited when the system of trial by jury is in issue and there is debate as to whether or not there is a violation of article 6 ECHR.

This thesis argues that explaining a decision has become an important legitimate expectation in democratic polity from all public decision-makers. This is largely due to the need for public confidence, accountability and openness. As a judicial tribunal and a derivative body, a jury is subject to the authority of the judge. The success of the CJS is contingent on public confidence, however measured, in the jury, the court system, the administration of justice and on the operations of the law. While there is much study into jury decision-making from social psychological perspectives largely exploring the human elements of decision-making with mock juries, there has not always been a connection between the academic efficacy of law as a social instrument and human psychology as an ever-present part of the judicial process. The legal community should address the research findings of social sciences and embrace changes where these have been identified as potentially beneficial. Furthermore, as to whether or not the jury can explain its chosen verdict, there is very little research. As a corollary to that, the question as to whether or not an explained verdict is a legitimate expectation of a modern criminal trial under the common law system has only began to be broached especially in International Tribunals but remains largely un-researched in domestic Courts. Yet, the need for openness is palpable.

The position is that of institutionalised or collective acquiescence made cogent by judicial pronouncement in England & Wales. Perhaps this is because of the stringent

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<sup>46</sup> S.8 Contempt of Court Act 1981

statutory provisions and the common law or the received wisdom that it would be best not to make such requirements of the jury. This thesis carefully analyses selected research literature while observing the statutory provisions. It argues that the place for the explained verdict in the ECJS, given the prevailing rules of evidence and the trial procedures, probably lies in the hazy twilight of jury deliberations.

It argues further, that an explained verdict is a valuable nugget of a trial by jury and thus, should not be hidden amongst the unobserved deliberation of jurors. Instead, it should be part of a system of fair trials spotlighting the CJS and ensuring much needed enlightenment and transparency. Furthermore, its place in our contemporary democracy must be constructed as a shore up to the efficacy of the modern jury trial. To put it another way, the survival of the jury system depends on its relevance to the society it serves and its deployment as part of a fair system of trial. Part of that relevance is predicated upon its coherence and ability to stay dynamic. Dynamism, in this instance, is not to be equated with instability but with a healthy evolution of relevant thoughts that improve the administration of justice. Stability is recognised as a strong feature of any legal system. That place can only be made possible by the sweeping away of ideological objections, intellectually lazy, legal and detached anecdotes that are more interested in maintaining the status quo than delivering a semblance of fair justice. These, it is argued, will have to be replaced by a whole new intellectually relevant and informed approach to trial by jury that serves its constituency. The place of the explained verdict in domestic and foreign jurisdictions, presently, is more latent than manifest and where it is manifest, is confined to judge only trials or pseudo jury trials especially of some of Europe's new systems.

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As our society and institutions become more complex and the spotlight is riveted stubbornly on the fairness of trials in the English Courts, the calls for such a place may become too loud to ignore.

In the chapters that follow, this thesis attempts to discover the place of the explained verdict. It does so, not as a new construction, but argues that historically, such a place has always existed but that it has been denied both by judicial control of the jury and by the present arrangement of the trial process.

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In essence, there is a place for the explained verdict provided the tribunal of facts is specifically instructed and provided with the means to deliver.

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### **Chapter Three: Legal Background**

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In the last chapter, I stated that this paper has a single conclusion. That is that the jury is competent to explain a chosen verdict provided it is specifically instructed to do so and equipped or supplied with the means to do so.<sup>47</sup> I further observe that the judicial system's entrenched interest in the verdict of a jury at the expense of the juries' reason or the thought process that results in the decision is damaging and ultimately questions the efficacy, fairness and legitimacy of trial by jury. As such, I argue, any aspersion to be cast on trial by jury is largely undeserved not least because it is a strictly controlled judicial tribunal whose participation in the trial process is largely passive. The nuances of a modern trial are such that impressions and 'gut feelings' play a prominent role in decision making.<sup>48</sup>

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<sup>47</sup> Such measures are articulated in later chapters. The explanation, it is suggested, must relate to the majority opinion.

<sup>48</sup> It has not always been so. Jurors were self-informing – a position that allowed them to dominate the proceedings relative to verdicts and which kept the judge in the dark as he did not share the local knowledge. Langbein details that in the age of the altercation, jurors often joined in the court conversation to ask questions or to make observations which had a good impact on the verdict rendered afterwards. This, he presents, led to the jury being effectively muted by the courts: Langbein *ibid* at page 319.

In this chapter, I shall present the legal background to the lack of explained verdicts and explore the relationship between that position and the demands of the modern society.

The effect of not requiring an explanation is to give cogency to unquantifiable factors which, in most cases, are extra-legal in nature. Every verdict is ultimately, in danger of being interpreted as sanctioning the trial system and procedures used in evidence gathering.

When juries deliver a particular verdict without explanation, there can be very little doubt that the ordinary citizen sees that as an admission that the system of trials is working well. That can be misleading. While a jury's verdict is not a referendum on the conduct of the trial officials, the involvement of the ordinary citizen in a quasi-democratic process should be allowed to expand the perception of the process and provide a platform for assessing the efficacy of such an important institution.

The modern jury is not required to explain its verdicts nor can it do so given the state of the trial process and what such an explanation, unarticulated, might reveal. It is argued that this position is far more complex than simply requiring the fact finder to deliver a general verdict. In nearly all cases, the verdict of the criminal jury does not reveal the factual basis on which that verdict was articulated. In fact, in some jurisdictions, the jury is simply not allowed to explain its verdict – it is certainly the case in all criminal trials in the UK and Canada. The US does not require it per se but jurors frequently give press conferences in an attempt to explain their decisions. In these jurisdictions, the deliberation is also sacrosanct. In Europe, Belgium, Spain and Russia require special verdicts involving a list of factual findings made by the jury.

South Africa and Israel have abandoned trial by jury and there have been much development in most European countries in the advent of the European Convention on

Human Rights. There is a shift in ideology altering the way juries deliver their verdicts. The question of accountability however, remains a thorny one.

The question of reconciliation of the European Convention on Human Rights and the International Conventions on Human Rights with these jurisdictions spotlights the notion of fair trials. The fairness of a trial, it is submitted, includes all aspects of that trial until the decision of the court as to penalties or discharge is pronounced by the presiding judge.

When understood in this context, fairness, therefore, is directly linked to the principle of an explained verdict. The rights to a fair trial and to an effective appeal are broadly recognised and support a requirement that an accused be told the reasons for a court's decision. Explanation or reason for a verdict is therefore a legitimate expectation of a modern democracy. Specifically, reasons provide a convicted defendant a basis to mount an appeal on the grounds that the decision is not supported by the evidence and avoids arbitrary rendition of in-articulated verdicts. They also ensure that procedural rules, especially rules of evidence are followed. As Kern<sup>49</sup> has argued, 'reasons are the antithesis of arbitrary decisions prohibited by the principles of fairness in criminal trials'.

With the exception of the United States, Canadian and Scottish jurisdictions, most of the legal jurisdiction researched here including England and Wales require trial judges to deliver reasoned opinions. Some of these positions are entrenched. In the US, the judge generally does not give reasons. In Canada, by contrast, he need not but this may be overturned on appeal where the evidence is strongly contested.

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<sup>49</sup> Kern, H. M. (2003) Reasoned Judgments requirements in International Criminal Law, Issue 13, Case Western Reserve University School of Law International War Crimes Project.

In Scotland, a judge does not have to give reasons for his decision but must do so if requested by the defendant for appeal purposes. Most other jurisdictions require that judges provide reasons for their opinions, generally in writing.<sup>50</sup>

The verdict, central as it is to a trial, is only a part of the process. To pronounce judgment without supplementing it with a précis of the factual basis of that verdict, it is argued, constitutes unfairness to a defendant primarily and to the system in general. As such, on a closer analysis, the explanation for a verdict ought to be part of a fair trial.

Since a fairness is a legitimate expectation of the parties to a criminal trial, there is scant justification for its emasculation by the denial of an explained verdict. This therefore, also becomes a legitimate expectation.

On the international scene, the principle that fact-finders must provide reasoned judgments exists or is at least emerging. Statutes governing international criminal tribunals expressly require reasoned judgments and the custom of nations supports a finding that reasoned judgments are required.<sup>51</sup>

The confidentiality of jury deliberations and the cryptic nature of their verdicts have received robust defences from the highest judicial officers in the land in various test cases. Some of the rulings are difficult to defend and in some ways, have attracted broadside comments from equally eminent legal thinkers. For instance, in *Ellis*, Bankes LJ declared that:

‘The court will never admit evidence from jurymen of the discussion which they may have had between themselves when considering their verdict or of the reasons for their decision whether the discussion took place in the jury room after retirement or in the jury box itself.’<sup>52</sup>

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<sup>50</sup> Kern *ibid.* op. cited

<sup>51</sup> Kern, Heather, M. (2003) Reasoned Judgments Requirement in International Criminal Law: Memorandum for The Office Of The ICTR Prosecutor.

<sup>52</sup> Per Bankes LJ in *Ellis v Deheer* [1922] 2 KB 113 at pp 117-118

This comment by his Lordship is a strict adherent of the common law rule that evidence of jury behaviour is inadmissible to determine what took place in the jury room. Yet, recently, this judicial pronouncement faced a robust rebuff in an obiter opinion in a test case. Lord Steyn's submission provides a contemporaneous lesson from the Law Lords for the 21<sup>st</sup> Century.

'...absolutist judicial pronouncements frequently do not survive the gauntlet of experience'.<sup>53</sup>

The retort reflects the willingness of some judges in the appeal process to consider the events leading up to a verdict and then decide whether or not to admit evidence depending on where the jury was.<sup>54</sup> Ellis, although a civil case, thus sits uncomfortably with some modern thinking outside of the court system once one becomes objectively focused on the matter. The common law position appears to have its origin in the ancient juries whose role was that of witnesses<sup>55</sup> and whose verdicts, given what they knew, were more or less unambiguous. As we enter the 21<sup>st</sup> Century with all its implications and Human Rights Conventions, the position taken by the judiciary in relation to an explained verdict, although attracting some sympathy, appears, ultimately, indefensible given the deference paid to the open process and the concept of fair trials. It is fraught with ambiguities.

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## Chapter Four - Ambiguity of Verdicts

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<sup>53</sup> Per Lord Steyn, *R v Mirza: R v Connor and Rollock* [2004] UKHL 2. Per Lord Rodger, 'Lord Steyn considers that he has identified a middle way. He is concerned to uphold the general rule that evidence about jury deliberations is inadmissible, but at the same time to admit 'cogent evidence demonstrating a real risk that the jury was not impartial and that the general confidence in jury verdicts was in the particular case ill reposed'.

<sup>54</sup> We have the interesting cases where evidence would be taken if the activities took place outside the jury room in court but not if the activities took place in a hotel. See *R v Mirza*. Op. cit.

<sup>55</sup> The origin of the jury dates back into obscure antiquity and there is a limit to how far back one can go but there are echoes of such a system even at the time of Hamurabi. See. Green, T.A (1985) *Verdict According to Conscience*. Chicago University Press.

In recent years, the lack of an explanation for a verdict has been described by Devlin as 'the oracle deprived of its ambiguity'.<sup>56</sup> The matter of this ambiguity is explored in later chapters. Furthermore, it has been argued that an explanation from the jury of its verdict or as it was put in Armstrong<sup>57</sup>, 'discussions and disagreement in public as to what happened in the jury room' is likely to undermine public confidence in the jury system and may have an adverse effect on the CJS.

This would appear to be the real reason why the jury is not asked to explain its verdict. Such an activity might lead to embarrassment.

The Law Lords submit their opinions on the matter in a way that only the polite and cordial debates within the erudite chambers of the superior courts can pay deference. The reality of society's evolution is checked by the conservative wisdom of the Lords and the supposed sound basis of the common law. Yet, in a world of accountability, can such a position be sustained? The above statement from Armstrong, however, is purely speculative and derives its eloquence not from empirical reality but from misguided 'absolutist' reasoning that does not address the issue of judicial instructions and jury management nor considers the implications of fairness in trials. In advancing such arguments, it might be more helpful to make the connection with the perception and actual reality of fairness in criminal trials. This pronouncement however, is a subject of its time taking place long before the advent of the ECHR enshrining the principle of and right to a fair trial.

The speculative nature of the point in Armstrong is worthy of note. In dealing with jury explanation for a verdict, the traditional decorum of the courts and conservatism of the institution may be helpful but need not constitute an impediment to progress and fairness. Their Lordships' allusion in Armstrong to 'disagreements in public' is a

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<sup>56</sup> P. Devlin, *Trial by Jury*, (1965)

<sup>57</sup> *R v Armstrong* (1922) 2 KB 555 at p. 568

strong indication of deflection argument. It suggests an unwillingness or reluctance to confront the issue. Instead, the argument is couched in inflammatory language that bears no semblance to the issue. The matter has always been about a constructive dialogue or articulated reason as opposed to a forum for exploring who said what during deliberations.

Juries need not be and are not asked to discuss what went on in a jury room – a position sustained by English common and statutory law. However, requiring the articulation of an explanation need not require verbatim reporting of the deliberations or a violation of the law.

There are compelling reasons why the deliberations should remain confidential. These have been articulated over a series of test cases.<sup>58</sup> Some are more coherent than others. All sustain the status quo. The reasons given for not requiring an explanation are far more ephemeral, less objective and largely unpersuasive given developments in human rights.

But Armstrong almost misleads. The reasons for not requiring an explanation have very little to do with disagreements by the jurors although there is every reason to sympathise with the point. It has more to do with the evolutionary control of the system by the judges.<sup>59</sup> This is a point that is addressed in chapter 6 which submits

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<sup>58</sup> R v Thompson [1962] 1 All ER 65, 66, per Lord Parker CJ; Ellis v Deheer [1922] 2 KB 113, 117 - 118, per Bankes LJ; at p 121, per Atkin LJ; Attorney General v New Statesman and National Publishing Company Ltd [1981] QB 1,10, per Lord Widgery CJ; R v Miah [1997] 2 Cr App R 12, 18 - 19, per Kennedy LJ; Roylance v General Medical Council (No 2) [2000] 1 AC 311, 324B, per Lord Clyde; R v Qureshi [2002] 1 WLR 518, per Kennedy LJ. The only exception is that where there has been, or may have been, an irregular occurrence of an extraneous nature, which may have compromised the impartiality of the jury the evidence may be admitted: Ras Behari Lal v King-Emperor (1933) 50 TLR 1; R v Hood [1968] 1 WLR 773; R v Brandon (1969) 53 Cr App R 466; R v Young (Stephen) [1995] QB 324. The position is similar in Scotland: Stewart v Fraser (1830) 5 Murray 166; Swankie v H M Advocate (1999) SCCR 1. Subject to differences as to the scope of the exception, a similar exclusionary rule has prevailed in Commonwealth countries: Canada: R v Pan; R v Sawyer [2001] 2 SCR 344; Australia: R v Andrew Brown [1907] 7 NSWLR 290; R v Medici (Court of Criminal Appeal, Victoria, 5 June 1995); New Zealand: R v Papadopoulos [1979] 1 NZLR 621.

<sup>59</sup> Langbein argues that jury trials have always been fraught with danger as jurors are untrained in the law and often inexperienced in adjudication, they decide without giving reasons and have no continuing responsibility for the consequences of their decisions: Langbein, *ibid* at page 321

that the cryptic verdict developed as an extension of an expected divine response in the use of trial by battle and other forms of medieval trials coupled with a judicial undertaking to guide the jury<sup>60</sup> in returning a verdict consistent with the direction of the judges. How does one intone on behalf of deity? As touching a jury's verdict as an extension of the divine oracle, we currently rely on a denial of reason and accept the outcome without question in most cases.

No one seriously suggests that the presentation of an articulated explanation is on par with giving a narrative account of the deliberation process.

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This research concerns collective reason articulation (which is harder to intellectualise in the present legal climate) as opposed to arbitrary comments by individual jurors (which although prohibited by English law, are easier to obtain – at least in some other jurisdictions).

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### **Evidentiary Fact Finding and Juror Ignorance**

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According to Damaska, there is, of course, the acknowledged strain between lay adjudication and the subjection of fact-finding activities to technical legal regulation. His argument is that too legalistic a demand places an undue and perhaps intolerable barrier to a successful outcome.

Jurors, as untrained decision-makers, cannot be expected to conform to a strict legal regime and still do their job. Yet the rules of evidence contradict him because they expect them to.

Damaska went on to comment, in the context of exclusionary rules of evidence and jury's approach:

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<sup>60</sup> Thayer, J. B. 'A Preliminary Treatise on Evidence at the Common Law. Part I. Development of Trial by Jury'. Little, Brown, and Company, Boston, 1896. Thayer argues this throughout his book especially at pages 137-181 as Langbein points out at page 321.



'Left to themselves, amateur judges are likely to follow a method of fact-finding with which they are familiar – a method, that is, in which the treatment of evidentiary material deviates as little as possible from conventions and strategies used in ordinary life and personal affairs'.<sup>61</sup>

The thrust of this submission appears to be that emotional affectations, rather than objective evaluation, often inform everyday decisions making it harder to explain a decision. The gravamen is with the use of the line 'left to themselves'. The implication is that the decision-maker, in the legal context, needs to be guided not just for the sake of decorum, but more importantly, by a set of rules and values designed to uncover a particular set of facts and deliver a certain predetermined conception of a trial in a civilised setting. Outside that context, conscience, warts and all, will be the bedrock of decisions. Even as Damaska later argues, part of the growth of the legal rules in criminal trials can be attributed to the presence of a controlled lay participation. In the absence of such control or instructions and guidance from the bench, the rules of evidence stagnate.

Damaska contrasts the situation with and supports his position by noting that the old English tradition of adjudication by amateur justices of the peace did not beget technical evidence of law. The risk of bias was not seen as a threat to the justices who were somewhat trained in their task.

However, as the public became a part of the system, it became necessary to ensure a fair trial by limiting or restricting the information available to the fact finder.

As a result, we have the rules of the exclusion of evidence. Damaska observes that the usual justification for this approach is juror incompetence on a scale that contradicts the usual eulogy reserved for the system.

As if to underline the point, it is observed that in contemporary criminal trials, the one thing whose stagnation is palpable is the jury. While the court system has evolved and

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<sup>61</sup> Damaska, M. R (1997) Evidence Law Adrift, Yale University Press at page 27

entered, albeit reluctantly, the modern age, the jury continues to sit, Damaska puts it, as 'potted plants' watching passively the drama of a criminal trial. It has remained enigmatic only because its composition is random and its reasons are withheld. The public continues to suffer the ignominy of an unexplained verdict. The CJS has evolved over time and the system has been somewhat modernised in part – we only need the assistance of history to remind us of the barbarism of legal Victorian England - lay participation however, in the form of a jury has not attempted to disprove, demonstrably, that it is capable of reflecting contemporary thinking or delivering justice in a fair and competent way. Yet, it remains a central part of all trials within its competence.

How do we explain it?

Dean Griswold of Harvard University,<sup>62</sup> echoed by Glanville Williams in reference to Herbert Spencer, once famously described the jury as a 'group of twelve men of average ignorance.'<sup>63</sup> Both the dean and Williams appear to embrace the same intellectual school of thought. Damaska, for his part, suggests that the oldest reason for developing evidential exclusionary rules in Anglo-American jurisprudence is the need to compensate for the alleged intellectual and emotional frailties of amateurs\* (juries) cast in the role of occasional judges.<sup>64</sup> For these commentators, the jury, as revered, is a hallowed gathering of 'dimwits'.

Damaska's use of the word 'alleged' draws attention as it has never been conclusively proven that jurors are deficient in their assigned role. Anecdotal<sup>65</sup> evidence abounds but conclusive and persuasive evidence is still lacking. How can we know for certain?

<sup>62</sup> Griswold, E. N (1962-1963) Dean of Harvard Law School, Report, pp5-6, cited in Kalven, H and Zeisel, H, (1966), *The American Jury*, University of Chicago Press

<sup>63</sup> Glanville Williams, (1963). *The Proof of Guilt* (3<sup>rd</sup> Ed.). London: Stevens, pp 271-272

<sup>64</sup> Damaska, *ibid*

We neither test jurors for intellectual prowess prior to a trial nor do we allow them to demonstrate their understanding or lack of it. The verdict, supposedly unambiguous, is replete with its own ambiguity in a way that does not advance understanding or the development of the jury as an institution.

Williams, echoed by Sir Robert Mark, the Commissioner of Metropolitan Police, submitted that 'there is no guarantee that members of a particular jury may not be unusually ignorant, credulous, slow-witted, narrow minded, biased or temperamental'.<sup>66</sup> He is, of course, correct. There is, after all, no professional juror and no training grounds or programmes to coach the citizen on being a good informed juror.

It is not clear either, that members of any chosen profession, however elitist, (the judiciary included) will not have enough of some of these attributes to make their judgments questionable.

Yet, the statements are made almost as if average ignorance is the exclusive domain of the ordinary man. Ignorance, of course, is a subjective factor and is relevant to a particular set of circumstances. If we mean legally ignorant, we, of course, play into the hands of juror exclusions and disqualification rules in England.

If we mean common sense, this is presumed. If, on the other hand, we mean gullible, well, that is an entirely different matter. Pronouncements about juries and their verdicts however, largely depend on which side the speaker is on. Such observations, it is observed, are not new.

In 1607, James I made a proclamation for Jurors that asserted that jury service:

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<sup>65</sup> The exclusion of certain classes of the citizenry in the EK fuels the argument that the system is deprived of those who could make an informed and positive contribution to the process.

<sup>66</sup> See Williams, G. (1963) *The Proof of Guilt: A Study of the English Criminal Trial*, 3<sup>rd</sup> Edition: The Hamlyn Trust, London at page 271.

'...oftentimes resteth upon such as are either simple and ignorant and almost at a gaze, in any cause of difficultie, or else upon those that are so accustomed and inured to passé and serve upon Juries and they almost lost that tendernesse of conscience which in such cases is to bee wished and make the service as it were an occupation and practice'.<sup>67</sup>

The statement attributed to Dean Griswold has much in common with the proclamation of King James I although with some significant difference.

It is instructive that time has done very little to blur the lines or the perception of the jury even though the circumstances might be somewhat different.<sup>68</sup> It is equally interesting that time has not assisted the approach of the CJS towards the jury.

The Criminal Justice system, through a lack of focused commitment to reform, appears committed to perpetuating this perception of ignorance. It need not be.

Glanville Williams, like Damaska, supposedly, acknowledges the institutionalised flaw in civic society – that the individual is not sufficiently prepared, by the system or otherwise, to think in complex situations and worse, the system knows it and has no answers for this. Instead, we attempt to make up for what we lack by protecting the jury from intrusion in the form of sacred deliberations and the cryptic verdict. Indeed, he appears quite scathing about the quality of jurors and makes a cogent observation of who the average juror was.

However, in his assessment, valid at the time, he comments, almost patronisingly, that jurors are 'kindly souls' but that 'persons whose occupations are of humble character rarely qualify to be regarded as first rate intellectual machines'.<sup>69</sup>

One can only speculate on how Williams measured the intellect. On the basis of his assessment, random selection of jurors from the public must be abolished, serious

<sup>67</sup> James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 142 (1983)

<sup>68</sup> The problems alleged in the proclamation and in later years were due to complex cases including the issue of corrupt sheriffs who might be bribed into choosing partisan jurors or the problem of property qualification which made it difficult to find qualified people to serve. There were also the cases of jurors being bribed to become partisan. See Oldham *ibid*.

<sup>69</sup> *Ibid* at page 272

consideration given to a school of professional jurors and juror exclusion law repealed thus bringing 'first rate intellectual machines' into the pool or as Tocqueville put it, select the jury from the aristocratic portion of the nation'.<sup>70</sup> The inferior intellect of jurors, it is argued, however, is not *sui generis*.

Yet, the man of average ignorance is, to the extent that trial by jury is concerned, indispensable. What both the Dean and Glanville Williams meant by average ignorance is not clear. It is instructive to note that by virtue of excusal and exemption, the jury is denied the contributions and intelligence of many relevant citizens. Thus, we may be led to believe that the average man is not equipped with the intellectual capacity to perform the mental and intellectual acrobatics required by trial by jury as Williams articulates.

One must consider that such observation upsets the presumptive prowess of the ordinary man to hear evidence, unassisted, except by the drama of the trial lawyers, deliberate without trial notes<sup>71</sup> and return a just verdict – a role that keeps him central (in the relevant corner) to the criminal justice system.

One would expect that a legal process that glorifies novice amateurs as fact finders would also presume their intellectual and emotional capacity for the job.<sup>72</sup> That is, of course, the precise problem. That presumption is strong as a matter of principle and dogma but lacking at the point of delivery as touching an explanation. The position, however, cannot be justified. Of course, Griswold's position, echoed by Mark Twain, is in opposition to trial by jury.

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<sup>70</sup> Alexis de Tocqueville, *Trial by Jury in the United States Considered as a Political Institution*, in Alexis de Tocqueville, *Democracy in America* 318 (1835/Phillips Bradley Trans., 1960)

<sup>71</sup> The situation has now been updated in England & Wales. Jurors may now take notes during a trial but are not allowed to take their notes outside the court or jury room. They can discuss the case when all jury members are present and in private...[www.cjsonline.gov.uk/juror/the\\_trial](http://www.cjsonline.gov.uk/juror/the_trial)

<sup>72</sup> Damaska, *ibid.* page 29.

General research indicates that the jury enjoys tacit acceptance by the judiciary not for its forensic intelligence but for the fact that it is a controlled and controllable medium for lay participation in the CJS. In other words, the jury can be relied upon to do as directed at least in the main. However, its intelligence or lack thereof, is taken for granted and has not been tested. There appears to be a collective decision to resist the test.

Our system of democracy favours lay participation in the trial process for reasons of connectivity (the idea that public involvement in the judicial process legitimises the system with the masses). The jury fulfils this role. The judiciary largely controls the extent of that participation. A provision requiring a post verdict explanation should provide the lay participants with a platform to learn the dynamics of evidence evaluation, collective decision-making within the context of group bargaining and reason articulation for the benefit of the CJS. But the benefits are not just institutional. An articulated and structured explanation of the reasons behind a verdict has implications for the principle of finality or *res judicata* to the extent that the system is seen to be open however removed from reality the decision might be perceived to be by objective observers. (The matter of the objective observer will be discussed later in chapter 13).

It also provides a platform for the jurors to come to terms with their decision and the role they have played.

It is argued that in the event, confidence in the system is a prized commodity that relies as much on perception and fairness as it does on logic and evidence evaluation. Articulating an explanation may assist that public opinion in ways that are yet to be researched.

An explanation stabilises this logic in spite of and even in the face of the confidentiality of jury deliberations. The emphasis should be balanced between the verdict and the reasons underpinning it.

There is one further point. An explained verdict may serve to inform those who participate in the CJS as to areas in need of improvement.

Such areas may include the gathering of evidence, the presentation of evidence, the ability and legal counsellors, the principle of due process, the complicity of the state and many other areas that are not articulated here.

A general verdict relies on the standard of proof. In other words, if the presented evidence can be legitimately contested, the defendant ought to be given the benefit of the doubt. What happens when further compelling evidence becomes available that would tend to question the validity of a verdict? In the present climate, a general verdict does not leave any room for debate except for recourse to the Court of Appeal on a point of law and not on the evidence.

Yet, a reading of some rulings from the Court of Appeal would indicate that the two often merge in analysis. Perhaps this is what Devlin meant by the Oracle being deprived of ambiguity. We have the appeal process to address that but this is a qualified access. Much argument surrounds the application for appeal and it is by no means guaranteed.

Can an explained verdict indicate whether or not more evidence is needed, withheld or suppressed? One suspects the answer must be in the affirmative. As such, it becomes vital to the system.

This paper contends that there is more to be gained from an explained verdict and in the latter chapters, goes on to explore these.

First, however, is there a constitutional platform for trial by jury?

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## The Constitutional debate

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There has been much debate about the contribution made to the legal process by lay participation in the form of a jury<sup>73</sup> in criminal trials. This has been amplified in recent times in light of recent various Royal Commission recommendations<sup>74</sup> and the UK government's proposals although the debate had raged on well before Sir Patrick Devlin delivered his seminal Hamlyn lectures in 1956.

Much commentary and empirical social scientific research from the UK, the USA and other common law jurisdictions have fuelled the debate but no consensus has emerged on whether or not the jury is a useful tool for discovering the truth of a matter in question and for dispensing justice.

Yet the jury survives in various guises in the common law jurisdictions probably because a suitable and acceptable replacement in our democracy has not been found.

Or as Tocqueville stated, because 'the jury serves to communicate the spirit of the

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<sup>73</sup> It has been observed that thinkers as disparate as Winstanley, Cromwell, Bentham, Frank and possibly even Glanville Williams would support abolition of the jury. See Freeman, M.D.A (1981), *The Jury on Trial: Current Legal Problems*.

<sup>74</sup> The Roskill Commission of 1986 advocated the abolition of the right to jury trial in complex fraud cases. The James Committee, in its 1975 study, 'The Distribution of Criminal Business between the Crown Court and the magistrates Courts', recommended that minor thefts and similar offences should become summary offences thus removing them from the jurisdiction of the jury. Very few civil cases are now tried before a jury. In terms of statutes, Amendments to the Criminal Damage Acts 1971 took certain cases away from the jury making them summary offences. Part V of the Criminal Justice Act 1988 removed the right to jury trial for other offences including driving whilst disqualified. The Coroners' Court has been modified by the Criminal Law Act 1971 and the Northern Ireland (Emergency Provisions) Act took away the right to jury trial for defendants in serious criminal cases



judges to the minds of all citizens and this spirit, with habits which attend it, is the soundest preparation for free institutions.’<sup>75</sup> One would have thought that this system which has been subjected to robust criticism would have succumbed to Rawl’s submission that:

‘A theory, however elegant and economical must be rejected or revised if it is untrue: likewise, laws and institutions no matter how efficient and well arranged must be reformed or abolished if they are unjust’<sup>76</sup>

The statement is worthy of note. Trial by jury is neither elegant nor economical but it does say much about our sense of democracy. By the same token, many of our public institutions are neither elegant nor efficient but continue to survive on the basis that they provide a public service. Few, however, would argue that the system of jury trial is unjust. Yet, that is a charge that may raise its head as society becomes more advanced and demands for accountability and openness increase. Alas, although attempts have been made quite valiantly to remove trial by jury, it continues to flourish albeit in a less elegant corner of the criminal justice system.

Contributions to the debate, though highly articulate in the most, have ignored the dual subjects of reason as a vital ingredient in the verdict of a jury and the appendage question as to whether or not the tribunal of fact is equipped to explain its verdict.

Damaska articulates a brief exploration of the trial process holding that

‘...unfamiliar with applicable rationalising conventions, these judges cannot elaborate a satisfactory explanation of their decision’.

He concludes that

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and the right to jury trial in Northern Ireland was taken away in most serious cases (not exclusively relating to terrorism) following Lord Diplock’s report on intimidation of jurors in 1973

<sup>75</sup> Tocqueville, *ibid* at 317, 319

<sup>76</sup> Rawls, J. (1971), *A Theory of Justice*, Harvard University Press at page 3.

'...the requirement that jurors make the exercise of their power transparent, although attractive in democratic theory, appears undesirable in practice'.<sup>77</sup>

Damaska makes three important points. Firstly, he presents the unfamiliarity of the jurors with rationalising conventions (a point he does not define) but which can be taken to mean accepted and acceptable formal rules of behaviour that are expected by the judiciary which are outside the everyday experience of the jurors in their individual capacities. This recognises the supposed inadequacy of the masses to align themselves with the expected rationalising norms. We can hardly feign surprise at this given that no attempt is made to avoid it. Even more telling is the absence of a definition of what really is expected of juries except to deliver a general verdict and to observe certain modes of behaviour that have more to do with decorum of the courts than justice. We expect jurors to retire for deliberations but, strictly speaking, have no requirement to deliberate or a way of ensuring that deliberations take place given the sanctity of the jury room.

Secondly, he touches on the elaboration of a 'satisfactory explanation of their verdict'. We can presume that by 'satisfactory', he really meant 'acceptable on a balance of probability' rather than satisfying the subjective legal standards of the system operators. It is submitted that the pursuit is not satisfaction but logic and reasonableness. We cannot test the level of satisfaction except by appeal to objective standards. However one explains a verdict, one will not satisfy everyone but a pattern of logical reasoning may be more persuasive.

Thirdly, we may read his reference to 'elaboration' to mean 'clear communication' rather than embellishment or amplification. This highlights the fact that what would

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<sup>77</sup>Damaska, M. *Evidence Law adrift*. Yale University Press, New Haven & London 1997.

be required would be a brief and articulated presentation of reasons for a verdict as opposed to a prolonged and detailed explanation that may have to trace the genesis of a verdict and make a narrative of deliberation unavoidable. It is submitted that the genesis of a verdict lies in the reasons for the trial in the first place and the evidence produced to sustain any allegation.

An explanation need not allude to the genesis of the verdict as it would be superfluous unless there are compelling reasons for doing so. This must remain at the discretion of the jury.

As a fourth point, Damaska goes on to talk about the process not being desirable in practice. Indeed. He opines that the jury 'cannot articulate reasons...' This begs the question whether or not it is possible and who should be doing the desiring. If the requirement for an explanation is to be pursued, this should be done in response to the public who serves and is served by the criminal justice system in deference to the demands of fair trials. It appears, at least in international law, is doing precisely that.

Finally, as a fifth point, he discusses 'making the exercise of their power transparent'. This position is denied by this paper and arguably by the legal system judging by the recent ruling on the confidentiality of jury deliberations by the House of Lords in *Mirza*.

Making the process transparent could be confined to the narrow criteria of articulating an explanation for a verdict.

This is significantly removed from opening up the deliberation process to public scrutiny which appears to be the thrust of Damaska's commentary as enunciated by Armstrong. The established argument then is not so much that the jury cannot articulate a reason as that it should not. Like most commentators, Damaska appears to

be referring not to an articulation of explanation but to the transparency of the deliberation process. The two are opposed although one is antecedent to the other.

Yet, the summation of these comments appears to be, under the present conditions, the jury is incompetent to explain its verdict and that as a practical matter, it should not. The Contempt of Court Act 1981 and the common law in England and Wales prohibit any 'intrusive' research into jury deliberations.

Thus, the matter is beyond the encroachment of academic research. However, survival of the jury is, in the event, subject to public confidence<sup>78</sup> and the delivery of fair trials by the CJS. Public confidence, it is argued, is not necessarily attached to actual lay participation (although it is a powerful symbol of it) but in the perceived consistency of the 'correctness' of verdicts delivered by the jury. The matter of jury participation has been extensively researched. It is outside the remit of this inquiry.

The approach of this thesis to the debate is necessarily narrow but pragmatic. If we can determine whether or not the jury can be made to articulate an explanation for its verdict, we may be able to determine how this may assist the ECJS and whether or not there is a place for an explained verdict.

In turn, the debate as to the usefulness of lay participation in the form of a jury in modern criminal trials will be greatly assisted and perhaps driven to an objective conclusion.

We may then be able to determine whether or not we have a system that reflects and satisfies the needs of a modern democracy. The approach is both principled and practical.

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<sup>78</sup> Consistently shown to be high. See e.g. Times Newspaper January 2002 which indicates an 84% approval rate. See 'The Auld Review of the Criminal Courts of England & Wales', 2001, Professor Michael Zander in 'Response to the Auld Review 2001. See also 'What can we learn from research into the jury up to 2000?' Dr. P. Darbyshire et al.

There is very little mileage in attacking a jury's verdict unless we are prepared to look beyond the verdict to the factors that affect that verdict and beyond those to see why those factors affect the reasoning process. In order to do this, it is necessary to consider how people think individually and in group situations. It is also necessary to consider how group decision making might be affected by external authority and circumstances surrounding the process.

First however, we must explore the basis for a jury trial.

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### **The Right To a Trial By Jury**

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As a point of observation, it is submitted that there is a difference between a defendant's (elective) right to trial by jury and a society's entitlement and commitment to the system.

It could be argued that if the UK government<sup>79</sup> were to succeed in its legislative efforts, trial by jury as a system would be retained in the main but a prescribed defendant's access to a jury would be subject to a number of restrictions and regulations. Yet, in England & Wales, there is no right to trial by jury – at least not in the way it is often presented. Instead, there is automatic access to trial by jury for all indictable offences. In other words, it is not a choice.<sup>80</sup>

For all offences triable either way, one may elect trial in a magistrate's court or opt for jury trial. An accused cannot just demand trial by jury

It is further submitted that if, in the event, a jury is found incompetent to explain its decision but remains a popular part of our criminal trials and that society demands and is justifiably entitled to an explained verdict or that an explanation is an essential

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<sup>79</sup> See The Criminal Justice (Mode of Trial) (No.2) Bill (2002) which proposes that trial by jury be abolished in complex fraud cases or in cases where the jury has been or likely to be intimidated or even, for whatever reason, the defendant has waived his right to a jury trial.

ingredient in a modern criminal trial, a bridge would have to be constructed for the chasm that would have been identified between the popularity of trial by jury and the system's incompetence.

In other words, how can a society that demands and is entitled to a reasoned verdict happily repose its faith in a system whose workings and verdicts remain unexplained?

This is a matter for further academic research.

### Legitimacy deficit

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The jury suffers legitimacy deficit, Damaska has argued, because 'persons who exercise authority in a democratic polity are expected to give reasons for what they decide or do'.<sup>81</sup> The argument of this paper is that an explanation adds credence to a verdict but its absence, on its own, does not detract from the verdict's legitimacy. However, when the issue of fair trial is addressed, the verdict's position becomes untenable with regards to legitimacy. After all, the jury is an invited passive but important participant in a trial. Its role is not self imposed but derivative. Thus, fairness is not restricted to the jury but involves the trial process as a whole and the judicial system in particular. If the jury's verdict lacks legitimacy, the entire system is the equally culpable.

The jury, at present, is not required to nor does it give reasons for its verdict.

The starting point, it would appear, is to explore a possible explanation for this situation which leads one to the quest whether the jury can articulate reasons for its verdicts given its nature and any likely consequence that might follow.<sup>82</sup>

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<sup>80</sup> A Review of The Criminal Courts in England and Wales, Auld, L.J. (2001).

<sup>81</sup> M. Damaska *ibid*.

<sup>82</sup> For an interesting discourse on the intellectual perspective of the unexplained verdict, see M. Damaska, (1977) *Evidence Law Adrift*, page 41. Yale University Press, New Haven & London..

This paper explores the subject of reason given the prevailing medieval judicial view that a jury's decision is a matter between God and its conscience.<sup>83</sup>

It argues that the roots of the unexplained verdict lie in the nature and composition of the medieval jury as self-informing witnesses and the early authorities.<sup>84</sup> It further argues that the lack of requirement for an explained verdict, in the modern context, owes as much to jury dynamics and the nuances of a trial as it does to judicial concerns and legal considerations. The view is substantiated by reference to legal history and the subsequent use of juries both by the crown and the judiciary.

The argument is sustained by reference to research studies into the decision-making process and behaviour of the jury past and present.

There is another point. The average person, it has been argued, is ill-equipped to make a useful cerebral contribution to the system of trial by jury because of the nature of the activity. The system therefore fights shy of asking him to articulate an explanation of his decision. Yet, the system finds him perfectly capable of reaching a decision – prejudiced and all.

Given the adversarial nature of our criminal trials and the inherent predispositions of jurors which they are largely allowed to keep, it is submitted that the case for an explained verdict can be robustly argued. The legal system does not yet acknowledge its own faults in this area and no sustainable evidence has been presented to continue to deny the place of the explained verdict.

Yet it is difficult to ignore the boundless and exacting demands of a modern democracy, post human rights conventions, and the contributions that, arguably, could be made to the criminal justice system by an explained verdict.

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<sup>83</sup> Lord Mansfield 1784.

This paper grudgingly countenances the view that the jury's verdict, notwithstanding the above, ultimately and as part of a criminal trial process, lacks legitimacy precisely because it is not qualified with an explanation. It presents, as a crucial point of legitimacy however, the fact that jurors, randomly chosen strangers from the local community, are briefly translated to the dizzy (and what must appear to them to be an inexplicable) position of power and authority with no formal training in order to 'inject' humanity into the judicial process and then dismissed back into obscurity and anonymity. This, it is argued, is not enough. This paper presents the argument that because jurors are never there long enough to become case-hardened and that in themselves, do not constitute a 'personal institution' such as a judge might become, their decision is both independent and legitimate. Yet the matter goes further.

The matter is that intellectual objections to the system notwithstanding, the very essence of humanity and experience that jurors bring to the trial and the non-verbal nuances of lay participation<sup>85</sup> not only add unparalleled legitimacy to jury verdicts but also make it impossible for the body to articulate a reason.<sup>86</sup>

That legitimacy however, is qualified and in an age of accountability, is blunted by the lack of explanation. It is quite possible that future generations may come to view its absence from criminal trials as a denial of a basic human right. This is made more pronounced by the fact that it is something that can be rectified quite easily through

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<sup>84</sup> Bushell's Case (1670) in *State Trials*, 6:951 (1770) and the Seven Bishops' Case (1688), Green T, *Verdict according to Conscience*. Chicago: University of Chicago Press, 1985 at page 202

<sup>85</sup> Matters such as belief in the witness' testimony, body language and interpretation of evidence, social, cultural and religious backgrounds, experience, prejudice and the very nature of humanity – values with which the mythical 'reasonable man' is supposedly endowed with. See *R v Mirza* [2004] HL where some members of the jury, with the exception of one found that the use of an interpreter by a defendant was dubious.

<sup>86</sup> The argument is not that the jury cannot articulate a reason but even as Damaska concedes, it cannot present it in a way that is both intelligible and acceptable to the scrutiny of the courts and to the judicial system. However, it would be intellectually questionable to claim that this robs the jury's verdict its legitimacy.



the use of coherent and specific judicial instructions and above all, through an articulated and deliberate reformation process.

In the event, speaking generally, it is argued that the jury, like any other body of decision makers, can indeed give reasons for its verdicts if required to, encouraged to and provided with the mechanism to do so. We see this at the juror level (in some jurisdictions where post verdict press conferences are held by jurors) at the very least albeit with varying degrees of reliability brought upon by various motivations outside the judicial control.

This is to be abhorred as it does not, in any way, advance the course of the system. However, there is evidence that jurors desperately wish to tell their stories especially in highly publicised cases where the verdict is scrutinised and interpreted by the media. In the absence of a legal requirement to articulate an explanation that can be produced post verdict, it is not difficult to see why jurors would speak out where the law does not prevent them from doing so (as in the US). This, it is argued, provides a 'vent' for the jurors as it allows that very human need – to justify his decision to a possibly sceptical public. The crucial question is relevant to collective coherence and articulation.<sup>87</sup> The presentation of articulated (and somewhat unassailable reason - for the purposes of an appeal) by a jury in open court is an unexplored and legitimate public concern deserving academic research. So far, there is no authority in this basic area.

An extrapolation of the conclusion of the study may inform the debate as to whether or not the jury should continue to survive as a judge of facts in a modern CJS. It is conceded that although the hypothesis in this work may be proved, any conclusion

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<sup>87</sup> It is one thing for each juror to give his reasons. It is quite another to present it in a way that serves a useful purpose to the CJS. Jurors (and indeed everyone) look at evidence from different angles and invariably, reach a decision for various reasons. Unless their collective reasoning is structured and articulate, incalculable damage could be done to the system. I shall return to this subject later.

that suggests the imminent demise of the jury institution based on an empirical understanding may be still-born.

This is because there is a wide gap between a finding that the jury is incompetent to explain and a subsequent call for its abolition or abandonment by the country at large.

The giving of reason is now required in all public, judicial and political<sup>88</sup> judgements and a modern democracy expects<sup>89</sup> reason as part of an open judicial and political system.

‘The starting point must always be that in a trial on indictment, the jury is the body to which the all-important decisions on the guilt of the accused are entrusted...’<sup>90</sup>

This is an essential ingredient of the UK’s unwritten constitution. Put in its most simplistic form, the jury decides the fact, the judge decides the law.<sup>91</sup>

The jury delivers its general verdict after an encounter with the evidence presented in a highly structured oracular event – the trial. That verdict may or may not be appealed against. The jury does not explain or indicate the basis for that verdict.

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<sup>88</sup> For a view in civil matters, see *R v Aylesbury Vale Council, ex parte Chaplin* (1997) 76 P & CR 207 where it was held ‘that where there was no statutory duty imposed, an authority need not give reasons for the granting of planning permissions’.

<sup>89</sup> The word is used advisedly and makes no attempt to predetermine the findings of the study. Society appears to expect reason from all public servants and there is even the provision to challenge an unreasonable reason in the courts. This has become part of the political psyche made necessary by the prevalent openness and demands of effective civil rights conventions. It is a matter of interest, nonetheless, that either due to the statutory or constitutional provisions or the perceived inscrutability of the jury, society at large appears to accept that the anonymous jury will take the secrets behind their verdict back into obscurity. No political agitation or civil liberties unrest exists to challenge this statutory provision and common law rules of inadmissibility either in the form of political lobbying or on the grounds of human rights. The House of Lords recently decided to perpetuate the secrecy of jury deliberations in *R v Mirza; R v Connor and Rollock* [2004] UKHL 2 with Lord Steyn somewhat dissenting on technical grounds but countenancing the majority view nonetheless. While under consideration was the secrecy of the deliberation process, the question of reason is not being addressed. It is conceded that this might become superfluous in light of the ruling on the secrecy of deliberations (because if we can have access to the deliberations, demanding or extrapolating a reason may become part of the process) but this is by no means conclusive. An open deliberation process does not translate into a reasoned verdict but may indicate to the observer, the thinking leading to it and may also force the decision maker to be more objective. This may have far reaching consequences for the survival or otherwise of the jury and the issue of representative and participatory judiciary.

<sup>90</sup> *Franco v The Queen* (2001) UKPC 38 quoted by Michael Mansfield QC and referred to with approval by Lord Bingham of Cornhill in *R v Pendleton* (2002) 1 Cr. App. R. 34

<sup>91</sup> It is of interest to note that ‘the judge and jury were never formerly created as two separate institutions: there was never any separation of powers, never any conscious decision by anyone that questions of law ought to be decided by lawyers and those of facts by laymen. The jury derived all its

Thus, it is impossible to tell, save perhaps from questions asked by the jury after retirement,<sup>92</sup> what challenges<sup>93</sup> the jury faced or why it made a particular decision, what evidence it accepted or rejected.

Support for the jury has fluctuated over time and it remains a controversial institution. Many argue that it is incapable of understanding the complexities of some modern criminal trials.<sup>94</sup> Various legal reviews<sup>95</sup> in the UK have advocated the abolition of the elective right to jury trial. The government's proposals include limiting access to trial by jury by extending the sentencing powers of magistrates' courts.

There is, further, the argument that given the powers of the jury to return a 'perverse' verdict,<sup>96</sup> it diminishes the essence of democracy and accountability.

This argument is by no means coherent and is addressed in chapter thirteen where it is contended that except for certain parties to a trial and given the structure of our trials, the notion of a perverse verdict does not legitimately exist.

powers from the judge and from his willingness to accept its verdict'. Devlin, P. Trial by Jury, Hamlyn Lectures, 8<sup>th</sup> series (1966) at page 13.

<sup>92</sup> The jury has to write down any questions it wishes to ask the judge. These must then be submitted to the judge who will summon the entire participants back to court for an open reading of the questions and any responses from the judge.

<sup>93</sup> In civil cases, these challenges that jurors face can be telling as in *Igwemma v Chief Constable of the Greater Manchester Police*, (2001) EWCA Civ 953, (2002) QB 1012. Here, a jury which had been discharged was told it could stay while the judge considered a question of law relating to malicious prosecution. On hearing the judge's address to the claimant of the verdict, the foreman told the judge that the jury might have misunderstood the questions put to them whereupon the judge invited the jury to retire again and further consider the question with the effect that the jury changed its verdict on the particular question. In dismissing the appeal, the Court of Appeal held that the judge was entitled to set aside the jury's discharge and to allow them to deliberate further under properly controlled circumstances in order to enable it to give the answer it wished before its members separated and before they had heard anything they should not have heard.

<sup>94</sup> *Jurors and Juries*, V. Hans and N. Vidmar 2002 2<sup>nd</sup>. Ed. Blackwell Companion to Law and Society.

<sup>95</sup> *The Distribution of Criminal Business between the Crown Court and the Magistrates' Court*. Report of the Interdepartmental Committee. Cmnd. 6323 November 1975, *The Runciman Royal Commission of 1993 and the Nairey Commission in 1997*.

## A National Treasure

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On the other hand, the jury has been described as the ‘lamp that shows that freedom lives’<sup>97</sup> and a bulwark of our democracy.<sup>98</sup>

As compelling as the argument has been, there has been no articulation of the competence of the jury to explain its verdict in open court. It is a body of randomly selected citizens who are as unfamiliar with each other as they are with the case at hand and in most cases, the system. As a by-product of democracy<sup>99</sup> and an instrument<sup>100</sup> of the judicial process used to help the judge ‘arrive at a right decision’, the jury is discharged as soon as a verdict is rendered.<sup>101</sup>

The random selection, adversarial trial system, deliberation process and the nuances that give birth to the verdict appear to render an explained verdict unfeasible and an unattractive prospect.

It is a ‘little parliament’<sup>102</sup> of the people, a ‘palladium’ that ‘...remains sacred and inviolate’.<sup>103</sup> The verdict, in some cases, is as much a duel between the state or the

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<sup>96</sup> Auld. LJ recommends, in his Review of Criminal Courts in England & Wales 2001, that this be outlawed by statutory provision if necessary. This has been rejected by the government. The matter of perverse verdicts is dealt with later..

<sup>97</sup> Sir. Patrick Devlin, Trial by Jury, Hamlyn Lectures 1956.

<sup>98</sup> Blackstone Commentaries on the Laws of England (Oxford, 1765-1769) Book IV, Ch. 27, Para. V.

<sup>99</sup> In the modern sense and in those nations that have embraced trial by jury such as the US, Canada, Australia etc, authoritative lay participation in criminal trials is seen as a corollary of fair trials and one of the last aspects of participatory democracy.

<sup>100</sup> Trial by Jury, *ibid.* at page 12

<sup>101</sup> The verdict, according to Devlin, is legally sterile until judgment is entered upon it.

<sup>102</sup> Trial by jury, *ibid.*

<sup>103</sup> Blackstone Commentaries *ibid*

law and the jury's conscience<sup>104</sup> as it is a game of wits, test of reasonableness, experience, negotiations skills, prejudice and sheer staying power of the jurors.

That it is almost impossible, in the prevailing circumstances, for the jury to explain its verdict *coram populo*<sup>105</sup> is worth further investigation.

Perhaps the criminal justice system will benefit from an explained verdict thus making the system certain in some respects. The benefits to be gained from an explained verdict include clarity of the state of the law and some certainty over the grounds for appeal should this be deemed necessary quite apart from having a stifling effect on prejudice during deliberations.

On the other hand, perhaps such a requirement might undermine the judicial process.

As E. P. Thompson observed,

'When the jurors enter the box, they enter also upon a role which has certain inherited expectations; and these expectations are inherited as much from our culture and our history as from books of law...the English common law rests upon a bargain between the Law and the People. The jury box is where people come to court, the judge watches them and the jury watches back. A jury is the place where the bargain is struck. The jury attends in judgement not only upon the accused but also upon the justice and humanity of the law'.<sup>106</sup>

There is an argument that the jury's silence on its verdict maintains and guarantees that bargain<sup>107</sup> and this view is consistent with Damaska's. Thus, asking the jury to explain its stance may bring it overtly into the political arena and a position that is neither healthy nor helpful. The bargain is struck and the details are moot. It is almost as if both the judiciary and the juries are saying to each other,

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<sup>104</sup> Auld LJ. described it as 'a partnership between judge and jury given the summing up and judge's directions before retirement of the jury'. The jury does not have to accept the views of the judge especially if they feel they are being admonished to find against their conscience. The judge's summing up being an act that turns on his position to uphold the law'.

<sup>105</sup> In the presence of the people

<sup>106</sup> Writing by Candlelight, 1980

<sup>107</sup> A point explored in subsequent chapters where it is argued that to explain a verdict would expose the system to intolerable scrutiny which neither the jury nor the CJS as a whole may be able to sustain.

‘...some of that which you know, we know too but our silence guarantees our acquiescence and by implication, our survival’.

Yet, it has been observed that the jury plays a political role as argued by Tocqueville especially when it nullifies a law by acquitting a defendant in the face of uncontested and overwhelming evidence.<sup>108</sup>

Further from the above statement, one may reach the conclusion that the jury implicitly engages in political judgements when ... ‘it attends in judgment not only upon the accused but also upon the justice and humanity of the law’.

We shall go on to analyse some of the arguments. First, we must understand the origins of the jury.

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### Chapter Five - A Historical perspective

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The word ‘jury’ is a derivative of the old French noun ‘juree’ meaning an oath, judicial inquiry or inquest (as in the verb ‘jurer’ – to swear) and the medieval Latin ‘jurata’ from the verb ‘jurare’.<sup>109</sup>

‘The origin of the jury is probably to be found in the importation, from Normandy, of a system of inquisition in local courts by sworn witnesses. This was found in England shortly after the Norman Conquest and from the first, combined with the existing procedure of the shire-moot. The earliest jury was a body of neighbours summoned by a public officer to give an oath as answer to some question’.<sup>110</sup>

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This would be more pronounced in controversial cases, notorious or politically motivated crimes when the jury acquits.

<sup>108</sup> Such as the cases involving the Official Secrets Act where the jury acquitted in the face of overwhelming admitted evidence thus confusing the law on national security.

<sup>109</sup> The Oxford English Dictionary

<sup>110</sup> See Walker, DAVID M. The Oxford Companion to Law. Oxford: Clarendon Press. 1980) p. 686.

The sworn inquest was used to enable the recognition on oath of a number of probi nomines<sup>111</sup> who were selected as neighbourhood representatives testifying to matters of personal knowledge.

Trial by jury was applied by Henry II to all types of legal and fiscal matters. It later came to be used in various types of legal action.

At the end of the 12<sup>th</sup> Century, an accused was able to obtain the right to jury trial by payment of a fee.

Defendants in those offences classed as felonies were tried on indictment, with their consent, before a jury.

The Statute of Westminster I (1275) prescribed the severe punishment of committal to prison forte et dure<sup>112</sup> if a defendant refused trial by jury. The practice was abolished in 1772. From 1827 onwards, if a defendant refused to plead, the plea of 'not guilty' was entered.

Trial by jury was the prescribed mode of trial thus negating arguments as to the defendant's right to choose. It was not a right. It was a requirement. The decree in 1215 by Pope Pius III prohibited clergy participation in trial by ordeal<sup>113</sup> and other methods of trial such as compurgation,<sup>114</sup> trial by battle<sup>115</sup> and blood feuds.<sup>116</sup> The

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<sup>111</sup> Translates roughly to 'good, upstanding names'.

<sup>112</sup> Hard and strong prison which was later transformed into peine fort et dure, a form of torture whereby in the 16<sup>th</sup> Century, the prisoner was placed between two boards on which increasingly heavy weights were placed until he consented to jury trial or died. See David Walker's *The Oxford Companion to Law*. (1980)

<sup>113</sup> An ancient Anglo-Saxon method of settling disputes at customary law which made it to common law. It relied on assumption that God has opinions about human disputes and will follow these up with divine interventions. Some methods required proof of rapid healing after the accused was dumped into hot water or put in contact with hot iron. Other approaches included throwing him into deep water and immediate sinking was seen as proof of innocence since the pure water was prepared to accept him. Prompt rescue was both desirable and justified. On the grounds that it was arbitrary, it was outlawed in 1215 and gradually replaced by Trial by Jury.

<sup>114</sup> Where the accused sought to clear his name by using his oath supported by those of others, usually 12, who would normally be friends and neighbours testifying to his character as opposed to facts. It was used by common law where it was called 'wager law'. It was largely replaced by Trial by Jury and was finally abolished in 1833. See Walker, *ibid*.

<sup>115</sup> A common law method of trial where an aggrieved party sought retribution for his injuries. It was probably introduced to England by the Normans. It was condemned by Glanville as early as 1190.

decree brought these modes of trial into disrepute and there developed a vacuum in the method of trials.<sup>117</sup>

Judges, as they travelled in circuits, had to improvise a new method.<sup>118</sup> It has been suggested that it became natural for them to choose trial by jury<sup>119</sup> which later became a panel of 12.<sup>120</sup>

‘The function of the jury was not to weigh evidence but to decide on the basis of their own knowledge, or the general belief of the district, and for this reason they were always selected from the hundred or district where the question for decision arose. If they did not have the knowledge, they could readily ascertain it. They were accordingly, witnesses rather than judges of fact.’<sup>121</sup>

This set the stage for what later became the practice, in criminal trials, of choosing members of the jury from the local community – this followed on from choosing the lay magistracy and police officers from the local community (a practice that recognised the effect of local knowledge and membership in dispensing local justice). This remains the case but with significant changes.<sup>122</sup> The implication of the above statement is that of the significant difference between the medieval jury’s verdict and that of the modern jury. In the former, truth was a function of discernible fact and therefore, the general verdict delivered could, arguably, be said to be a closer

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When the jury system took root, it gradually fell in to disuse and was finally formally abolished in 1833 after an alarming attempt to resurrect it by a litigant in the Kings bench in 1818.

<sup>116</sup> A feature of early European Societies evident in Anglo Saxon England where people who sought revenge for the murder of a family member fought wars between families for the domination of early kingdoms (this was particularly evident in Northumbria and Wessex). This was later slowly moderated by a system of monetary compensation.

<sup>117</sup> A very interesting development and an apt replacement since none of the modes of trial was a quest for the truth. Rather, they were designed to be confrontational or adversarial as today. The best man literarily, carried the day.

<sup>118</sup> Green, T.A op. cit.

<sup>119</sup> Sir Patrick Devlin: Trial by Jury (1956) p.10

<sup>120</sup> There have been many attempts to determine why the number came to be 12. Most of these have proved to be speculations: Sir Patrick Devlin, ‘Trial by Jury’, Hamlyn Lectures, 8<sup>th</sup> Series 1956: Forsythe, ‘History of Trial by Jury’, 1875: J.B. Thayer, ‘The Jury and its Development’ Harvard Law Review 5 (1892): 249

<sup>121</sup> David M. Walker: The Oxford Companion to Law (1980) p.943.



approximation of the truth. In the later, the verdict delivered is more speculative and a distillation of collective bargaining. From this latter narrow perspective therefore, justice is unstable and there is a higher probability of miscarriages of justice.

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In criminal matters for instance, the question of intention and provocation remain a grievous one on the issue and turns on the prevailing community's perception. It is a matter for the jury's interpretation. This perception is subject to change.

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## **Chapter Six - Constitutional Declaration**

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The Magna Carta of 1215 is a document that has often been celebrated as marking a decisive step forward in the development of constitutional government, the cornerstone of liberty and main defence against arbitrary rule in England. It ushered in, for the first time, a reference point for the principle bringing the monarch within the jurisdiction of posited law. The development of civil liberties and constitutional governments around the world use this document as a platform.

The Latin words Magna Carta mean the Great Charter.<sup>123</sup>

Clause 39 which has been celebrated as embodying the right to trial by jury states:

'No free man shall be seized or imprisoned or stripped of his rights or possessions or outlawed or exiled or deprived of his standing in any other way nor will we proceed with force against him or send others to do so except by the lawful judgement of his equals or by the law of the land.'<sup>124</sup>

It is worth mentioning that this clause alludes to two alternative judgements – that by one's peers or by the law of the land. As such, it is hardly the guarantee for a right to jury trial as it is claimed to be. To the extent that there is a guarantee, it is an

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<sup>122</sup> Jurors are now randomly chosen from the area of the jurisdiction of the courts where the crime was committed. They are not required to know the facts of the case.

<sup>123</sup> The Latin translation being adopted by Her Majesty's Government (HMG) in 1946.

<sup>124</sup> Latin translation by the British Library at <http://www.bl.uk/diglib/magna-carta-text.html>

ambiguous one that cannot necessarily be claimed by reference to a 'lawful judgement of his equals' or 'by the laws of the land'.

Clause 39 has been cited as guaranteeing the great English liberty and constitutional right to trial by jury.

Many would disagree and indeed, Auld LJ argues that it started as something quite different.<sup>125</sup> This point has been made here. He then went on to give five reasons in support of his position.

He claims that a freeman's right to lawful judgement of his 'peers' did not refer to trial by jury<sup>126</sup> and that the right was not universal in the kingdom due to the rigid class system of the time.

There is some sympathy from Holdsworth who comments that

'...a trial by a royal judge and a body of recognitors was exactly what the barons did not want. What they did want was first a tribunal of the old type in which all the suitors were judges both of law and fact and secondly, a tribunal in which they would not be judged by their inferiors. Some of them did not consider the royal judges, none of them would have considered that a body of recognitors were their peers. It is in this respect that the clause is reactionary'.<sup>127</sup>

This view has gained some currency in recent times and modern legal writers now accept the position of Holdsworth.<sup>128</sup> Nonetheless, the controversy persists and there are some arguments about the constitutional basis of the 'right' to trial by jury emanating from a closer analysis of the clause. Some historical perspectives might be of assistance.

When first used, the 'Great Charter' or big charter was probably no more than that.

The term was used to distinguish it from the shorter forest charter of 1217. History

<sup>125</sup> Auld. LJ in *Criminal Courts Review* 2001 at p.138 citing Sir Patrick Devlin: *Trial by Jury*, Hamlyn Lectures 1956.

<sup>126</sup> Citing Forsyth: *History of Trial by Jury*, 1852, p.108, Holdsworth: *A History of English Law*, Vol.1, 1903, W. R Cornish: *The Jury*, 1968, p.12

<sup>127</sup> William Wordsworth *ibid.* p 164

writers note that it was a product of rebellion against King John, a discredited monarch who was also distrusted by his barons.<sup>129</sup> The royal household of Plantagenet occupied the throne at the time and King John who was the only living male adult was immensely unpopular. Thus, his unhappy barons had no disgruntled member to turn to. The charter was the only alternative they had to a revolution.

They drew up this document and after London fell to them, prevailed on the king to sign it at Runnymede Castle.

Neither the king nor his barons regarded it as anything more than a delaying tactic.<sup>130</sup>

Fresh outbreak of hostilities between the parties saw the barons reverting to traditional practices and they ended up appealing to King Louis VIII of France for assistance.

King John died a year later in 1216 and his son, supported by many of the barons, issued a modified charter.

Other charters were produced culminating in the one of 1225. This last one entered the statute book as the first and most fundamental of English laws.<sup>131</sup> It was generally understood to be the fundamental statement of Englishmen's liberties by the middle of the 13<sup>th</sup> century whenever the crown opponents advocated programmes of reform.<sup>132</sup>

Gardiner points out that allusions to the Magna Carta as the constitutional basis for the elective right to trial by jury was the making of a myth which spurred a debunking movement by the 20<sup>th</sup> century. The 17<sup>th</sup> century constitutional lawyers – Coke and others – came to be accused, by many modern scholars, of creating an anachronistic myth and that the charter, seen in its own context, had in fact been nothing more than

<sup>128</sup> See Penny Derbyshire: *The Lamp that shows that freedom lives – Is it worth the candle?* (1991) Crim. LR 740-752, p.741

<sup>129</sup> Juliet Gardiner & Neil Wenborn: *The History Today, Companion to the British History*. 1995, Colins & Brown Ltd. p. 493

<sup>130</sup> The peace it bought lasted only for a very short time.

<sup>131</sup> Juliet Gardiner et al *ibid*.

<sup>132</sup> Gardiner argues that those who devised the petition of Right in 1628, the 1258 Provisions of Oxford and the Ordinances of 1311 thought they were 'following in the footsteps of those who fashioned the Magna Carta of 1215'.

a feudal document reflecting narrow baronial interests.<sup>133</sup> This view is supported by history.

The rights contained in the charter were explicitly granted to 'all freemen of the realm and their heirs forever'. It was, to all intents and purposes, a discriminatory right.

Not all in the realm were freemen. The barons held military or honourable service from the king. They were the lowest ranking in the hereditary peerage.

The word 'baron' came to refer exclusively to the king's barons especially those who attended his 'great council' or later, were summoned to parliament. The freemen were the aristocracy and the document referred to, feudal.<sup>134</sup> The barons were battling for their rights against the king.

Together with other landed gentry and the nobles who held positions and some sort of allegiance to the king in the form of service, these were the freemen.

The recognitors that Holdsworth referred to were ordinary men who most certainly would not have been considered peers by the barons. The word 'peers' referred to equals. It is in this context that the word 'peer' as it appears in the Magna Carta should be construed. If that is the case, then the right to be judged by one's peers was a right won by and for the barons and the freemen who were not the ordinary subjects of the crown but considered themselves the contemporaries of other barons and men of title.

The right to trial by jury therefore, was not a right that was extended, as it is seen today, to all in England but to a fraternity of equals.

Dr. Darbyshire, a modern legal writer, countenances this view and commented that:

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<sup>133</sup> Ibid.

<sup>134</sup> From the Latin feudum, a term that became common in 12<sup>th</sup> Century England referring to property held from a landlord in return for a rent in the form of service – military or administrative. The 17<sup>th</sup> Century legal scholar Sir Thomas Craig and Sir Henry Spelman developed the idea that laws and customs relating to land tenure could be grouped together and termed feudal law. The word is now

'...by Magna Carta, the barons simply sought to secure a deal from King John within which they safeguarded their right to be judged of no lesser rank than themselves. Liber homo has been translated as either 'freeman' or freeholder...does not mean what it does today...freemen<sup>135</sup> were a limited class in the feudal system'.<sup>136</sup>

The matter does not rest there. There is the further argument that by extension, the Magna Carta did enshrine this right, to the extent that it could be called a right.

Holdsworth comments on the significance of clauses 38-40 and at first, admits that the 17<sup>th</sup> century interpretation of the right to jury trial contained in the charter is false, given that at the time, the right was yet in its infancy. However, he outlines the sense in which the interpretation could be true:

'These clauses do embody a protest against arbitrary punishment and against arbitrary infringements of personal property: they do assert a right to free trial, to a pure and un-bought measure of justice. They are an attempt, in the language of the 13<sup>th</sup> century, to realise these ideas...this is the real sense in which trial by jury ...may claim descent from these clauses of the charter. The historian may prove that there is not a strict agnatic relationship: he must admit that there is a natural – cognatic link'.<sup>137</sup>

It would appear then, in the light of these commentaries, that Blackstone applied a wider interpretation of the Magna Carta and saw the document not just as safeguarding the liberties of English noble men but all English men in general. He commented that the Magna Carta had:

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used loosely and generally refers to medieval matters. See. Juliet Gardiner & Neil Wenborn *The History Today*. Ibid.

<sup>135</sup> Freedom here refers to a set of rights and privilege constituting the liberties or franchise that the townsmen acquired through chartered grants from their lords as well as traditional rights as indicated in costumals. A freeman was not thus a man who was personally free (being neither a serf nor a villain) although this was a sine qua non, but a member of the enfranchised community. The rights possessed by the community such as burgage tenure tended towards promoting more personal freedom. A resident was not, in most towns, automatically a freeman but acquired this privileged status by entering the freedom or taking up the franchise

<sup>136</sup> Penny Darbyshire: *The Lamp that shows that Freedom lives – Is it worth the Candle?* (1991) *Crim. LR* 740-752 at p. 741

<sup>137</sup> William Holdsworth, *A History of English Law* 3<sup>rd</sup> Edition, 1923, Vol. II p.214-215.

'...secured to every Englishman that trial by his peers which was the grand bulwark of his liberties...a sacred bulwark of the nation'.<sup>138</sup>

That such a statement needed to be made highlights the vulnerability of English liberties to the crown in the absence of a written constitution.<sup>139</sup>

It is also quite possible that to Coke, the nobility represented the Englishman and by implication, all those in his servitude.

Sir Patrick Devlin, a renowned proponent of trial by jury, articulated that:

'...for more than seven centuries...trial by jury ensured that Englishmen got the justice they liked and not the sort of justice that the government or the lawyers or any body of experts thought was good for them'...<sup>140</sup>

In other words, justice was a matter for local interpretation subject to local considerations.

One wonders if there is a distinction between that which is liked and that which is reasoned. That the English like trial by jury does not explain whether or not the system works. History instructs us that Medieval England loved capital punishment. Public execution was a spectator sport which was always well attended. It was liked. It worked. Reform based on reason later prevailed.<sup>141</sup>

Recognising the supremacy of parliament and the powers of the executive, Sir Patrick made a thinly veiled attack on the executive government holding that:

'...each jury is a little parliament. The jury sense is the parliamentary sense...the first object of any tyrant in Whitehall would be to make parliament utterly subservient to his will and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands

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<sup>138</sup> Blackstone Commentaries Book 4. pp.349-350

<sup>139</sup> A matter now addressed by the HRA 1998 which introduced the European Human Rights Convention into English domestic Law in 2000.

<sup>140</sup> Sir P Devlin, 'Trial by Jury' (1956) p.159-160

<sup>141</sup> See generally 'The Old Bailey' by Theresa Murphy. Mainstream Publishing Company (2003)

of his countrymen...trial by jury is more than an instrument of justice, more than one wheel of the constitution: it is the lamp that shows that freedom lives’.

By all accounts of history, by the 13<sup>th</sup> and 14<sup>th</sup> centuries, the Magna Carta had become a reference point for civil liberties by Englishmen so accustomed to disagreements with and oppression by their monarchs.

Given the oppressive custom of the monarchs, the unwritten constitution and codes guaranteeing human rights, legal scholars saw the charter as a convenient and fairly comprehensive articulation of the legal rules against arbitrary use of power by the crown. Magna Carta may, on a strict application, not be the defining document that it is held out to be, but it was the beginning of something new and tangible relevant to the liberties of the Englishman. It also represented the struggle for freedom of the people even if those rights were reserved initially for the nobles who fought for it.

There is a further constitutional observation. Dr. Darbyshire has argued against reference to jury trial as a constitutional right, commenting that this is misleading.

She holds that the ‘right’ is not entrenched as it is in the US Constitution or in the Canadian Bill of Rights<sup>142</sup> and that ‘in issues beyond the grasp of the EC or international laws, we have no entrenched rights’. That is a valid argument given the supremacy of the UK parliament, the absence of a constitutional framework and a rule of law.

There is, however, a wider principle at stake that is worthy of observation.

‘The use of the term ‘constitutional right’ is a loose one that reaches far beyond a documentary evidence and well understood by those who use it...a jury is a symbol of

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<sup>142</sup> P. Darbyshire *ibid.*

participatory democracy.’<sup>143</sup> ‘In that context, its use represents, perhaps more than any other symbol, the last true connection between the citizen or subject and the legal process.

It is to trial by jury more than by representation that the people owe the share they have in the government of the country: it is to trial by jury also that the government mainly owes the attachment of the people to the laws...’<sup>144</sup>

The American jury enjoys constitutional protection and so does the Canadian.

The British rely on the mercy of parliament and in the face of ever more powerful executive, even that mercy cannot be guaranteed.<sup>145</sup>

It could be argued that a woman has a right not to be raped by her husband following the case of *R v R*.<sup>146</sup> It was a right pronounced at common law following the case of alleged marital rape overturning a legal perspective held for over a century. It was sustained by the law lords until given a statutory footing. It is not an entrenched right

<sup>143</sup> Bruce Holder Q.C ‘The Importance of Preserving the Jury System and the Right of Election for Trial’ (1997)Crim. LR 875-881 at p. 879

<sup>144</sup> Lord John Russell cited in Research Papers 02/73 at page 21

<sup>145</sup> It is a parliamentary custom that no parliament can bind a future one – the principle of parliamentary supremacy enunciated by Albert Dicey, in his book ‘Introduction to the Study of the Law of the Constitution’ (1885): ‘Parliament... has... the right to make or unmake any law whatever’ and further, that ‘no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament’. The doctrine may be summarized in three points: 1. Parliament can make law concerning anything. 2. No Parliament can bind its successor (that is, it cannot pass a law that cannot be changed or reversed by a future Parliament). 3. No body except Parliament can change or reverse a law passed by Parliament. According to Sally Lloyd-Bostock, ‘The United Kingdom operates within a unique constitutional system in which constitutional law is to be found in a combination of statute, common law, conventions and international treaties rather than in a single written document. This reflects a political system based on the overriding principle of parliamentary sovereignty, whereby Parliament in principle can make or unmake any law it chooses. It follows that Parliament is incapable of binding its successors since a subsequent Parliament similarly has the power to undo previous legislation’. ‘DECLINE OF THE "LITTLE PARLIAMENT”’: 62 *Law & Contemp. Probs.* 7 (Spring 1999): JURIES AND JURY REFORM IN ENGLAND AND WALES. For a detailed discussion of the constitutional structure of the United Kingdom and the role of Parliament, see A.W. BRADLEY & K.D. EWING, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 3-98 (12th ed. 1998

<sup>146</sup> *R v R*. [1992], 1 AC 599 HL. The decision in this case has now been given a statutory recognition in the Criminal Justice and Public Order Act 1994.



mandated by and enshrined in the constitution but no one would argue that it is not a constitutional right on a wider interpretation.

The question remains as to why clause 39 makes mention of two alternative trial modes but only that of the judgement of the peers is adopted as guaranteeing a right to trial by jury.

Does the adoption of one negate the other or does the choice owe its allure to the implication of 'the law of the land'? Does this represent an allusion to posited law created by the mechanism of government through Parliament? Given that parliament is controlled by the executive by virtue of majority rule, can we explain the relegation of the alternative judgement espoused by the clause? Perhaps we can, but only in the context of parliamentary supremacy.

On the other hand, that 'no man shall be condemned except by the lawful judgement of his peers or the laws of the land' perhaps sought to remove from the King the arbitrary power to condemn his subjects.<sup>147</sup> As Devlin observed,

'...whenever there is a condemnation without trial by jury, it is because Parliament has so willed'.<sup>148</sup>

In other words, judgement only by the voice of the people or by properly enacted laws through Parliamentary representation of the people.<sup>149</sup> Given the other modes of trial available as options:

'...the unequivocal view of the Criminal Bar Association committee is that...jury trial is well recognised to be the fairest form of trial.<sup>150</sup>

In the event, constitutional or otherwise, the law does not operate in a vacuum of consensus. A law or system of laws will persist for as long as it enjoys public confidence. Even constitutions can be violated and the people can and do rise up

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<sup>147</sup> Without either through a law properly debated and passed by parliament or a jury

<sup>148</sup> Trial by Jury, page 90

<sup>149</sup> There is no jury trial in the Diplock court in Northern Ireland and trial by jury is seriously restricted in the most by the creation, by Parliament, of summary cases under the jurisdiction of magistrates.

against a part of the constitution that no longer serves them. But perhaps the last word on the matter belongs to Judge Learned Hand:

'I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and courts. These are false hopes: believe me, these are false hopes. Liberty lies in the hearts of men and women: when it dies, no constitution, no law, no court can save it: no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it.'<sup>151</sup>

So what is the nature of the modern criminal trial? The following chapter explores its position.

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### **Chapter Seven – The Modern English Jury in Criminal trials**

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On a trial for indictment in England & Wales, matters of fact are within the competency of a jury of 12 people drawn, at random, from the locality and from the electoral role by the Jury Selection Board. Matters of law are determined by the presiding judge.<sup>152</sup>

Offences triable either way give the accused the elective right to choose trial in a magistrate's court or trial by jury in a Crown court. Other more serious offences are triable only on indictment. In such cases, there is no elective right to choose the mode of trial. The matter must be tried by a judge and jury.

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<sup>150</sup> Liberty Press Release 17 July 2002 cited in Research Paper 02/73, 2 December 2002: The Criminal Justice Bill: Juries and Mode of Trial.

<sup>151</sup> Professor V. A Vlasihin, Towards a Bill of Rights for Russia: Progress and Roadblocks, 17 Nova L. Rev 1201 (1993) quoting Learned Hand, Address at the 'I am America Day' ceremony (May 21 1944) in Spirit of Liberty. 189-90. Taken from 'The introduction of Jury Trials & Adversarial Elements into the former Soviet Union & Other Inquisitorial Countries' by Professor J.W Diehm of Widener University Law School, a former US Attorney for the District of the Virgin Islands.

<sup>152</sup> It has not always been so. Juries used to be able to decide both the law and the fact – a fact which sorely tested the intellectual position of the bench in the Bushel's case. The subsequent ruling by Chief Justice Vaughan did not necessarily clarify the position and according to Langbein, the power to judge on the law was not conclusively wrested from the jury until much later. See generally Langbein, J. H (2003) The Origins of Adversary Criminal Trial, Oxford University Press and Green, T.A (1985) Verdict According to Conscience, The University of Chicago Press' for some stimulating insights into the great debate as to jury and judge jurisdictions.

As we have seen, historically, the medieval jury swore an oath as witnesses and in some cases, was self-informing. Thus, a juror was a man who was compelled by the King to take an oath as to what he knew.<sup>153</sup> The modern juror, on the other hand, swears an oath to try the defendant and return a verdict according to the evidence.

He must know nothing of the case prior to trial<sup>154</sup> and swears an oath only to try the defendant and return a verdict consistent with the evidence.

Strictly speaking, a jury in a criminal trial in England and Wales does not pass judgement on the accused except in relation to the facts in issue.

That is a matter within the competence of the trial judge. The jury's part is merely to return a general finding on whether or not the case against the defendant has been proved beyond a reasonable doubt.

To do that, they must listen to all the evidence and apply 'common sense'<sup>155</sup> which a 'reasonable man' is supposedly endowed with.

The oddity of the matter is that the Magna Carta speaks of the judgement of his peers (jury) or the laws of the land (statutory law as enacted by parliament).<sup>156</sup>

Yet, today, there appears to be a blur between what we mean by judgement in this context and the resultant verdict.<sup>157</sup> The jury returns a verdict upon which a judgement of the court is predicated.

The latter follows the former and except in the juryless Northern Ireland Diplock Court, the jury must first return a verdict or make a find of fact. It is submitted that

<sup>153</sup> Sir Patrick Devlin, 'Trial by Jury', Hamlyn lectures, 8<sup>th</sup> Series 1956.

<sup>154</sup> The medieval jury excluded any man who was ignorant of the facts at stake. See *The Origins of Adversarial Criminal trials* by Langbein, op. cited.

<sup>155</sup> Defined by the Oxford dictionary as 'sound practical sense especially in everyday matters'.

<sup>156</sup> Article 39, *The Magna Carta* 1215

<sup>157</sup> The Latin phrase (*Vere Dictum*) means truly said. It is an answer of a jury to a question committed to their examination and for their decision. See *Dictionary of Law* by LB Curzon, 5<sup>th</sup> Ed. Pitman Publishing 1998 at. P391

this is not 'the judgement of his peers' spoken of in the Magna Carta. The jury is a judge or determinant of fact. This determination precedes its verdict.

The judgement is made in secret during deliberations.

A jury's judgement is not a verdict but is the bedrock for it.

Thus, once a finding has been made during deliberations based on an assessment of the facts and communion of jurors, a verdict which represents the collective decision is agreed upon and is returned in open court.<sup>158</sup>

Although a verdict may not always be consistent with the 'judgement',<sup>159</sup> it is this verdict, which now represents the verbalised and agreed 'judgement of the peers' that carries the day. Having thus delivered, the role of the jury in a case is at an end. They have determined the fact.

It is now the place of the 'law of the land' to play its role and 'enter a judgment upon it'. The jury's role in the CJS per se, is limited but at present, indispensable.

Nor did the early jury, as an inquest, have much to do with the administration of justice. As Devlin observed, 'disputes were settled simply by one of the disputants proving himself by one means or another to be the better man. This included 'trial by battle' or 'trial by compurgators' swearing an oath.<sup>160</sup> Thus, no one is imprisoned today except by the judgement<sup>161</sup> of the courts in conjunction<sup>162</sup> with the verdict of a

<sup>158</sup> It is assumed that the verdict is a true manifestation of the judgement or agreement from the deliberation process. This may not always be the case. The jury may well judge that the facts are proved but nonetheless, return a verdict of acquittal.

<sup>159</sup> Jurors may agree among themselves that the crime has been committed but in their verdict, refuse to convict the defendant or return a verdict according to their conscience. This may happen when they clearly can deduce from the evidence that the crime has been committed as charged but choose, instead, for reasons best known to them, to acquit or may feel restricted by the verdicts available or feel that the burden of proof has not been met by the prosecution. The reverse may also be the case. See Grove, T. 'The Juryman's Tale', Bloomsbury Publishers (1998), and D. Graham Burnett, 'A Trial by Jury', Bloomsbury Publishers (2001). See also R. v. Ponting, 1985 CRIM. L. REV. 318, 320. 20.

<sup>160</sup> A simple matter of the accused bringing as many of his neighbours as he could find to swear to the value of his oath

<sup>161</sup> A formal decision made and pronounced by a court of law or other tribunal. This may, sometimes, include the reasoning leading to the decision, See Civil Jurisdiction and Judgments Act 1982, s 18(2).

jury except in cases tried by magistrates with limited sentencing powers or in the Northern Ireland juryless Diplock Court.

That this is at one and the same time an oddity can be explained in the context of a national culture. '...the jury, like so many English institutions, has been constructed biologically rather than mechanically'.<sup>163</sup> In other words, the word has been transplanted as part of the jury's evolution.

Outside this context, it is difficult to explain how the swearing of witnesses to what they knew could be described as a judgement in the context of the words of the Magna Carta or indeed any other context.

The conflation is not significant but is worthy of note. Judgement, in this sense, refers to the opinion of the peers consequent upon a deliberation of the evidence<sup>164</sup> relating to the facts in issue. Thus, the judgement is a finding of a particular fact or set of facts. If favourable to the defendant, it is the judgement of the court that he leaves a freeman. Otherwise, it is the judgement of the court that he have sentence passed on him. This is mandated and determined by the laws of the land. Judgement therefore, in relation to the jury, is to be given a wide interpretation. In this context, a trial before a judge and jury results in two judgments. One is by the jury upon agreement on the facts leading to a verdict. The other is by the court following the verdict. In order to reach its verdict, the jury is required to restrict itself to questions of fact – facts which the procedures and rules of evidence of a trial have decided are best left to a jury. The question to be determined then is who is a juror and why is he 'representative' of a reasonable man?

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With some exceptions no judgement can be regarded as a secret document: *Forbes v Smith* (1998), *The Times*, January 14.

<sup>162</sup> Whenever there is trial by judge and jury, the judgement of the court cannot be pronounced until the jury has rendered its verdict.

<sup>163</sup> Trial by jury *ibid.* at page 57.

### **The Juror and legal representativeness**

The question is asked in the present tense. The personality of the juror has evolved over time and different periods have demanded different types of jurors – from being a partial witness to being a passive impartial observer. Nonetheless, the essential ingredient has remained the same – that he returns a verdict in light of admissible evidence and his conscience.

Trial by jury is an evolution rather than a legal or statutory prescription. Jurors were summoned to attest to their knowledge in a particular case and were thus informed in one way or the other.

They were used, in addition to many other things, by Henry II as a jury of presentment or accusation.<sup>165</sup> Thus, they acted as the eyes of the King. The jury then was akin to an inquest – an inquiry of those who are supposed to know.

Today, a juror is a citizen who swears to listen intently to the evidence and to return a verdict consistent with that evidence presented in open court.

It is implied that a juror knows nothing of the case or at least not enough, in spite of pre-trial publicity and other sources of information, to be prejudiced or to disqualify himself from being empanelled.

The juror's duty then is to listen to the evidence and deliberate with his fellow jurors. Then they must collectively return a verdict so that the judgement of the court may be delivered.

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<sup>164</sup> Evidence, in the context of jury deliberations, refers to and includes what Sir Luis Blom-Cooper calls 'factors outside the ambit of factual evidence' in 'Twelve angry men can be wrong' The Observer, 21 October 2001.

<sup>165</sup> Trial by Jury, page 9

The jury system has been traced by Holdsworth to the Carolingian Kings who, according to Maitland,<sup>166</sup> assumed the privilege of determining their rights by means of an inquisition.

The Domesday Book was compiled from verdicts of jurors in civil matters whose expert knowledge of their localities made it possible to compile a statement of the extent, value and tenure of the greater part of the land in England.<sup>167</sup>

The role of the juror began to change by the middle of the 14<sup>th</sup> century from that of being a witness to being an independent arbiter with no previous knowledge of the case in question.<sup>168</sup>

This ignorance resulted in the verdict no longer representing their previous knowledge of the case but the result of deliberation or compromise following evidence afforded by the witnesses of the fact. The jury began to engage in inductive reasoning innate to the trial process but deprived of the ability to justify its conclusions publicly. They became judges of fact with matters of law being declared by the presiding officer of the Crown.<sup>169</sup> The verdict relies largely on the presentation of artificial, well structured deductive evidence to the trier of fact. The verdict represents a statement of fact mixed with law. It is, therefore, the result of a partnership between the judge who presides over the law and the jury whose domain is that of the facts.

However, the system's interest is restricted to procedural concerns and in the juror's ability to reach a decision. It does not concern itself with how he reaches that decision unless there is evidence upon which a challenge can be mounted.<sup>170</sup>

<sup>166</sup> A History of English Law, 3<sup>rd</sup> Edition, 1, page 312

<sup>167</sup> Report of the Departmental Committee on Jury Service, 1965, Cmnd. 2627 at page 6. Hereinafter referred to as the Morris Report.

<sup>168</sup> Langbein, op. cited

<sup>169</sup> Stubbs, 'The Constitutional History of England' 1<sup>st</sup> edition, 1 page 620

<sup>170</sup> Such evidence must not relate to events that occur during deliberation and within the retirement room within the courts. See R v Mirza.

Presumably, this later is assumed from the process itself – a situation that is neither acceptable nor intellectually sustainable. The deliberation process, one may speculate, involves a robust exchange of ideas, wits and counter arguments.

It was argued by Damaska<sup>171</sup> that these lay decision-makers, untrained in the art of decision making, would be unnecessarily restricted from a frank exchange upon which a decision is based if they were subject to public gaze either in the form of open deliberation<sup>172</sup> or explained judgment. There is very little evidence that jurors would be put off from frank exchanges. Equally, the juror anonymity is guaranteed unless deliberations were to be televised or visually recorded – a position that is forbidden in the English courts.

We have done ingenious things with audio recordings without compromising matters. There is no reason such a procedure cannot be used with juries while maintaining anonymity.

We seek to avoid a possible undermining of the judicial process and compromise of the trial that could be generated by a ‘talkative jury’. Indeed, there will be talkative jurors unless a requirement is made of the collective as opposed to ‘court stairwell’ conferences and photo opportunities that prevail in some jurisdictions. In England, the Contempt of Court Act 1981 makes this a moot point. While the argument in support of the secrecy of deliberation may well be compelling, the absence of an explained verdict is not. In addition, the benefits of an explained verdict, relative to soundness of deliberation, have never been explored. A system that is denied accountability cannot be judged accurately by its one live pronouncement however solemn. We do not know whether people are necessarily inhibited from frank exchanges merely because they are being watched, televised or audio recorded. Modern reality

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<sup>171</sup> Evidence Law Adrift (1997) supra

<sup>172</sup> R v Armstrong. Supra.



television programs are interestingly instructive although, one must concede, on an entirely different level. We do not know that the jurors and the system will not benefit from the opportunity to explain their verdict.

Anonymity, however, provides a strong inducement for maintaining the confidentiality of deliberations because of the nature of criminal trials and what they entail for the people concerned.

One can speculate however, that this frank exchange may mask a multitude of sins. If by frank, we mean that prejudices should be voiced and explored or that strongly held but potentially wrong opinions should be robustly defended and challenged, then we are in effect submitting to and perpetuating errors that deny fairness in trials.

If, on the other hand, we mean that the anonymity of jurors should prevail in order to safeguard free thinking and exchange of ideas during deliberations, we must divorce this from fairness and be more objective about it. An explained verdict does not threaten anonymity. It need not unmask it. It merely shows that the jury understood its task, considered the options and the evidence and articulated its decision however much disagreement there might have been during the deliberation process. Bigotry, when challenged or subjected to discipline, often retreats. There is no evidence that prejudice and other forms of human resentment are not present in the deliberation chambers. The argument has been that we do not want to know about it.

The jury, however, was not always independent of the authorities. For this, they had to fight very hard and at great personal disadvantages.

Cases such as *Bushell and Cook*<sup>173</sup> indicate the extent of this battle. They used to be punished for returning a verdict contrary to the directions of the court.

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<sup>173</sup> (1699) 13 ST TR 311, this case provides the authority for general verdicts.

Today, a jury may return a verdict according to its conscience<sup>174</sup> and this was given a statutory footing in 1668 when parliament ruled that it was illegal for a judge to menace, fine or imprison juries.<sup>175</sup> Many now regard the cases of Bushell and Cook to have provided the platform upon which the freedom of the modern English jury is established.

A juror was a freeman<sup>176</sup> and by virtue of the Jury's Act 1825,<sup>177</sup> he was also a freeholder.<sup>178</sup>

Largely, he was the person responsible to pay the rates in respect of separately rateable accommodation. This also meant that the original jurors were overwhelmingly men<sup>179</sup> but the number was limited by virtue of the rateable value of property. It was predicated on the belief that only those who possessed property were considered to have a sufficient stake in the country to justify their being allowed to take part in public life or to exercise franchise.<sup>180</sup> This may well draw cynical remarks today but was a valid point at the time before the Reform Act (1831)

Under s.1 of the 1825 Act, a juror was between the ages of 21 and 60.<sup>181</sup> This remained the case for over 140 years.

<sup>174</sup> Lord Chief Justice Mansfield in *R v Shipley* (1784) 4 Doug. 171 at 176 and per Willes J at 178, quoted by Devlin: *Trial by Jury*, pages 87-88

<sup>175</sup> See Hill, C. (1961), *A Century of Revolution 1603-1714* at page 226.

<sup>176</sup> This is one who holds an estate of an uncertain length or duration. The surviving legal freehold estate is the fee simple absolute in possession.

<sup>177</sup> S. 50 Juries Act 1825 provided that no one shall be returned for jury service by the sheriffs of the City 'who shall not be a householder or the occupier of a shop, warehouse, counting house, chambers or office, for the purpose of trade or commerce within the said city and have lands, tenements or personal estate of the value of one hundred pounds'.

<sup>178</sup> It was thought that a property owner was less likely to be corruptible and more easily punishable by a fine

<sup>179</sup> The Morris report notes at page 14 that 'in some parts of the country, the Act was interpreted as excluding those householders in blocks of flats and council accommodation who receive no separate rate demand but merely pay the landlord an all-in sum which includes an element for rates'.

<sup>180</sup> The Morris report at page 15.

<sup>181</sup> The upper limit was raised to 65 as a war measure: *Trial by Jury* *ibid.* at page 22.

Those empanelled for jury service rose from 80,000 in 1963<sup>182</sup> as a result of the revaluation of properties and by 1964, there were 7.15 Million names marked as eligible for jury service on the 1964 electoral registers for England & Wales which was 22.5% of the 31.77 million names on the registers.<sup>183</sup> According to the Morris report, successive revaluation of properties resulted in an increase in the number of people owning properties and thus eligible for jury service. This in turn, it was argued, reduced the quality of jurors and the position was expected to deteriorate although there was counter commentary to this claim.<sup>184</sup> The General Council of the Bar spoke in glowing terms of the jury of the period in spite of the negative commentary. Nonetheless, Devlin observed that 'the jury was not really representative of the nation as a whole and that it had become predominantly male, middle aged, middle minded and middle class'.<sup>185</sup> Notice the absence of any reference to colour – the UK had not, at this time, become the multi-cultural society that it would go to become in later years. This, he explained, was mainly due to the property qualification and to some extent to the character of the exemptions.<sup>186</sup> It is interesting that women were still subjected to unfair treatment and the disqualification was only removed by statutory declaration in 1919.<sup>187</sup> The Morris report took issues with jury qualification based not on intellectual merit but merely on the ability to be a property owner. This was a position, it was argued, that allowed the jury to exhibit class bias.<sup>188</sup> Thus,

<sup>182</sup> There appears to be no accurate figures for the period prior to 1963.

<sup>183</sup> Information supplied to the Morris report by the Social Survey Division of the Central Office Information and was based on counts made of a sample of pages of the registers for 48 parliamentary constituencies.

<sup>184</sup> Morris report *ibid*.

<sup>185</sup> Trial by Jury at page 20.

<sup>186</sup> Devlin explained at pp 20-21 that the property qualification made the jury mainly male since there were fewer women householders. Furthermore, property qualification also made the jury middle class and middle age since young men were less likely to be householders. The exemptions under ss. 8-10 of the Juries Act 1870 cover a large section of the upper and upper middle classes, the loss of ability resulting from the exclusion of so many professional men and women was severe but not addressed.

<sup>187</sup> s.1 Sex Disqualification (Removal) Act 1919..

<sup>188</sup> Cmnd paper 6817 at para. 236 quoted by the Morris report at page 18.

trends toward universal jury eligibility appear to be the norm because in the latter half of the twentieth century, most of the property, gender and ethnic/racial qualifications for jury eligibility that characterised the historical jury have been eliminated.<sup>189</sup> The question then is who should be a juror and how representative is he?

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## Section Two – Chapter Eight - The Modern Juror

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The Morris report considered the question of eligibility. It noted that it was 'necessary to have on a jury men and women who will bring common sense to their task of exercising judgement, who have knowledge of the ways of the world and of the ways of human beings, who have a sense of belonging to the community, who are actuated by a desire to see fair play and above all, who will strive to come to an honest conclusion in regard to the issues which are for them to decide'.<sup>190</sup>

The Report appears to acknowledge inductive reasoning as it pertains to the jury but makes no attempt to imbue the juror or jury with the authority and ability to explain or justify its posited assertion – the general verdict. As to its avowed prescription, the position is largely a subjective one. Attributes such as 'common sense', 'knowledge of the ways of the world and human beings', 'a sense of belonging', 'a desire to see fair play' and 'will strive to come to an honest conclusion' are objectively inscrutable. They can be employed in reaching a decision and provide the necessary prejudice upon which trial by jury is built. This prejudice, English law presumes, will be neutralised by its abundance during deliberation with one strongly held view being

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<sup>189</sup> Vidmar, N, (2000). World Jury Systems. Oxford University Press at page 28.

<sup>190</sup> Morris report, paragraph 53 at page 18

challenged by another. Yet, there was to be no test to determine that the summoned juror possessed the attributes stipulated.

Short of manifest bias, a juror is merely summoned and per chance, empanelled to try a case. On the question of juror intellect, English law has consistently exempted a number of people.<sup>191</sup>

These exemptions, it could be argued, deprives the jury of the valuable talent it needs to make informed decisions. There is some merit in the argument. I shall return to this theme in the concluding chapters.

Having made other considerations, the committee decided that citizenship should be the only qualification for jury service. Any allusion to the intellect is sacrificed on the altar of participatory citizenship.

Taking the above passage into consideration, it follows, of course, that there must be an age limit<sup>192</sup> to the citizen.

This was therefore limited to those aged 18 and above who were registered to vote – restricted to British subjects and citizens of the Irish Republic. The selection process was to be random. Anyone who had difficulties with the English language was disqualified and Commonwealth citizens must undergo a qualifying period. The Morris committee was at pains to point out that the notion of a professional jury system whereby volunteers were called based on their intelligence and status would lead to the development of a class of expert jurors. It rejected this on the basis that it would be most undesirable.

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<sup>191</sup> The Morris Report, *ibid*.

<sup>192</sup> The Morris Report recommended a lower age limit of 21 and an upper age limit of 65. The implication is that the attributes recognised by the Morris Committee are a function of age and experience. These are elements potent to trial by jury. These are also subjective elements that are impossible to quantify. The experience of an 18 year old may be significantly different by virtue of

It was argued that jury service was not a duty that can be delegated to one particular section of the community. Thus, any class chosen would be as exclusive in its own way as the judiciary.<sup>193</sup>

This argument is a forceful one and taken to its logical conclusion, would militate against the contemporary calls for a jury of experts<sup>194</sup> in fraud trials or indeed against Lord Mansfield's special jury of experts<sup>195</sup> although this was fundamental to the formulation of mercantile laws.

Nonetheless, the establishment of a jury of experts is a school of thought that deserves further investigation given the accusations made against the ordinary jury as being incompetent in many ways.<sup>196</sup> The argument appears to have an impact on the central theme of this paper concerning explained verdicts.

Furthermore, the relationship between a 'guinea-man' and the desire for conviction must be scrutinised<sup>197</sup> in subsequent research.

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time, yet, in a certain area, his experience may be more intense and better informed. Perhaps this is what was meant by 'way of the world' in the Morris Report.

<sup>193</sup> Morris Report at para. 54, page 19, quoting the General Council of the TUC.

<sup>194</sup> This is in relation to serious fraud cases. In 1986, the research conducted for the Roskill Committee by psychologists at Cambridge University indicated that juror comprehension could be significantly improved by the provision of aids such as glossaries and written summaries and using visual aids to present information. The Committee, however, recommended that complex fraud trials should no longer be tried by a jury but by a Fraud Trials Tribunal made up of a judge and two lay experts

<sup>195</sup> Juries composed of merchants were used at times in commercial cases until the 18th century. However, in the 18th century, and primarily under the influence of Lord Mansfield as Chief Justice of the Court of King's Bench, the practice of using merchant juries became a regular occurrence in commercial cases. Lord Mansfield explained his reasons for using expert juries in the following terms: The special jury, (amongst whom there were many knowing and considerable merchants)... understood the question very well, and knew more of the subject of it than any body else present'. Mansfield served as Chief Justice from 1756 – 1788.

<sup>196</sup> A jury composed of particularly qualified individuals could understand sophisticated concepts that might be beyond the ability of either a judge or a traditional jury. Jury confusion would be less of a problem than it is with jurors who are unfamiliar with the technical, financial and legal issues involved in much of today's complicated litigation. There would also be less likelihood of an irrational verdict because the special jurors would be able to make a reasoned decision based on their understanding of the facts and the law: 'The case for Special Juries in Complex Civil litigation.' (1980) 89 Yale Law Journal 1155 p. 1159

<sup>197</sup> It is a noteworthy point that Ancient Greece had a system of paying jurors 3 Obols as their remuneration for jury service although this payment was setup in order to encourage the poor to serve. (*Aristot. Ath. Pol.* 62.2). Payment for service was a democratic innovation, of course, because it

In the event, the position of the Morris Committee countenanced the principle that the chance of participation in the CJS as a citizen is the birthright of every Englishman.

One then finds it difficult to justify the excusal and disqualification of certain sections of the society by virtue of their intellect or profession. Perhaps there is some merit in the US experience that might benefit the English system.<sup>198</sup>

Given the assertions that those who serve as jurors are those who are not smart enough to obtain excusal and Glanville Williams' statement cited earlier on, does the duty not fall to be delegated to the '12 men of average ignorance', 'the unemployed and the unemployable' and the white, middle class men who largely dominate the jury – a position decried by the Report?

The Juries Act 1972 gave effect to the Morris recommendations.

Today, property qualification has been abolished by virtue of the Juries Act 1974 and a juror is chosen randomly from the electoral role.

The lower age limit is 18 and the upper is 70.<sup>199</sup> However, as far as jury service is concerned, not everyone qualifies to be called.

The modern jury is a body of 12 people selected at random according to the law and sworn to give a verdict on some matter according to the evidence.<sup>200</sup>

With some notable exemptions and disqualifications, the juror is selected from those eligible to vote and registered to do so. The importance of random selection as a safeguard against some sort of bias was articulated in Tarrant.<sup>201</sup>

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allowed the poorer citizens to participate in the governance of their city. There was no property requirement for service: any citizen who did not owe any debts to the treasury, was at least thirty years old, and had not lost his citizenship through any legal action could serve as a juror (*Aristot. Ath. Pol.* 63.3). One wonders what contributions to the system this made beyond the perception of lay participation in the justice system. See Professor Sommerstein in WASPS, *Aris & Phillips Ltd.* 1983: pp xvi-xvii

<sup>198</sup> In some US States, judges, lawyers and others holding positions in the criminal justice system have sat as jurors and the experience has been that their fellow jurors have not allowed them to dominate the deliberations.

<sup>199</sup> See also Juries Act 1974, Sch. 1: Courts and Legal Services Act (CLSA) 1990, Sch. 18 and Bushell's case (1670) 6St Tr 999

Throughout the trial and particularly the period of deliberations, the jury must be protected from any external influence.<sup>202</sup> This is a matter within the authority and discretion of the judge.

The anonymity<sup>203</sup> of the jurors is paramount and jurors are required to withdraw from a trial if they are, in some way, connected with the case and for impartiality, allegation of jury racial bias<sup>204</sup> in court is dealt with prior to deliberation.

Once the jury has retired and is in deliberation, no enquiry can be carried out into what transpires amongst the jurors – a position constantly upheld by common law and recently upheld in the House of Lords' case of *Mirza et al.*<sup>205</sup>

### The Conceptual Framework

There is more to being a modern juror. The very basis of lay participation in the CJS is, notwithstanding the idea of being tried by one's peers,<sup>206</sup> to inject the ordinary man, with his 'reasonable' dispositions into the process.

The American jury is rigorously vetted<sup>207</sup> for possible bias. There is no way of determining first hand, the mindset of the juror in England & Wales.

<sup>200</sup> Supreme Court Act (SCA) 1981, s 69), 33, r 5: and County CA 1984, s 66.

<sup>201</sup> *R v Tarrant* (1997), *The Times*, 29 December. In this case, the trial judge, suspecting that attempts might be made to intimidate a jury in the trial of a man charged with drugs offences, ordered that the jury be selected from outside the court's catchment area. The Court of Appeal in quashing the conviction held that the judge had no power to interfere in the random selection of juries and that his powers were limited to ensuring that jurors were not incompetent, not disqualified and will not suffer personal hardship that might distract them from their duties.

<sup>202</sup> See *R v Ling* (1987) *Crim LR* 495. This case dealt with a judge ordering protection for a jury. See also *R v Dodd and Others* (1981) *Cr. App. Rep.* 50

<sup>203</sup> The question of jury anonymity was dealt with in the case of *R v Comerford* (1997), *The Times*, 3<sup>rd</sup> November. Here, the Court of Appeal held that the judge has discretion to discharge a jury and empanel another one with protection if he was persuaded that the circumstances warranted it.

<sup>204</sup> See *Gregory v UK* (1997) *ECHR*, *The Times*, 27<sup>th</sup> February where it was held that a judge's decision to deal with an allegation of racial bias in a jury...by means of a redirection rather than a discharge was correct. This case is also the authority for the argument that trial by jury is not incompatible with Article 6 *ECHR*. *CF. Sander v UK* (2000) (34129/96) where the opposite was held to be the case in the circumstances. The Court explained that in the former case, there was no clear and precise allegation of racism as was evident in the later case.

<sup>205</sup> *R v Mirza*, *supra*.

<sup>206</sup> This includes the fact that the jury alleviates the judges certain of their burdens including having to make decisions that would deprive a man of his freedom when the evidence was somewhat dubious.



The jurors are simply sworn in, barring any identifiable reason for exclusion by the judge, with all their human experiences and prejudices in order to represent the conscience of the community and cynically, to 'let a little popular prejudice into the administration of justice'.<sup>208</sup>

This is the essence of the jury. That it should try a case based purely on the evidence tendered in court but be guided both by its conscience and its own experiences of life. Jurors come from all walks of life. They may or may not be, by learning and experience, competent people who have to make evaluations on a daily basis and reach decisions that may or may not affect other people. The repercussions of their decisions in their individual lives may or may not always extend beyond their personal jurisdictions and accountability may or may not be a critical element of this process.

In their walks of life, formal training and education may or may not be a relevant factor. It is, nonetheless, justifiable to assume that should their areas of responsibility encroach beyond their private lives into the public domain, they would be required to have the relevant training, possibly experience and accountability required by the office.

Yet, the juror receives no formal training for the role except for introductory orientation pep talk and video presentation on arrival at the court. This position is due to be improved in the light of comments made by Lord Rodger in *R v Mirza*.

There is the widespread belief, at least amongst those who come in contact with the judicial system, that jury service is a civic duty which the citizen undertakes with pride and looks forward to.

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<sup>207</sup> This is an extensive use of the doctrine of *voir dire* – to speak the truth – to weed out potential jurors who are unlikely to be sympathetic to a side.

In a debate in the House of Lords, it has been observed that:

‘...jury tradition is not only about the right of the citizen to elect trial by jury but also about the juror’s duty of citizenship. It gives people an important role as jurors – as stakeholders – in the criminal justice system. Seeing the courts in action and participating in that process maintains public trust and confidence in the law’.<sup>209</sup>

This statement could be contested on various fronts not least in relation to the assertion that public confidence is maintained in the law by jury participation. That, however, would be a pedantic, albeit interesting, diversion from the present point relating to qualification to be an effective juror. Nonetheless, it re-enforces the concept of participatory democracy and the idea of citizenship.

Yet, in a non-homogenous society where there is evidence that the citizen feels disconnected from the political process as demonstrated by voter apathy, can an appeal to judicial stake-holding be sufficiently celebrated as a beacon of aspiration for the citizen? The matter deserves some investigation.

Those who perform any public duty are expected to and do receive training in their fields. Those who engage in private enterprise also strive to receive the relevant training necessary to be effective in their chosen fields.

### **Value-free Evaluation of Evidence**

Jurors, however, are not trained in any way in their crucial role of evaluating evidence impartially and without prejudice. Yet, the legal system appears to repose its confidence in the ability of the juror of average ignorance to be a sort of tabular rasa

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<sup>208</sup> Holmes-Pollock Letters, Vol. 1, p74, Belknap Press, Harvard

<sup>209</sup> Baroness Kennedy, QC., Criminal Justice (Mode of Trial) (No.2) Bill, House of Lords, 28 September 2000, Hansard, HL

(blank slate) and capable of applying the law in an evidence-driven fashion.<sup>210</sup> In fact, this attitude appears to have implications for civil liberties in relation to the principles of fair trial. In the US, in *Lockart v MacCree*, US Supreme Court Justice Rhenquist, delivering the majority opinion declared that:

‘Prospective jurors come from many different backgrounds and have many different attitudes and predispositions. But the constitution presupposes that a jury selected from a fair cross-section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case’.<sup>211</sup>

In other words, impartiality is presumed to be implicit in the system. It is submitted that this view is as academic as it is objective but somewhat unhelpful in the face of reality.

Furthermore, it owes more to the fact that partiality as a form of prejudice, is not only hard to detect amongst jurors but also impossible to police in any society and not least in a polarised multi-cultural one. The Judge failed to define what he meant by ‘a fair cross-section of the community’ however, nor did he clarify the components of impartiality. In a leading American case, the court said jurors are not impartial if:

‘...they have such fixed opinions that they cannot judge impartially the guilt of the defendant’.<sup>212</sup>

It is submitted that impartiality, as a type of prejudice, is subtle and can have serious consequences on the fairness of a trial. Furthermore, the constitution to which the learned judge takes refuge does not define the terms used nor does it make any provision for ensuring its presumptions.

<sup>210</sup> Finkel, N. *Commonsense justice: Jurors notions of the law*. Cambridge: Harvard University Press (1995), Smith, V. *Prototypes in the courtroom: Lay representations of legal concepts*. *Journal of Personality and Social Psychology*, 76, pp. 220-228 (1991).

<sup>211</sup> The Supreme Court went on to hold that removing venire person with strong objections to the death penalty did not violate a defendant’s constitutional rights by producing a more conviction-prone jury.

<sup>212</sup> *Paton v Yount*, (1984), p. 1479.

As to the other subjective elements referred to above, there is no test. We find no way of ensuring that jurors are able to conscientiously apply the evidence to the facts. What the American system does is to conduct a pre-trial questioning of jurors to determine where their sympathies lie.

This is probably why we do not ask them to explain their verdict. Affiliations and leanings unmasked by voir dire accounts for that.

In another American case, Judge Matsch, quoting from a dictionary, claimed that prejudice involves an adverse judgement or opinion formed beforehand or without knowledge or examination of the facts. He went on:

‘...the existence of such a prejudice is difficult to prove. Indeed, it may go unrecognised in those who are affected by it. The prejudice that may deny a fair trial is not limited to a bias or discriminatory attitude. It includes an impairment of the deliberative process of deductive reasoning from evidentiary facts resulting from an attribution to something not included in the evidence. That something has its most powerful effect if it generates strong emotional responses and fits into a pattern of normative values’.<sup>213</sup>

This opinion is narrow but recognises the nature of criminal trials. There is empirical evidence supporting the supposition that some people affected by prejudice remain unaware of it. Echoing those sentiments in the UK, in his opening remarks at the beginning of the Soham trial for murder of Ian Huntley and Maxine Carr, Mr. Justice Moses attempted to clarify impartiality admonishing the jurors that:

‘...you will be trying this case on the evidence you hear and see in court and on nothing else...’

This is in sharp contrast to the position of the medieval jury who often had to rely on self information of the case at hand. Giving further details of his position, he went on, regarding impartiality:

‘...it means that you try this case on the evidence that you see and hear in this court, uninfluenced, unprejudiced by anything you may have heard, read or seen elsewhere or anything that you may hear,

read or see in the future...a fair trial depends upon the impartiality of you the jury. This courtroom is not the place for any expressions of emotion. It is the place where evidence is called...only by your understanding and appreciation of that principle can a fair trial take place. Impartiality also requires an open unprejudiced mind. The defendants...are innocent unless the prosecution, on the evidence, can make you sure of guilt...if you understand those principles, if you apply them, you will be impartial and a fair trial will take place...'<sup>214</sup>

These two views across the waters are united by a palpable common divergence.

The US courts appear to acknowledge the existence of juror prejudice and its effect on trial. Voir dire is designed, to some extent, to mitigate its impact. This, combined with the superior court's interpretation of the constitutional position, provides the guiding platform. The English courts equally acknowledge the existence of prejudice but seek to nullify its effect by the use of elaborate admonitions to the jury to lay aside its own prejudice. In both cases, the sterility of the judicial system is only matched by its objective assessment of the situation and tacit acceptance that in spite of its acknowledgments and admonitions, prejudice and impartiality can affect jurors to such an extent that the doctrine of presumption of innocence and the idea of a fair trial can be seriously undermined or put under considerable threat. This conflicts with the view that jurors, unskilled as they are generally perceived to be in the art of evidence evaluation, are capable of applying the law in an evidence-driven fashion. It also questions the presumption that in the absence of manifest prejudice, a juror is an impartial judge of facts. Furthermore, there is a question mark as to the success of the basic social, judicial and psychological principles that are applied by various jurisdictions to counteract the potential effects of prejudice although these jurisdictions might also resort to extra judicial measures to prevent prejudice when its presence is potentially manifest.

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<sup>213</sup> U.S v McVeigh, (1996), p.1472

<sup>214</sup> The Irish Examiner, 4<sup>th</sup> November 2003 at [www.breakingnews.tcm.is/2003/11/04/story120036.html](http://www.breakingnews.tcm.is/2003/11/04/story120036.html)

Blackstone<sup>215</sup> and later Kennedy<sup>216</sup> indicate that potential juror prejudice was a recognised phenomenon in the development of the modern jury.

Yet, for all its admonitions, the jurors are allowed into the trial in the hope that they will let some popular prejudice in the form of common sense into the process.

In England and Wales, the doctrine of sub judice<sup>217</sup> or statutory law is used to prevent the mass media from printing and distributing information that could affect the impartiality of a jury or prejudice a trial. This is a thorny issue that pitches the right to a fair trial against the needs to safeguard freedom of expression.

In addition, jurors are barred by the Contempt of Court Act (1981) from disclosing deliberations. Also in England & Wales, Scotland, Ireland and New Zealand, the basic presumption is that jurors will follow their oath to be impartial and no questioning of jurors, as in voir dire in the US, takes place except under the most exceptional circumstances. Thus, a jury which is not trained to be objective may ignore the judicial admonitions on impartiality and return a verdict based on its prejudice or in some cases, breach the rules of jury confidentiality. Such a jury, the existence of which is, by all means possible, is neither competent to explain its verdict nor does the system provide it with the means to do so. Such a jury could perpetuate prejudice in the legal process.

### **Citizenship and Training**

Citizenship is a birthright deriving from national and territorial laws. The rights conferred by it are exercised and enjoyed innately.<sup>218</sup> The duties imposed are discharged voluntarily in most cases. Participation in the judicial system as a juror is

<sup>215</sup> Blackstone, W. (1769/1966). Commentaries on the laws of England, Oxford: Clarendon Press

<sup>216</sup> Kennedy, J (1826). Law and Practice of juries. Publishers unknown

<sup>217</sup> From Latin meaning under the judge – the case is before the court of justice for judicial determination.

an elective (but narrowly defined) duty carried out by those who have the motivation and not excused or exempt. But it is not a right that one can insist on being allowed to exercise.

On the contrary, there are gallant efforts to escape its clutches for all sorts of reasons. The right to serve as a juror is also an elective one. Thus, as the law stands, if one is sufficiently motivated, even when summoned, one may opt out of jury service. By virtue of the exemptions, one may also escape being called up for jury duty. The right to a jury trial is, by all accounts, an elective one. Unless the crime falls within a given category, one need not elect trial by jury.

It is an offence not to respond to jury summons although studies indicate that it is not always enforced by the summoning court. The question of serving as a juror is an entirely discretionary matter.<sup>219</sup> The issue, however, relates to the freedom or otherwise of an accused person and the elective right to trial by jury. Beyond that, and of equal importance, is the integrity of the CJS. Every system of law requires certainty and stability as part of its effectiveness and continuity. Those who play an active role in the CJS receive the necessary training required to administer and dispense justice that can be sustained by the rest of the public.

Jury trial is used only in about 1% of criminal cases in England and Wales. Yet that role is highly important and symbolic. There can be no judgement of the court in cases within this category without the verdict of a jury.<sup>220</sup>

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<sup>218</sup> These include the right to a fair trial, the right to remain silent when charged or questioned although adverse inferences may be drawn from this, the right to legal representation, the (elective) right to be tried by a jury of one's peers, the right not to be detained without charge and the right to free speech.

<sup>219</sup> Discretionary to the extent that the prospective juror is not disqualified or excused from serving, wants to serve and does not come up with a reason why he should be excused. The journalist Rosie Millard, writing in the Guardian on 14<sup>th</sup> June 2000 noted that when she received her summons, her friends advised her to send in a strong note on a headed paper to 'just say it is inconvenient for work'.

<sup>220</sup> There is no rule that a conviction was a nullity if it rested upon a change of plea at trial but the jury had returned no formal verdict. See *R v Poole* (2001), The Times Newspaper, December 11<sup>th</sup> 2001.

For those involved in the CJS: 'whenever a man is on trial for serious crime or when in a civil case, a man's honour or integrity is at stake or when one or other party must be deliberately lying, then trial by jury has no equal'.<sup>221</sup>

Quite how juries go about detecting a lying party is not articulated in law.

Nor is the law prescriptive on the matter. It is left to the jury and its conscience.

Evidence from social psychology indicates that detecting deceit via verbal and non verbal behaviour is a 'precarious exercise on which people cannot rely'.<sup>222</sup>

In our system, however, and almost certainly throughout the common law world, there is very little that is done to educate the citizen and equip him to discharge his duty as a juror when the time comes.<sup>223</sup> It would appear that we pay lip service to the principle of judicial citizenship and stake holding as far as civic duties are concerned.

There is little evidence that our youths are acquainted with the legal process in any informed way. Very few of them ever come in contact with the judicial process except when they are arraigned before the courts as defendants or summoned to jury service. Consequently, they grow up ignorant of this civic duty and largely unwilling and ill-equipped to carry it out.

From an academic point of view, there is scant evidence that our national curriculum attempts to teach the citizen the relationship between his rights as a citizen and his duties.<sup>224</sup> Nor is he prepared to evaluate material in a dispassionate manner, reach a decision and explain it afterwards.

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<sup>221</sup> Ward v James (1966) 1 QB 273

<sup>222</sup> Raskin, D.C. (1986) The Polygraph in 1986: Scientific, professional and legal issues surrounding acceptance of polygraph evidence. *Utah Law Review*, 29, 29-74. See also Konhnken, G. (1996) *Social Psychology and the Law* in G. R. Semin & K. Fielder (Eds.) *Applied Social Psychology* (pp. 257-282), London: Sage Publications. For a further analysis of this idea, see Lesko, W. A., (2003) *Readings in Social Psychology*, 5<sup>th</sup> Edition Pearson Education Inc. at page 48.

<sup>223</sup> The American system of voir dire goes some way to address this issue by conducting an extensive questioning session with potential jurors. This process extends some form of education to the jurors who, at the end of the voir dire, would have a better knowledge of what is expected of them. The process is not without its criticisms.

<sup>224</sup> This is in contrast to the USA where children learn, from a very early period, allegiance to the state and the requirements of citizenship.



Yet, we expect that this citizen may one day serve as a reasonable juror capable of evaluating sometimes complex evidence and deciding the fate of another citizen in a dispassionate way.

In effect, we seem to expect that the juror's predispositions will be sifted out, mitigated or traded-off by the communion of jurors during the trial, by judicial instructions, the juror's oath and the deliberation process. The evidence is somewhat inconclusive.

Opinion polls are frequently conducted in which subjects' opinions are canvassed on whatever topic is making the headlines. Very few of these pollsters dig deeper to determine the reasoning behind the views. So is our jury system. The decision is important. The route to it is not.<sup>225</sup>

In a penetrating book, Kuhn<sup>226</sup> investigated the way people reason and advance arguments. She discovered that while most people have a very shallow understanding of their positions and in some cases, have not articulated their position conclusively, others, when given the opportunity, produce articulated reasoning that lends credence to their stated position. Thus, a statement made often represents a complex trend of thoughts leading to the verbalised conclusion. Often, these conclusions, posited as disposable statements, grab the headlines but the reasoning behind them is lost except on closer scrutiny. The pollsters have no appetite for this.

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<sup>225</sup> 'The importance of this rule was recognised long ago in an opinion given by Lord Mansfield in *Vaise v Delaval* (1785) 1 TR 11, 99 ER 944 (KB), where it was held that the court could not receive affidavits from two jurors indicating that they had decided on their verdict by tossing a coin to resolve the issue. Mansfield's rationale was that this was to protect them against self-incrimination for what he described as a 'very high misdemeanour'. So the evidence had to come from some other source. This was an innovation upon the prior practice which had been to receive evidence from jurors and others about misconduct or irregularities during the trial without discrimination: 8 Wigmore, *Evidence in Trials at Common Law*, J McNaughton rev ed (1961), para 2352' per Lord Craighope in *R v Mirza*.  
Op. cit.

<sup>226</sup> Kuhn, Deana, (1991) *The Skills of Argument*, Cambridge University Press.

Kuhn successfully demonstrated that given the chance and specific instructions, a subject can articulate an explanation for his reasoning or decision.

Of course, it is recognised that at the juror level, this is entirely possible as research has shown. The challenge is to duplicate it with a jury. There appears to be no reason this cannot be provided the criteria is pronounced at first hand.

People make decisions everyday. For the majority, this only affects their lives, their business and those of the immediate family.

For others in the public setting, decisions are reached after following and evaluating a pattern of events and research of some form or another. In other words, they can explain their decision by reference to a format and a body of evidence.

The articulation of an explanation for their decision is, therefore arguably, a less tasking activity in such cases.

A jury, on the other hand, retains the decision making powers of a professional without the requirement to explain.

It is submitted that, far from being a justifiable amalgam of jury conscience and sanctity of the deliberation process, the requirement not to explain is a concession to ignorance<sup>227</sup> and fear based on anecdotal evidence.

This is at odds with a modern democracy with a low rate of illiteracy, where openness is a feature of the legal and political process and the fairness of criminal proceedings is touted. It is also inconsistent with the modern criminal trial where the jury no longer plays the role of sworn witnesses.

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<sup>227</sup> Ignorance on the part of the jurors who have not been trained to dispassionately and objectively evaluate evidence and provide reasons after a decision and ignorance on the part of the state which chooses to ignore the possible lack of objectivity of the jurors. This ignorance, it is argued, represents the triumph of hope over procedure. It is a kind of collective deception which the state judiciously goads the citizen into and to which the citizen slowly awakes to through the trial and the deliberation process. The power of the jury appears not quite so much as given by the court as taken by the jury with the tacit but undeniable acquiescence of the state and the judiciary because a jury would do what it wishes regardless of judicial admonitions.

That they could return a verdict according to their conscience was understandable given the knowledge they possessed and were required to possess.

This was understood in the context of divine revelations now displaced by human evaluation.

The preservation of this right is an understandable factor since jurors have to have their 'predispositions' intact and be free to deliberate without the fear that their comments and personalities may become the subject of public derision. However, whether or not this position can be justified and sustained in a modern setting that should be and largely is an open system is a moot point.

The sanctity of the deliberation process may have been justified recently by the House of Lords in *R v Mirza*, however, it must not be confused with the requirement to explain which does not violate that sanctity provided strict guidelines are enforced.

There is the further argument that the lack of a requirement to articulate an explanation could nourish prejudice expressed during deliberation. Let us examine this.

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## **Chapter Nine - Fermenting Prejudice**

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It could be argued that the lack of explanation of a jury's verdict engenders institutional dishonesty and other prejudices that should not be part of a modern CJS or a fair trial and ultimately undermines the concept of fair trials. This confidentiality of jury reasoning appears unjustified given that the whole process is arguably designed to uncover or establish the truth. If jurors return verdicts based on some prejudice of one form or another, is there a beneficiary? If jurors acquit because they disagree with the law or the prosecution, would it not be a service to the country and the system if they made their reason quite clear?

A law that is unacceptable to the people as represented on a jury should be reconsidered by the legislature. But how will the legislature know exactly whether it was the law the jury was objecting to or some other aspect of the trial process?

If jurors convict or acquit against the evidence tendered in open court, is the system not deprived of its virtue when it is ignorant of the reason?

In so doing, does the system not foster and nurture prejudice and ignorance thus promoting the culture of grasping at straws in place of certified knowledge?

It has been argued that jurors are allowed into the system to inject a little bit of popular prejudice into the judicial system. This begs the question as to whose prejudice. While the juror's prejudice is taken for granted, what can be said about judicial prejudice? Can it ever be justified to argue that judicial prejudice is masked by lay participation or that judicial incompetence is embodied by the jury?

Let us explore this.

The doctrine of parliamentary supremacy is established in The United Kingdom.

The courts may not rule that statutes are contrary to the law though they must interpret them to be consistent with European Union Laws. Legislators must draft laws that are consistent with EU law and in the context of the ECHR, 'as an aid to statutory interpretation, the courts have developed the presumption that Parliament does not legislate contrary to the United Kingdom's international commitments'<sup>228</sup>.

The role of the courts is to interpret and enforce the Acts of Parliament. Judges do not refuse to uphold the law on the grounds that they think it unfair. As authoritative as the judge is, that role devolves to the jury. The jury generally does not know enough about a particular law to declare it unfair but can, by a general verdict, reduce it to a

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<sup>228</sup> See *Salomon v Commissioners of Custom and Excise* [1967] 2 Q. B. 116, [1966] 3 All E.R. 871. See also the unique Northern Ireland case of *R v McCormick* [1977] N.I 105; [1978] 21 E.C.H.R Yearbook 789. For an interesting research on this concept, see generally: Duffy, P.J, 'English Law and

nuisance. Any change in that law, as a result, would be consequent upon the inference drawn from the jury's disinclination to convict rather than a pointed obstruction by the judiciary.

Thus, an explanation, as seen from the judiciary's perspective, would require definitive statements in this regard - a position that could confuse the state of the law would then arise. The alternative would be to draw inferences from both the jury's verdict and its reason. The complexity for the judicial system only needs to be stated to be appreciated.

Secondly, one of the biggest obstacles to a fair delivery of justice lies not so much in the way that juries interpret evidence as in the quality of the evidence presented. Damaska, in *Evidence Law Adrift*, articulates this and it has been observed that the miscarriages of justice in England in recent years, were, in the end, not due to jury incompetence but the quality of evidence presented to them most of which was manufactured.<sup>229</sup>

If the jury was to explain that it did not find the evidence persuasive or that it believed the evidence was improperly obtained or manufactured, this would create untold embarrassment to the law enforcement agencies. Yet, such definitive statements would focus attention on the rules regarding the collection and presentation of evidence. It would also help to ensure the most robust and upstanding methods are adopted for the collection of evidence.

However, could it ever be allowed that comments disparaging about the trial process be made in public by the jury? Perhaps. Will this have the effect of focusing attention on the shortcomings of the judicial process? The scenarios articulated above may persuade us to respond in the affirmative.

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The European Convention on Human Rights'. *The International and Comparative Law Quarterly*, Vol. 29, No. 4. (Oct., 1980).

In that case, there is a palpable reluctance not to require an explanation. The main reason may not be that the jury is incompetent but that in addition to the spotlight on the jury, there will also be a beacon of light on the judicial system itself.

Can the requirement not to explain a verdict be justified either by reference to the fear of undermining the trial process<sup>230</sup> or to the potential explosion of appeal cases? Will it reveal more than can be useful and thus throw the system into confusion? This appears to be an area dominated by speculation and there is virtually very little academic research and commentary.

On one hand, does this represent the perpetuation of a myth? Could it be that the jury does not explain because it really cannot explain given that the value of the deliberation process is that a compromise can be reached between people who invariably will interpret the same evidence in various ways based on personal inclinations? Perhaps the matter is less fluent. Perhaps the jury can explain but is not equipped to do so due to lack of juror education and the entrenched fear of the system? After all, the object of interest is the decision not the reasoning behind it.

Could a requirement to explain a verdict provide a filter for personal prejudices that have an impact on the outcome of a jury trial?

Could this requirement, in turn, help to bring about a modern CJS that reflects the needs of those it serves and thus commands higher informed public confidence?

On the other hand, Professor Cornish echoes the sentiment of Dean Griswold and contends that:

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<sup>229</sup> See The Roskill Report. *Supra*.

<sup>230</sup> The principle of *res judicata* may be upset by a reasoned verdict as it may postulate a reason behind an acquittal that may not resonate with the public or the system. It is one thing for the jury to engage its conscience and acquit an absent-minded old lady for manifestly shoplifting on the grounds that nothing would be gained from a guilty verdict in such a case, it is quite another to convict a young black man on the grounds of his race in the face of weak evidence. In both cases, a reasoned verdict may prove extremely unhelpful. In the former, it confuses justice with mercy and in the later, it dispenses prejudice in place of justice. Yet, it is argued that the requirement to explain will temper prejudice with mercy. Both would confuse the state of the law.

'As a practical matter... there could never be any question of requiring juries to produce full reasons for their verdicts. It would be highly unlikely that juries could regularly give a consistent account of their reasoning which would be proof against the scrutiny of lawyers searching for grounds upon which to base an appeal.<sup>231</sup>

If that is the reason for not requiring an explanation, then perhaps this absolutist argument is valid. However, there appears to be more to it than this deflection which recognises the possibility that the defence may seek grounds for an appeal. It is argued that the requirement to explain will do more than this. It may also assist with the search for an informed CJS that will command higher public confidence. If the trial process contains prejudicial activity personified and hidden by the jury and institutionalised because of the lack of requirement to explain, an injured party is entitled to legal redress through the appeal process. In its absence, justice is denied.

The matter however, is complex. Cornish did not produce any evidence for his conclusion. The authority of his statement rests on little else but his scholarship. It is not, as he argues, a matter of juries regularly giving consistent account of their reasoning. The argument for consistency is not broached as it is unnecessary. Each case turns on its own merits. Furthermore, each jury is discharged once its verdict is delivered. Consistency, to the extent that it is required, would only relate to a format for explaining a verdict. The exercise however, would not be held hostage by rules of procedure. The conclusion, in the absence of research, is somewhat premature.

Training or not, there seems to be no earthly reason why a group of decision makers, properly directed, cannot produce an explanation for a decision made. If jurors can determine the innocence or guilt of a given defendant, what evidence is there that they cannot collectively articulate an explanation for their verdict?

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<sup>231</sup> W.R Cornish: *The Jury*, Penguin Press 1968 at page153.

The rules of evidence frequently make demands of jurors which are hard to understand. For instance, when jurors are invited to use a piece of evidence for a narrow inferential purpose, the successful completion of this task often calls for sophisticated mental operations.

Yet, in most trials involving the hearsay rule and previous convictions, this is the order of the day. A system that demands and requires the mental flexibility of jurors in deciding matters of fact cannot so easily dismiss the ability of the same jurors to explain their verdict merely because it has fettered itself with rules of evidence. In that case, calls for reform of the system would be hard to ignore.

This is an area of interest which is crucial to the research on the place for the explained verdict in the English CJS.

For now, the question remains. Given the judicial position that a verdict is a matter for its conscience and the fact that we have no way of gauging conscience, it becomes necessary to investigate the factors that may affect a juror's understanding and interpretation of a case. This fluidly leads to an exploration of the factors that affect a jury's verdict.

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## Section Three

### Chapter Ten – Factors That Affect A Jury’s Final Verdict

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Jurors are not and have never been impartial unbiased players in criminal trials. In fact, such a characteristic would probably disqualify a juror from taking part in a trial.<sup>232</sup> To assume or expect otherwise would be naïve. It would appear however, that there is a feeling against an overt display of bias or prejudice and to the extent that they harbour these characteristics, they are kept private.<sup>233</sup>

Furthermore,

‘we expect members of the public to dutifully put aside any biases they may have, step into the jury box, swear an oath, be totally fair and deliver an impartial, just verdict’.<sup>234</sup>

Yet jurors come to the trial, at least in England & Wales, where peremptory challenge has been abolished and no provision of voir dire exists, with all their ‘experiences’ in place. As if this was not enough, the characteristics of a juror are such that they cannot be completely removed. In fact, it is precisely because of these that we value the jury’s participation in criminal trials. There is evidence to indicate that jurors’

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<sup>232</sup> All jurors, presumably, start with a dispassionate interest in the outcome of a trial. This is because as members of the society, they are presumed to have an overriding general interest in the state of the law and the society they live in. Juries are a part of the CJS precisely because they see things differently from the judges and can bring the ordinary man’s experience into the court room. For this reason, dishonesty, for instance, in the crime of theft, is a matter left to the determination of the jury as objectivity’s views are unhelpful. But the law serves its people and their interpretation of actions, it is argued, is a better safeguard of both posited law and the community’s morality.

<sup>233</sup> A situation which, in the US at least, has been read as jurors being encouraged by the system during voir dire, to lie about their true inclinations.

<sup>234</sup> Dr. Penny Darbyshire et al in ‘What can the English Legal System learn from jury research published up to 2001? at page 2.

predispositions affect their verdicts even when they are instructed to lay them aside.<sup>235</sup>

Should we seek to nullify these characteristics or pre-dispositions and blunt their effect on a jury's final verdict? Objectivity would argue that we should or at the very least, attempt to do so. These, it is argued, have no probative value and should not, ideally, influence jury verdicts. This argument, however, makes reason stare in light of reality. Lord Slynn argued that:

'It is apparent that from time to time, jurors may be influenced by what is said or done to them – maybe they will even be bribed – outside the court room or in a jury room. It is also apparent that from time to time, jurors may show in the course of the trial, or their deliberations, that they have been influenced by strongly held views which result in prejudice or bias which override their obligation to listen and decide impartially. The result in either case might be seen as an unjust decision by the jury'.<sup>236</sup>

It is difficult to argue against the cogency of this statement. Manifest prejudice may be detected and perhaps checked, however, latent prejudice is quite another matter.

Various studies<sup>237</sup> into jury participation indicate that indeed, external factors, including a juror's characteristics do have an effect on jury verdicts.

Blom-Cooper's assertion that jurors should not bring factors outside the court process to their deliberations appears to be based on a strict and objective interpretation of the role of the tribunal of fact. However, it is a statement that ignores certain factual realities consequent upon a trial by the country. It is also a view that ignores Lord Slynn's remarks. Nonetheless, prejudice and partiality, it would appear, play second fiddle to the evidence – subject to its strength. There is evidence, agreed by many researchers, that the factor that has the greatest influence on a jury's verdict is the

<sup>235</sup> English, P & Sales, B: A ceiling or consistency effect for the comprehension of jury instructions., *Psychology, Public Policy and Law*, 3, (1997) pp.381-401

<sup>236</sup> R v Mirza. Op. cit.

<sup>237</sup> Dr. Darbyshire's report for the Auld Review, The American Jury cited below.

strength or weakness of the evidence.<sup>238</sup> Due to the provisions of s.8 Contempt of Court Act 1981, only scant research is available in the UK on simulated jury deliberations. There is none on actual live jury deliberations.

This part of the research therefore concentrates largely on research in the US and other common law jurisdictions.

### **The Challenges of Simulated Research**

Before exploring these studies, it is necessary to state a cautionary position.

Some of the studies explored below are in the experimental tradition using mock juries and so necessarily restricted to university students.

High profile jury trials and empirical jury trial using mock jurors by social scientists raise questions about the efficacy of the contemporary practice of simulated jury trial.

The main point of concern is that the lack of real juries makes the findings somewhat unreliable. In the UK in particular, jury research using actual juries is made impossible because of the restrictions of the law.

This situation also applies to some common law jurisdictions such as Australia and New Zealand although both jurisdictions have developed ingenious ways of conducting such a research with real juries without falling foul of the law. Jury simulation using, in the majority, college students allows for the manipulation of variables and replications. These are not possible in actual trials.<sup>239</sup>

This has made jury trial simulation the subject of severe criticisms by many scholars.<sup>240</sup> Such simulations including the use of students as subjects, the artificial nature of the stimulus materials and measures used and the lack of deliberation in the natural setting add to doubts about their results. Indeed, some evidence exists to

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<sup>238</sup> Kalven & Zeisel, *The American Jury* (1966)

<sup>239</sup> McCoun, R. J. (1989). *Experimental Research on Jury Decision-Making*. *Science*, 244, 1046-1050

indicate that the mode and complexity of the stimulus material make a difference to the verdicts in such studies<sup>241</sup>

The inherent challenges posed by this method of jury research are recognised. There are, however, a number of researches carried out from court studies.

There are inherent difficulties relating to translating some of these experimental studies to the field. Equally, there are demonstrable risks in transplanting policy conclusions from one jurisdiction to another. While there may be areas of similarities, each jurisdiction is recognised to be unique and its laws insular.

Nonetheless, it is submitted that the majority of these studies enjoy the confidence of the academic community and legal institutions. To that extent, their inclusion in this paper is justified.

As this study concerns the UK jurisdiction, it contains distinct references to and analysis of research and academic commentary carried out in the UK. The main body of the research however, concentrates on work done in the USA, Canada and Australia.

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There are many elements that affect the final verdict of a jury in a criminal trial. There is a need to explore whether or not the interplay of these elements explains the perceived lack of the competence of the jury to explain its verdict. An appendage question that is worth asking refers to Sir Louis' concern with what, in the US, O'Connor J,<sup>242</sup> called 'extraneous influences'. How far does the lack of a requirement

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<sup>240</sup> Bornstein, B. H(1999) The ecological validity of jury simulation. Is the jury still out? *Law and Human Behaviour*, 23, 75-92, Diamond, S. S. (1997). *Illumination and Shadows*, *Law and Human Behaviour*, 21, 561-571 etc.

<sup>241</sup> Weiten, W & Diamond, S. S. (1979). A critical review of the jury simulation paradigm: The case of defendant characteristics. *Law and Human Behaviour*, 3, 71-79

<sup>242</sup> *Tanner v US* 483 US 107, 117

to explain allow the jury to import facts outside the ambit of the court process into its deliberations?

To answer this question, we must pray the social sciences to consider these factors in turn.

### Research of The Social Sciences - Evidence As a Decisive Factor

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As stated, there is every indication that the evidence<sup>243</sup> tendered in open court has a greater impact on jurors than many other factors.

In their 1979 study<sup>244</sup> carried out in the US of 65 jurors in 10 felony cases, Bridgman and Marlowe showed that with 95% of jurors, the opportunity to engage in and a review of the evidence was the most influential post trial factor.<sup>245</sup> The indication is that jurors find the sporting effect of evidence review both challenging and stimulating. But this is as good as it gets. Quite apart from this, there is no measure, in this research, of the role other factors play in jury verdicts. Yet they do – albeit on a reduced or perhaps imperceptible<sup>246</sup> level.

Indeed, if it were otherwise, no jury would return what is called a ‘perverse verdict’ were we to take this work at face value. Or at the very least, there would only be a 5% margin for verdicts manifestly inconsistent with the evidence. Yet, that is not the case.

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<sup>243</sup> This is in reference to the quantity and quality of evidence tendered by the prosecution during a criminal trial. The rules on evidence in the English courts are often based on assumptions about the limits to jury competence and the likelihood that juries will be unduly prejudiced by certain types of evidence. The courts have established, for example, that juries should be warned that several impressive and truthful witnesses can be in error, a jury instruction referred to as the ‘Turnbull direction’ (R v Turnbull [1977] Q.B 224). See Sally Lloyd-Bostock in *World Jury Systems* by Neil Vidmar (Ed.) Oxford University Press, 2000 at page 81

<sup>244</sup> Bridgeman & Marlow: *Jury Decision Making: An Empirical Study Based on Actual Felony Trials* (1979) 64 *Journal of Applied Psychology*, No.2, p.94. In this study, 10 trials were studied comprising of 11 defendants (one trial had 2 defendants). The average age of the defendants was 23 years. 2 defendants were charged with possession of heroin, one with assault, two with rape, two with homicide and four with burglary.

<sup>245</sup> They cite Saks who concluded that trial evidence was more than three times as powerful as juror attitudes in influencing jury decisions, *Scientific Jury Selection. Social Scientists Can’t Rig Juries*, *Psychology Today* (1976), 48-57.

Visher's research suggests that the personal characteristics of jurors have a substantially insignificant effect on verdicts.<sup>247</sup>

On the other hand, it is realistic to expect that two very objective observers may consider the same evidence and reach different conclusions.

In fact, Ellsworth noted that different jurors draw different conclusions about the right verdict on the basis of exactly the same evidence.<sup>248</sup> None of these commentators denies there is an impact of factors apart from the evidence or that individual differences do affect verdicts. Indeed, several researchers have found that mock jurors' attitudes about case-relevant subjects, their experience of everyday events and their prototypes of offences and stereotypes of offenders substantially influence their case judgements.<sup>249</sup>

Thus, jurors' perception of case information including the players in a case and the verdicts available is guided by their personal theories and experiences.

Researchers agree that the strength of the evidence has the greatest effect on jury verdicts. The issue is at what point do personal experiences and judicial interventions override or substantially impact that evidence?

Let us explore this.

### **Ambiguity of evidence**

Various studies have assessed its impact on mock juries by manipulating the evidence. They have done this by varying eye witness identification of the

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<sup>246</sup> The requirement not to explain makes it impossible to determine the extent to which these factors have a bearing on an actual jury.

<sup>247</sup> C.A Visher, *Juror Decision making: The Importance of Evidence* (1987) Law and Human Behaviour

<sup>248</sup> P.C. Ellsworth, *Some Steps Between Attitudes and Verdicts*, in R. Hastie (ed.), *Inside the Juror*.

<sup>249</sup> See Bennet, W., & Feldman M, *Reconstructing reality in the courtroom: Justice and Judgment in American culture*. New Brunswick, NJ (1981) NJ. Rutgers University Press, Moran, G., Cutler, B., & DeLisa, A: *Attitudes towards tort reform, scientific jury selection and juror bias: Verdict Inclination in criminal and civil trials*. *Law and Psychology Review*, 18 (1994) pp.309-328 and Pennington, N, & Hastie, R.,: *Explaining the evidence: Tests of the story model for juror decision making: Journal of Personality and Social Psychology*, 62, (1992) pp.189-206

defendant,<sup>250</sup> manipulating similar fact evidence, previous conviction and judicial instructions.<sup>251</sup> We shall start with England and Wales.

Between 1968 and 1973, the LSE research<sup>252</sup> considered the effects of rules of evidence on jurors.<sup>253</sup>

In addition to these quests, the aim of the study was to determine whether there was any relationship between jurors' verdicts and their general characteristics such as age, gender or social demographics.<sup>254</sup> This part of the paper is concerned with the juror's ability to obey judicial instructions to ignore evidence that has come out in open court during the trial but ruled inadmissible by the judge.

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<sup>250</sup> Green, 1988

<sup>251</sup> W.R Cornish and A. P. Sealy, 'Juries and the Rules of Evidence' (1973) Crim. LR 208, A.P Sealy and W.R Cornish, 'Jurors and their Verdicts' (1973) 36 MLR 496.

<sup>252</sup> This research by the London School of Economics used two methods to select participants to make up 56 juries. One half was selected from those who responded to an invitation sent to government and commercial offices in Central London. This group contained a higher proportion of professionally qualified people than had been the norm even under the former rules for jury selection. The other half was recruited, after interviews, in an attempt to produce a sample that represented the likely jury composition under the Morris recommendations.

<sup>253</sup> As with most researches done with mock jurors, the LSE research had significant limitations. These include problems of the researchers' inability to control variables, the fact that the participants know that their verdict has no real effect on the defendant and the fact that only a limited number of different crimes could be considered. Furthermore, the research used tape recording which is less real than videos. Hearing of a previous conviction would form a higher proportion of the total information given to participants. In 'Juries and the Rules of Evidence' (1973) Crim. LR 208 at 210, Cornish and Sealy comment that the participants were 'deprived of myriad impressions made up of things seen in the court room'.

The previous convictions were not introduced in a neutral and consistent way in the study. They were either let slip by one of the defendants or by a police officer or revealed in cross-examination of the defendant who lost his shield. This created further complexity in analysing the results.

Finally, the LSE research had a large number of different variables combining previous conviction with different directions on the standard of proof and corroboration. In the rape case for instance, the similar previous conviction with a direction to ignore the evidence was coupled with only the first of the three directions on the standard of proof. It is thus difficult to compare this with the similar previous conviction without judicial direction which was coupled with all three directions.

<sup>254</sup> The research involved a mock jury listening to a tape-recording from a transcript of a real trial. The jurors were asked to give their verdicts before discussion. The discussion lasted 100 minutes at the end of which the participants were asked for a final verdict, their reasons for it, their views on the conduct of the case and other matters. This involved two trials. One was for an alleged theft in which the defendant, a porter at a meat market was suspected of having a quantity of stolen meat in his barrow. The Police stopped him and at a crucial moment during the unloading of the barrow, the Police failed to keep an eye on the meat and it re-appeared on a shelf by the barrow. The prosecution claimed that the defendant had put it there. He denied the charge.

The second trial involved two defendants in a rape charge. It was alleged that they had chased the victim and each raped her. D1 denied he achieved penetration, claiming victim's consent to what happened. D2 claimed he had only spoken to the victim after D1 had left. The mock jurors were also given the chance to vote for a verdict of guilty of attempted rape as well as guilty of rape or not guilty.

The rules of evidence were varied on each of the trials used (a theft case and a rape case) by altering the evidence given of the defendants previous criminal records and by altering the judicial directions on the standard of proof.<sup>255</sup> Four different combinations of present charge and criminal history were created as follows:<sup>256</sup>

1. The participants were told that the defendant<sup>257</sup> had a conviction for an offence similar to the one for which he was charged.<sup>258</sup> In the theft case, the previous conviction was admitted by the defendant in cross-examination by the prosecution either after the defence had asked a prosecution witness about his criminal past or after the defendant had raised the issue of his own good character during his testimony.

In the rape case, previous conviction was let slip by the co-defendant. In neither case did the judge direct the jury to disregard the evidence.

2. The participants were told that the defendant had a dissimilar<sup>259</sup> previous conviction. In the theft case, the previous conviction was admitted by the defendant in cross-examination after he had introduced his own good character. In the rape case, the co-defendant had inadvertently slipped in the conviction.

3. The participants were told that the defendant had a similar previous conviction (as in (1) above) but the judge instructed that this be disregarded. In the theft case, the

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In this case, further variations were created by altering the direction and evidence about the corroboration of the complaint.

<sup>255</sup> The participants were directed that in order to convict, they had to (1) 'be sure beyond reasonable doubt', (2) be 'sure and certain', or (3) 'think it more likely than not' that the defendant was guilty.

<sup>256</sup> The Law Commission for England & Wales, Appendix C, The LSE Research at [www.lawcom.gov.uk](http://www.lawcom.gov.uk)

<sup>257</sup> In the rape case, it was D2 who had the previous conviction.

<sup>258</sup> In the theft case, this was a previous conviction for stealing meat and in the rape case, a conviction for indecent assault on girls.

<sup>259</sup> In the theft case, this was a previous conviction for indecency. In the rape case, a conviction for dishonesty.



previous conviction was introduced by the prosecution witness (a police officer) letting slip the fact. In the rape case, the co-defendant let slip the conviction.

4. No mention was made of the defendants' criminal past.

An analysis of the result was revealing in terms of the strength of evidence and compliance with the judge's instructions. It showed that in the theft case, those jurors told of a defendant's previous convictions without the benefit of judicial instructions to ignore them were significantly more likely to return a guilty verdict than under any other variation. There was a higher percentage of guilty verdicts when the participants were told that the defendant had a dissimilar conviction or a similar conviction with a judicial instruction to ignore it than otherwise. However, it was found that the differences were minimal.

In the rape case, participants told of a similar conviction without judicial instructions to ignore it were, again, more likely to convict either of rape or attempted rape, than under any other variation. There was no significant difference between the number of guilty verdicts voted for by participants told of similar conviction with judicial instructions to ignore it and those not told of the criminal past.

Where the participants were told of the D2's similar past history, the number convicting D1 was significantly higher. This vaporised where judicial instruction was given to ignore the evidence. Hearing of D2's previous dissimilar conviction produced roughly the same percentage of guilty verdicts as under that obtained when the participants were ignorant of these facts.

The study concluded that a judge's direction to disregard the defendant's previous conviction averts any prejudicial effect.

Researches carried out since then have strongly contested this conclusion. The Crown Court Survey jury poll<sup>260</sup> conducted in the UK in 1992 showed that thirty-two per cent of the jurors polled said that the judge directed them to disregard information of some kind or another.

Eighty-four per cent of those reported that they understood the reason for such a direction and sixty-eight per cent said that they had been able to comply as directed. This leaves almost a third who admitted that they were unable to follow the judicial instructions to disregard a piece of evidence including previous convictions.

### **Judicial Instructions and directed forgetting**

Judicial reasoning from the US on the judicial instructions to disregard a piece of evidence tendered in open court is scathing. Judge Learned Hand described such judicial instructions as

‘...recommendations to the jury of a mental gymnastic which is beyond not only their powers but anybody else’s’.<sup>261</sup>

The US court in *Krulwitch*<sup>262</sup> called it an ‘unmitigated fiction’ and the practice ‘an exorcising phrase intended to drive out evil spirits’. These comments indicate that where the evidence is strong or ambiguous in one way or another, the strength of evidence shows a strong positive association with jury verdicts and that attempts by judges to mitigate its impact by instructing jurors to ignore inadmissible evidence that has come out in court has very little mileage. Thus, there is a conflict between the conclusions of the LSE project and some modern findings in terms of judicial direction to disregard irrelevant or inadmissible evidence.

<sup>260</sup> Jackson, J., (1995). Juror decision-making and the trial process. In Davies, Graham (Ed.). *Psychology, law and criminal justice: International developments in research and practice*. Berlin, Germany: Walter De Gruyter

<sup>261</sup> *Nash v. United States*, 54 F.2d 1006 (2d Cir. 1932) p. 1007.

<sup>262</sup> *Krulwitch v. United States* 336 U.S. 440 (1949) ] [336 U.S. 440 , 441], p. 453

Indeed, there are studies that indicate that judicial instructions to disregard evidence and reach a decision only on the strength of evidence deemed admissible and presented in open court may produce the paradoxical boomerang effect. An earlier study that researched the effect of limiting judicial instructions to a civil jury was discussed in the University of Chicago Jury Study.<sup>263</sup> Three different trials were submitted to more than 100 juries made up of those who had been summoned to jury service.

Each juror heard a recording of a mock trial based on the facts of an actual case.<sup>264</sup> The result supports the assertion that on occasion, the judge's instructions did backfire by drawing the jury's attention to some information or evidence that it may not have paid much attention to thus heightening its salience and subsequent accessibility in memory and possibly arousing psychological reactance.

Furthermore, there is much empirical evidence highlighting the difficulties people have ignoring or discounting information on command, blocking undesirable thoughts from entering consciousness or preventing unwanted information from influencing their judgment. This theory of evidence suppression has been explored. William James<sup>265</sup> argued, in his extensive writings on the topic of mental avoidance, that an unwanted cognition can be avoided by shifting one's attention to another thought. That way, one can regulate and control one's consciousness.

<sup>263</sup> Broeder, D. (1959), The University of Chicago Jury Project. *Nebraska Law Review*, 38, 744-760

<sup>264</sup> In one version, the defendant reveals that he has no insurance but no objection or further comment is made. The average jury award in these cases was \$33,000. In a second version, the defendant reveals that he has insurance but again, there is no objection or comment. The average jury award here was \$37,000. Finally, in a version in which insurance is mentioned by the defendant, an objection is made and the jury is subsequently instructed to disregard the evidence. The average award was \$46,000.

<sup>265</sup> James, W. (1890). *Principles of Psychology*. New York: Holt

Minsky,<sup>266</sup> for his part, explored the complexities inherent in attempting to exert control over the content of one's consciousness:

'All communities evolve some prohibitions and taboos to tell their members what they should not do. That, too, must happen in our minds: we accumulate memories to tell ourselves what we should not think. But how could we make an agent to prevent us from doing something that, in the past, has led to bad or ineffectual results? Ideally, that agent would keep us from even thinking that bad idea again. But that seems almost paradoxical, like telling someone, 'don't think about a monkey'.'

Minsky developed two theories of mental processes that attempt to keep unwanted contents from the consciousness. He called these the 'suppressors and the censors'. Suppressors are active when an undesired thought occurs and act to motivate one to engage in some other more acceptable thought. Censors might be established after experience with avoiding certain thoughts.

Minsky held that censors operate before an unwanted thought has made its way into the consciousness by recognising thoughts which often precede an unwanted thought and then pointing one's thought in another direction. It would appear that censors operate without the thought entering the consciousness but suppressors are consciously initiated by the candidate.

Research on memory has investigated the efficiency of the suppressors to filter unwanted information. The theories of Minsky were not validated by him through empirical research. However, there are several well investigated experimental paradigms that focus on the ability of consciousness to regulate its content. These include: direct forgetting, thought suppression, belief endurance and psychological reactance.<sup>267</sup>

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<sup>266</sup> Minsky, M. (1985). Jokes and their relation to the cognitive unconsciousness. In L. Vaina and J.K.K Hintikka (eds.), *Cognitive constraints on communication, representations and process*. Reidel at page 781.

<sup>267</sup> These factors have been implicated in psychological research relevant to the jury's ability to follow instructions. See Kassin, S.M., and Studebaker, C.A. (1989). *Instructions to disregard and the jury*:

Direct forgetting is the paradigm that deals with a subject's ability to disregard information on demand. This refers to the phenomena whereby information labelled 'to-be-forgotten' is not remembered as well as information deemed as 'to-be-remembered'. The idea of direct forgetting appears to be supported by research. On a closer analysis, it becomes clearer that this is an unlikely predictor of juror behaviour in a trial. In their 1968 study, Bjork<sup>268</sup> et al established the directed forgetting paradigm and concluded that allowing people to forget the first of two items reduced the proactive interference on the second one thus improving its recall. They called the procedure 'instructions to forget'.

In subsequent studies, Bjork<sup>269</sup> concluded that we often need to change the priority of information in memory and that a mechanism like directed forgetting may be one of the tactics we employ to achieve this.

In contrast, Elmes<sup>270</sup> investigated the effects of directed forgetting on short term memory.

He used subjects who were asked to study 12 lists where tests of some word pairs were interspersed with presentation and other pairs and concluded that there were no reliable recall advantage on a subsequent critical pair for the group that could forget earlier pairs compared to the group that could not forget them. After either 8 out of 12 or 10 out of 14 pairs, the subjects knew they could disregard all prior pairs and half did not. Although the participants were not explicitly told to forget, they could trust the cue because the pre-cue pairs never tested.

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curative and paradoxical effects. In J.M. Golding & C.M MacLeod (Eds.), *Intentional Forgetting: Interdisciplinary Approaches*, Lawrence Erlbaum Associates.

<sup>268</sup> Bjork, R.A., LaBerge, D., & Legrand, R (1968). The modification of short term memory through instructions to forget. *Psychonomic Science*, 10, 55-56

<sup>269</sup> Bjork, R.A (1972). Theoretical implications of directed forgetting. In A.W Melton & E. Martin (Eds.), *Coding processes in human memory*. Washington, D.C. Winston

<sup>270</sup> Elmes, D.G. (1969). Role of prior recalls and storage load in short term memory. *Journal of experimental Psychology*, 79, 458-472

In his second study however, Elmes<sup>271</sup> reported an inconsistency with his earlier study and concluded that all items resided in short term memory only as long as they were rehearsed and that a cue to forget was primarily a cue to discontinue rehearsal of the designated items which then were not transferred to the long term memory.

Following additional field work replicating the effects of the two previous works, Elmes and Wilkinson<sup>272</sup> concluded that explicit use of the word 'forget' appears to make a difference suggesting that the instruction to disregard has a differential impact upon recognition and recall.

As they obtained similar effects for relatively short and longer lists, the authors concluded that the directed forgetting phenomenon is not restricted to short term memory.

Yinger and Johnson,<sup>273</sup> in a later study, contradicted the above findings. They found that directed forgetting was limited to short term memory retention interval.

In a research that closely replicated Bjork et al's work, they extended the retention interval, measuring the effect of the cue to forget at 6 second and 15 second interval but no such difference after 40 seconds.

Basden et al<sup>274</sup> argued, in their study, that the two usual directed forgetting methods (items and lists) differ in terms of the mechanism that produces the difference between the items to be remembered and the items to be forgotten. They further argued that the item method led to selective rehearsal of the items to be remembered whereas the list method led to the inhibition of the items to be forgotten.

<sup>271</sup> Elmes, D.G (1969). Cueing to forget in short term memory. *Journal of Experimental Psychology*, 80, 561-562

<sup>272</sup> Elmes, D.G & Wilkinson, W.C., (1971). Cued forgetting in free recall: Grouping on the basis of relevance and category membership. *Journal of experimental Psychology*, 87, 438-440

<sup>273</sup> Yinger, R.J. & Johnson, W.L (1973). Cued forgetting: Short term memory effect. *Psychological reports*, 32, 1197-1198

<sup>274</sup> Basden, B.H., Basden, D.R and Gargano, G.J (1993). Directed forgetting in implicit and explicit memory tests: A comparison in methods. *Journal of Experimental Psychology; Learning, Memory and Cognition*, 19, 603-616

The conclusion is that there is significant evidence for a directed forgetting effect in short term memory. If subjects are permitted or instructed to cease thinking about an item, that item causes less interference on other items that the subject must remember. Although the to-be-forgotten items remain easily recognisable, they are poorly recalled.

This appears to lend credence to the conclusions of The Jury Survey which found that about 68% of the participants said they could follow the judges' instructions to forget a given piece of evidence ruled inadmissible.

This also somewhat assails the findings of the LSE project which concluded that judicial instructions can be effective and can serve the purpose for which they were intended. The LSE project found that simulated jurors often fail to disregard specific pieces of evidence on judicial instructions. It is argued that this is all relative to the strength of evidence in a given case. If the evidence is clear and unambiguous, all the above mentioned mental and psychological gymnastics become superfluous and the evidence carries the day. As it stands, the question remains wide open. Yet, we do not have to look too far to determine the reasons behind a jury's verdict.

If the evidence is strongly contested as it is in most criminal cases, the need for a reasoned verdict becomes overwhelming.

If such a jury is not instructed that it must produce an explanation for its verdict, it is difficult to see how it can articulate an explanation of its verdict given the conflict between what it must remember and what it is instructed to forget. It is also difficult to see how the will of the court relative to judge admonitions can be effective.

It is worth investigating whether a revision of the present system relative to judicial instructions to juries would assist reason articulation.

Perhaps, at the conclusion of the trial and prior to jury retirement and following the judge's summing up, he could present the jury with a written list of his instructions rather than the present oracular system where the instructions are given ad hoc as matters are raised.

On the other hand, requiring an explanation and communicating that requirement to the jury at the commencement of trial may, in fact, concentrate the jury's mind on the judge's instructions to disregard inadmissible evidence and therefore, its ability to comply. They cannot just come out and say that they found themselves unable to obey the judge's instructions<sup>275</sup> without explaining why unless of course the judicial instruction includes the word that they may disregard whatever they wish. Perhaps, in the process and in anticipation of the explained verdict, the jury would seek further clarification, if it needed to, from the judge.

The setting of a trial remains an artificial stage where a verdict is supposedly based on evidence tendered in court yet some of that is ruled admissible and others are not.

The artificiality of this drama is made more interesting by the simple fact that the deliberation process is a fermentation of a real life event – unscripted, unrehearsed and without pretensions. Here, it must be assumed, although with scant evidence, that the reality of the situation is made manifest by the realization that a defendant's future is at stake. Whatever goes on in there, a decision is final. That deliberation process, one ventures to suggest, may indeed ignore all that transpired in the court room and be a tug of war between prejudice in one shape or another and tendered evidence – admissible or otherwise.

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<sup>275</sup> It may be useful for the jury to say this if they determine that the judge's instructions were biased.



There is a further point. Judicial instruction to a jury to ignore inadmissible evidence is not the same as not to remember it although the confusion is foreseeable. A piece of evidence ruled inadmissible but present in court may be ignored for the purposes of objective assessment but it may be remembered for the purposes of subjective evaluation. Jurors, one might imagine, will recall inadmissible evidence even if they, in the end, ignore it or are reminded by fellow jurors to do so.

How effective or even useful is an instruction not to remember or to forget? How does one remember what one has been instructed to forget in order to comply? All intelligent people will remember what they consider important. What makes a juror sagacious is the ability to remember inadmissible evidence but disregard its influence from having an impact during deliberation and subsequently on the verdict. This is a position, as we have seen, that is fraught with difficulties. Furthermore, it is probably crucial for a juror to understand what is being ruled inadmissible and why the instruction to disregard it. In such understanding lies the dormant force of that evidence. Such understanding would assist the juror to comply because it would highlight the prejudicial effect or the lack of relevance of the said evidence.

Regrettably, if the current literature on jury deficiency is to be believed, reliance on juror intelligence is not to be encouraged. The argument about juror compliance, or lack of it, ignores one crucial point. Generally speaking, until very recently, jurors have not been allowed to take notes during trials. The taking of notes is still in experimental stages and there is considerable nervousness about its efficacy. They are also not given the judge's instruction in a written form. Given this situation, one can hardly feign surprise at a jury's inability to comply. A criminal trial is often a prolonged drama and the complexity of the process can leave even the most articulate drained of mental energy.

Some judges have been known to nod off during lengthy trials.<sup>276</sup> Given the mass of information that must be processed, a jury that is not assisted with written instructions nor given the exact mandate as articulated here apart from returning a verdict may well consider itself liberated to reach its conclusions as it deems fit without worrying too much about complying with judicial instructions on evidence or anything else.

These studies are reproduced to highlight the unsettled state of the jury research and the untenable position of any conclusion reached. Although evidence in a case is a very cogent matter, it is clear that on its own, it is not enough.

As a matter of course, evidence, by definition, never stands alone but almost reluctantly, must be interpreted or be affected by other factors. We shall now investigate some of these other factors.

### **The Age variable**

Age has not been conclusively proved to be a relevant factor affecting jury verdicts but there is some evidence that it does play a role. In their London research, Sealy and Cornish noted that a significant relationship emerged between age and the verdict

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<sup>276</sup> There is a different rule for judges sitting with juries. They may doze with impunity as long as the defendant cannot identify any specific prejudice. The issue has reached the Court of Appeal Criminal Division (CACD) several times since the 1970s. The appellant has always had to show, with reference to the transcript, what evidence the judge missed and thereby failed to sum up for the jury. None has yet accomplished this to the CACD's satisfaction. Two years ago, the appeals resulting from the plot to steal £200m-worth of jewellery from the Millennium Dome required the CACD to review the position in the light of the Human Rights Act 1998 and Art 6 of the ECHR (*R v Betson* [2004] EWCA Crim 254). This was not a task their lordships undertook with alacrity. They made no reference to the public's changing expectations and gave only the briefest of nods to jurisprudence of the Strasbourg court and the need for justice to appear to be done (para 47). Earlier they had referred to the parties' affidavits, including an unchallenged observation that: 'there were a few occasions towards the end of the trial when the judge slumped in his chair, fell asleep and was awakened by his own snoring. Some jurors drew the attention of each other to this and two of them shook their heads in apparent disbelief. On one occasion, because the judge was asleep, he failed to notice that one of the jurors had also dozed off.' (para 27).

amongst jurors.<sup>277</sup> They found that higher proportions of 'not guilty' verdicts occur amongst younger jurors.

Other works<sup>278</sup> appear to substantiate this finding by concluding that guilty verdicts generally increased with jurors' age particularly for rape cases where the strongest relationship between age and the number of guilty verdicts was found.

On the other hand, Baldwin and McConville found that the structure of age of jurors had no significant effect whatsoever on verdicts.<sup>279</sup>

This and other studies<sup>280</sup> would question the validity of the assumption that a jury with a younger age distribution is more likely to acquit because the members are more likely to identify with a younger defendant. There are, however, other factors relating to age.

In relation to memory, Penrod and Hastie<sup>281</sup> found that there was a clear relationship between age and recall of the judge's instructions.

In the recall of case facts, the oldest jurors displayed a markedly poorer performance than the younger ones. This was not explored but the medical presumption of memory degradation with age may be a factor.

They also point out that there appear to be certain differences regarding age during deliberations but that it did not appear to diminish the jurors' assessment of deliberation thoroughness.

This study however, is silent on age distribution and does not explain why memory recall of the evidence appears to diminish with age. The consensus appears to be that age does have an impact but one that is not, to any appreciable degree, significant.

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<sup>277</sup> Sealy and Cornish, *op. cit.*

<sup>278</sup> C.J. Mills and W.E. Bohanon, *Juror Characteristics: To what extent are they related to jury verdicts?* (1980) 64 *Judicature*, Number 1, 23

<sup>279</sup> John Baldwin and Mike McConville, *Jury Trials* (1979) Clarendon press at p.102

It is, of course, fair to speculate that those who have a better recollection of the facts of the case will tend to dominate the deliberation as Hans and Vidmar found with jurors who took notes in the Wisconsin jury research. This may have very little to do with age but much to do with organization and what the jurors are allowed to do. The Wisconsin project experimented with letting jurors take notes during trials.

The research indicated that those who took notes not only had a better recollection of the evidence, they also played the most active roles during deliberation. Again, it is submitted that a requirement for an explained verdict may act as a catalyst for better juror attentiveness during trial and later fact-recall, subsequent to full participation in the deliberations and thus a more informed verdict. Of course, the encouragement to take notes might assist the process although this is not without criticism. Note taking may actually distract attention to the trial and the required visual assessment of the witnesses. This would be a matter for the individual juror. However, in the event, it is argued, with the prospect of explaining their verdict present in their minds and forming part of the deliberating process, jurors are more likely to be 'mentally present' during the trial and to play an active role in the debate afterwards.

The studies are somewhat inconclusive but the point is made with respect to age. The observation however, is that with better organization and assistance with note-taking, age need not play a significant role. Jurors should be able to rely on their notes rather than commit the nuances of the trial to memory. Judges, it is observed, make notes. However, the ability to manipulate the demands of a trial and balance one's involvement may have more to do with social status and mobility than age. Let us explore this further.

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<sup>280</sup> A Louisiana study by J.P. Reed, *Jury Deliberations, Voting and Verdict Trends* (1965) 45 *Social Science Quarterly* 361-370, conducted between September 1959 and July 1961 of approximately 240 jurors found no associations of significance between age and verdict.

<sup>281</sup> Penrod, Hastie and Penington at p142

## Social Mobility

Jurors drawn from the manual labour force in a London research<sup>282</sup> appear to be conviction prone in cases where the evidence against the defendant is strong. This conclusion is contradicted by Reed<sup>283</sup> who found that the higher the status of the juror, measured by education and occupation, the more likely he is to convict.

Moran and Comfort<sup>284</sup> suggested, in their study, that males on lower incomes were more prone to convict. Correspondingly, Mills and Bohanon found that as male education level increased, so did acquittals. In contrast however, Bridgman and Marlow's study<sup>285</sup> in Santa Cruz County USA, concluded that demographic characteristics were largely unrelated to both procedural and outcome variables.

Yet Penrod and Hastie also found evidence that occupation and education affect performance during deliberations<sup>286</sup> and thus verdicts and that occupational-recall closely paralleled the results obtained for education. There was a 48% recall of facts from testimony for jurors with the lowest educational levels. This compared with 70% for those with the highest levels of education.

Furthermore, in a sub-sample of 269<sup>287</sup> jurors, a number of factors such as residence in a wealthy suburb, attitude towards someone who causes the death of another, brand of newspaper read and marital status accounted for 11% of variance of verdict preference. These are conflicting results which, taken individually, prove very little except the confused state of the research. However, they highlight the fact that different people interpret the same evidence in different ways depending on their experience make-up, educational and social groupings.

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<sup>282</sup> Sealy and Cornish op.cit, at p. 505.

<sup>283</sup> J.P. Reed, at p.366

<sup>284</sup> Moran and Comfort, op.cit., p.1057

<sup>285</sup> Bridgeman and Marlow, op., cit. The sample of jurors interviewed was not necessarily fully representative of Santa Cruz County being relatively younger, better educated and more middle class than the poorer more conservative jurors one may expect to see in smaller California counties.

It would appear that education engenders its own prejudice and values as much as the lack of it. It also shows that choosing the jurors with a particular level of education does not guarantee a particular desired outcome.

This seems to negate the popular view, articulated in one of the submissions to the Morris Report, that widening the jury pool necessarily degrades the quality of jurors or that the excusal and disqualification of certain potential jurors deprive the system of the intellect it requires to be an effective assessor of facts. The evidence indicates that intellect has its own prejudice and that education has its own challenges. It would also uncover another challenge. If we made juror participation a matter for a certain chosen group of people, would it deliver the chosen verdict? This would require further research although the common reason for the jury stares this prospect down.

Education, in this context, refers to some sort of measurable formal academic training. This neither guarantees common sense nor understanding. Education, in its formal sense, is manifestly different from training and/or experience. It can be used as a blanket expression. In this context, it should be avoided. However, it does demonstrate the prospect of some sort of discipline required to engage in academic pursuit.

This says something about the nature of the juror but certainly could not be called a determinant factor by any means. Education, training, experience and social status or social mobility. All of these engender their own prejudices which are difficult to detect and eradicate and some would say, should not be completely removed. Do these affect judgements?

### **Prejudice and its causes**

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<sup>286</sup> Penrod and Hastie. *Op.cit.*, at pp135, 137-8

<sup>287</sup> *ibid*, p129. The initial sample was 828 jurors.

It would appear that in the absence of any yardstick by which to test their reasoning skills, a jury would necessarily gravitate towards its dominating prejudice unless a counter argument exists to challenge entrenched views within the group. In the US, voir dire is used to make jurors confront their prejudice before trial commences. Jury consultants advise trial advocates to use this opportunity to make a prospective juror question his prejudice.

Thus, having dealt with it, the hope is that the juror would then withdraw, be eliminated or concentrate on the evidence relating to the facts as opposed to his pre-conceptions.

The fact remains however, that there is a clash of cultures operating in a jury room composed of disparate people. The requirement to explain a verdict emanating from the intense bargaining may provide an opportunity for discussing what is important and for allowing reason to ultimately prevail. Compromise is a product of dissenting opinions. Reasons for this compromise can be articulated. Prejudice, however, is innate. We are all products of our environment and to a large extent, pay deference to social cultures. For this reason, anyone can be a target of prejudice or discrimination on several grounds. In most cases, the prejudice we experience is not as a result of our humanity but as a result of what social or cultural group we belong to. In other words, we are made to bear the brunt of the characteristics of a particular group.

This is known as stereotyping. Thus, in the context of racial bias, when confronted with a member of an identifiable group, we may rely on a stereotype as a sort of decision-making shortcut rather than consider that person on his or her own merits.<sup>288</sup>

While it may be relatively easy to obey the laws against incitement with regards to our verbal pronouncements, non verbal prejudicial behavioural attitudes especially in

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<sup>288</sup> Lesko, W. A. (2003) Readings in Social Psychology. Ibid at page 158

non-regulated settings such as a jury deliberation chamber, are harder to detect and often harder to mask. This is a crucial point when dealing with trial by jury.

But what does prejudice have to do with jurors and why is it important to understand it? After all, given that we do not require an explanation from a jury and have no way of weeding out bigotry, a study of prejudice in the jury may appear to be a lost cause.

The answers may lie in our ability to categorise people and events and our skills at evaluating evidence. This is an important aspect of human intelligence and decision making.

Prejudice is defined as a preconceived opinion<sup>289</sup> and is considered a product of the subconscious mind and therefore, its manifestations can be quite subtle. Prejudice leads to stereotyping which is far more insidious and is apparently, innate in all humans albeit on a subconscious level.

In a study on stereotyping conducted by Mahzarin Benaji,<sup>290</sup> the subjects were presented with a series of positive and negative adjectives, each paired with a characteristically 'white' or 'black' name. As the name and word appear together on a computer screen, the subject presses a key indicating whether the word is good or bad. Meanwhile, the computer records the speed of response.

The result was interesting. Most subjects – black and white – responded more quickly when a positive word is paired with a white name or a negative word is paired with a black name. The researchers explain that because our minds are more used to making these associations, they process the information more rapidly. Though the words and names are not subliminal, they are presented so quickly that a subject's ability to make deliberate choices is diminished – allowing his underlying assumptions to be manifest. This study can be applied to any given situation.

<sup>289</sup> The Oxford Encyclopedic Dictionary

<sup>290</sup> For further discussion of this, see *Psychology Today*, (1998), ( May/June, 31 93), 52-55, 82



When subjects were shown a list of people who might be criminals, without knowing they were doing so, the subjects picked out an overwhelming number of black people's names. The researchers called this 'implicit stereotyping' – because the subjects knew they were making a judgement but were not aware of the basis for their decisions.

In a further experiment, a group of white subjects were required to perform a tedious computer task. While performing the task, some of the subjects were subliminally shown pictures of black Americans with neutral expressions. When the subjects were asked to repeat the task, the ones who had been exposed to the faces reacted with more hostility to the request because, as the researchers believed, they were responding in kind to the hostility which is part of the black American stereotype. They called this the 'immediate hostile reaction'.

Equally, according to the researchers, when black Americans accurately perceive the hostile expressions that their white counterparts are unaware of, they may respond with hostility of their own thus perpetuating the stereotype.

Much of what ultimately becomes the bedrock of stereotype comes from cultures around us and the experiences we have. We can also add that there is a big part played by things we have heard or experiences that are not altogether first-hand.

A juror who enters the deliberation process may have successfully masked his prejudice and, it is hoped by all, that for the sake of fair trials, he has also suppressed them to a negligible point. However, the role subtle prejudice plays in our criminal trials is difficult to calculate and it would be naïve to assume its absence.

The above account is about prejudice that touches on race and colour but not necessarily about race per se. Nonetheless, race has its own contribution to the debate and needs to be explored.

## The Racial Conflict

The impact of race on jury verdicts is an area that has attracted much research attention. There is a theory that racial prejudice affects final verdicts.

It has been found that black jurors and those of Slavic and Italian origin were more likely to acquit<sup>291</sup> perhaps because they identify with the defendant on a subconscious level. The main reason has not really been formally identified but it may have to do with a feeling of oppression.

As if to prove the point, a study in Baltimore in 1969 by Van Dyke<sup>292</sup> found that when jury commissioners changed from selecting jurors from property lists to random selection from voter lists, the composition of juries changed from 70% white to 43% black. Correspondingly, the conviction rate dropped from 83% in 1969 to an average of 70% in the next few years.

In two studies of 256 white undergraduates and 196 black undergraduates, Ugwuegbu<sup>293</sup> systematically varied the race of the defendant and the victim and the strength of evidence pointing to guilt.

The revelation was that the white participants ascribed a higher culpability ratio to black defendants than white ones.<sup>294</sup>

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<sup>291</sup> D. Broeder, The University of Chicago Jury Project (1959) *Nebraska Law Review* 744. It must be said that there is no indication as to how this finding was reached.

<sup>292</sup> Van Dyke, *op.cit.*, p33

<sup>293</sup> Ugwuegbu, Racial and Evidential Factors in Juror Attribution of Legal Responsibility (1979) 15 *J. Experimental Social Psychology* 133.

<sup>294</sup> Johnson S.L., Black Innocence and the White Jury (1985) 83 *Michigan Law Review*, p.1627

Interestingly, it was found that when the evidence was too weak for conviction, a white juror gave the benefit of the doubt to a white defendant but not to a black defendant.

Conversely, the second study revealed that black students rated a black defendant as less culpable than a white defendant and when the evidence was weak, granted the black defendant the benefit of the doubt. This also happened even when the evidence was strong enough for a conviction.<sup>295</sup>

In citing Ugwuegbu's studies, Johnson<sup>296</sup> highlights the risk inherent in the process of observing mock juries and concludes that the process of being observed may cause the mock jurors to conceal their racial bias.<sup>297</sup> This is an argument that could be used to justify the confidentiality of jury deliberations. But it also questions the validity of the research.

However, she argues that none of the ordinary sources of concern about external validity seriously threatens the significance of the laboratory findings on race and guilt attribution.

Attempts to measure the relationship between juror race and verdicts show that whenever a connection exists, it is likely to be the specific kind of connection often predicted by judges: white jurors are harsher with black defendants and more lenient with those charged with crimes against black people than black jurors are.<sup>298</sup>

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<sup>295</sup> Ugwuegbu as cited by Johnson. At page 1708, Johnson points out the possibility that actual jurors might be less biased than the participating students as a result of the filtration system known as voir dire.

<sup>296</sup> Johnson S.L op.cit., at 1611,1625

<sup>297</sup> This is a point which appears to militate against requiring the disclosure of jury deliberation but might, in actual fact, enhance and assist the decision making of juries thus ensuring a less prejudiced outcome.

<sup>298</sup> King, Nancy. Post conviction Review of Jury Discrimination: Measuring the Effects of Juror race on Jury Decisions (1993) 92 Michigan Law Review 63 at 85

Many other mock jury trials show that there is a racial bias in jury verdicts and real trials appear to substantiate this. A comprehensive study<sup>299</sup> in New York between 1986 and 1995 made an analysis between racial makeup and acquittal rates. For the study, a total of 35,595 criminal verdicts in 27 counties were used.

This study found a close relationship between racial demographics and jury behaviour. The highest jury acquittal rate was recorded in Bronx County. It also had the highest rate of black and Hispanic residence. Ontario County, on the other hand, with a second to the lowest population of these races had a lower acquittal rate.

When the researchers questioned whether strong and weak prosecutions were similar across the jurisdictions but with an independent control of trial rate, there were strong suggestions that the presence of black and Hispanic jurors made the difference in jury convictions between the counties. According to Darbyshire, it is widely assumed that in the US, the ethnic diversity of the modern jury has caused the acknowledged increases in hung juries.<sup>300</sup> Although Klein and Klastorin use statistical analysis to argue that diversity is an insignificant factor and eliminating it would only reduce the rate of hung juries by 3%,<sup>301</sup> it remains, nonetheless, a factor.

The OJ Simpson trial and the first trial of Rodney King highlight the impact of race on jury verdicts. In the Rodney King trial, when the predominantly white suburban jury from Simi Valley of California acquitted the four white defendants, Los Angeles went into an uproariously violent vent of anger and the shock waves were felt around

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<sup>299</sup> Levine, J., *The Impact of Racial Demography on Jury Verdicts*, in Markowitz and Jones-Brown (eds.) *The System in Black and White: Exploring The Connections Between Race, Crime and Justice* 2000.

<sup>300</sup> Darbyshire et al op.cit., p.17

<sup>301</sup> Klein, K.S and Klastorin, T.D., (1999). *Do Diverse Juries Aid or Impede Justice?* Wisconsin L.R. No. (3 special issue, 553-569)

the country.<sup>302</sup> The verdict became a yardstick for examining questions of racial bias in the US judicial system and the fairness of jury verdicts in a racially sensitive criminal trial.<sup>303</sup>

There have been further studies that have observed the interactions between the racial composition of the jury and the defendant's race. The result, once again, is inconclusive and often confusing. In an early mock jury study, McGowen and King<sup>304</sup> found that juries gave longer sentences to defendants who were racially similar to them.

More convincing support stems from a second mock jury study by Chadee<sup>305</sup> which revealed an interaction between jury-defendant similarity and strength of evidence.

Jurors in White-majority juries were more likely to convict a black defendant and were harsher in their preferred verdict than jurors in black-majority juries when the prosecution's evidence was weak. In contrast, jurors in black-majority juries tended to be harsher on a black defendant when the evidence against the defendant was strong.<sup>306</sup>

The argument that a jury is not accountable to anyone except its conscience can function to encourage the unbridled play of prejudice especially where race is concerned.

Fukurai posits that when a jury that is not racially mixed must pass judgment in a case involving minority defendants or victims, the fairness of its judgment is often met

<sup>302</sup> Allen, N.R., Jr. (1992), Rodney, rage and racism. *Free Inquiry* 12:52-53

<sup>303</sup> Fukurai, H. 'A quota jury: Affirmative Action in Jury Selection, *Journal of Criminal justice*, Vol. 25, No.6 pp. 477-500 (1997).

<sup>304</sup> McGowen, R. & King, G.D (1982). Effects of authoritarian, anti-authoritarian and egalitarian legal attitudes on mock juror and jury decisions. *Psychological Reports*, 51, 1067-1074

<sup>305</sup> Chadee, D. (1996). Race, trial evidence and jury decision making. *Caribbean Journal of Criminology and Social Psychology*, 1, 59-86

<sup>306</sup> This is consistent with the 'black sheep' effect observed with mock jurors. See Bonazolli, 1998: King, 1993

with scepticism.<sup>307</sup> However, he fails to explain why this is so and his argument highlights the unease of a less homogenous society that polarizes the racial divide. The summation appears to be the absence of fairness of one race in judging a member of another or more insidiously, the arbitrary nature of our humanity.

However, the question of a mixed jury is worthy of exploration. If by mixed, we mean the random sampling that would normally obtain in a given community without construction, then the position may be acceptable.

However, if the question of a mixed jury refers to a deliberate construction that seeks to enforce representation on the grounds of skin colour, racial origin or some other social divide, we may have difficulties. The definition of race, at least in the UK, is a legal issue and there are sub races within a given race.<sup>308</sup>

Three other field studies support the finding of Bonazolli. Perez, Hosch, Ponder and Trejo<sup>309</sup> observed that white-majority juries were much more likely to convict Hispanic defendants than white defendants. The reverse is the case with Hispanic-majority juries. Furthermore, Klein and Klastorin<sup>310</sup> noted a relationship between racial diversity and the likelihood of a jury hanging in that the number of white jurors was positively correlated with the odds of reaching a verdict when at least one defendant was black.

Daudistel et al<sup>311</sup> found that sentence length for white defendants was positively correlated with the number of Hispanic jurors. Thus, jury-defendant similarity bias

<sup>307</sup> Fukurai, op. cit., quoting Morin, R. (1992). Polls uncover much common ground on L.A verdict, Washington Post, May 11, A15 and Whitaker, C. (1992). The Rodney King wake-up call: Which way America? Ebony 47:116-18

<sup>308</sup> According to the House of Lords' ruling in *Mandla v Dowell Lee* [1983] 2 AC 548, 'the Sikhs are a sub race within the Indian race and as such, are entitled to protection under the Race Relations Act 1976, ss 1(1)(b), 3(1)'.

<sup>309</sup> Perez, D.A., Hosch, H.M., Ponder, B. & Trejo, G.C. (1993). Ethnicity of defendants and jurors as influences on jury decisions. *Journal of Applied Social Psychology*, 23, 1249-1262.

<sup>310</sup> Klein & Kleistorin, op.cit. at 553-569

<sup>311</sup> Daudistel, H.C., Hosch, H.M, Holmes, M.D. & Graves, J.B., (1999). Effects of defendant's ethnicity on juries' dispositions of felony cases. *Journal of Applied Social Psychology*, 29, 317-336

has been observed across a number of studies and contexts and appears to be a robust phenomenon.

### **The Liberation Theory**

When the evidence against a defendant is ambiguous, juries that are demographically similar to the defendant tend to be lenient. However, when the evidence is strong and clear, juries tend to be considerably harsher. Kalven and Zeisel advanced the liberation theory in their work to attempt to explain the matter.

They suggested that where evidence was ambiguous or evenly balanced, jurors feel liberated to respond to or employ non-evidentiary or extra-legal factors.

This 'liberation' hypothesis was investigated and confirmed by various subsequent researches.<sup>312</sup>

Hans and Vidmar also confirmed that when the evidence was clear, the jury was inclined to follow the law but in cases of evidential ambiguity or contradiction, jurors felt liberated to give rein to their own sense of justice and equity.<sup>313</sup> What goes on in the minds of jurors when race becomes an issue has not been properly researched, perhaps with good reason.

What is evident, however, is that the impact of race is a formidable one that, in the main, appears to defy all objective logic and research criteria.

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<sup>312</sup> Ugwuegbu, D. (1978). Racial and evidential factors in juror attribution of legal responsibility. *Journal of Experimental Social Psychology*, 15, 133-146. See also: Reskin, B., & Visher, C. (1986). The Impact of evidence and extra-legal factors in juror's decisions. *Law Society Review*, 20, 423-438 and Werner, C., Kagehiro, D., & Strube, M. (1982). Conviction proneness and the authoritarian juror: inability to disregard information or attitudinal bias? *Journal of Applied Psychology*, 67, 629-636.

<sup>313</sup> Hans, V.P., & Vidmar, N. (1986), *Judging the Jury*, New York, NY. Plenum Press.

In England and Wales in 1995, 382,000<sup>314</sup> recorded crimes were considered by the victims to be racially<sup>315</sup> motivated. According to the British Crime Survey, the estimated number of racially motivated offences in England and Wales fell from 390,000 in 1995 to 280,000 in 1999.

The number of racially motivated incidents against Black, Indian, Pakistani, and Bangladeshi people also fell, from 145,000 in 1995 to 98,000 in 1999.<sup>316</sup>

The reasons for the fall are complex as are the reasons for the huge numbers in the first place. However, the courts' attitude to race in the trial process is worthy of exploration.

### **The position of the Appellate Courts**

In *Ford*,<sup>317</sup> it was held that a trial judge had no power to construct a multi-racial jury and that a judge's power was limited to a juror's competence to serve. This ruling, couched in objectivity, turns a blind eye to the vexed question of racial representation and with good reason. The argument for jury racial mix is fraught with many challenges. It also directly challenges the position taken by *Fukurai* though on a different front.

<sup>314</sup> The British Crime Survey: Percy, Statistics on Race and the CJS, Home Office Publications, 1998. 143,000 against people of ethnic minority origin and 238,000 against white people.

<sup>315</sup> "A racist incident is any incident which is perceived to be racist by the victim or any other person." 'The Stephen Lawrence Inquiry' (1999), Sir. William Macpherson.

<sup>316</sup> Clancy, A., Hough, M., Aust, R. and Kershaw, C. (2001). Crime, Policing and Justice: the experience of ethnic minorities: Findings from the 2000 British Crime Survey, Home Office Research Study 223.

<sup>317</sup> (1989) 89 Cr. App.R. 278



The English courts need not, per se, pay attention to the perception of justice by the public or racial representation. Must the rest of us live with the decision of the 'non-representative' jury in spite of our misgivings? Should we, as admonished by Fukurai, accept enforced or constructive homogeneity or let Ford guide our hopes?

The correct position is hard to articulate but it is submitted, as the argument below will show, that a constructed mixed jury, far from being the panacea against jury prejudice, may actually foster racial disquiet.

### Historical Jury Racial Construct

As a matter of historical interest, for over five centuries, until 1870, the then minority ethnic groups in England such as Germans, Jews<sup>318</sup> and the Italians had the right to be tried by the *de mediate linguae*<sup>319</sup> - a jury comprised half of foreigners akin to the accused.<sup>320</sup> Racial origin, in this regard, was restricted to geographical origin.

The idea was that a defendant would feel a greater sense of justice if someone of his race was on the jury. This was abolished on the grounds that no foreigner needs fear for a fair trial in England.<sup>321</sup> Attempts have been made to engineer the racial composition of juries in order to match the ethnic background of the defendant. In 1993, the Royal Commission on Criminal Justice recommended that legislation be enacted to enforce racial representation. It argued that on the application of the

<sup>318</sup> According to Fukurai, op.cit., the concept of the jury *de medietate linguae* had its origin in the treatment of Jews in the 12<sup>th</sup> Century. The term applies to people who were considered alien or foreign and spoke a different language. The English considered the Jews as aliens in race, religion and culture and considerable animosity existed against the Jews who were known as Anti-Christ and Christ-killers, they were darker-skinned and spoke a mysterious and foreign language. For a fascinating chart of the matter and its extension to Italians, Germans, all foreigners and other matters, see Fukurai, op. cit, p 480.

<sup>319</sup> This means 'of half tongue' from M Constable, *The Law of the Other* (1994) as cited by Darbyshire at p. 18

<sup>320</sup> In order to preserve a 'jury of one's peers' and the principle of a fair trial.

<sup>321</sup> The Naturalisation Act of 1870 gave rights to aliens to serve on juries and to acquire, hold and dispose of property like any other English-born citizen. This paved the way to remove the need for the privilege of a mixed jury. See Ramirez, D. (1984). *The mixed jury and the ancient custom of trial by*

defence or prosecution and in exceptional circumstances, a judge would be able to order that a jury include up to three representatives of racial minority communities.

In addition, counsel should be able to ask the court to designate that one of the three be of the same racial background as the accused.<sup>322</sup>

It is submitted that the panacea is not necessarily the construction of a racially balanced jury as Darbyshire,<sup>323</sup> Auld, the Royal Commission and Fukurai argue.

This argument has been presented before and each succeeding research indicates that a racially balanced jury is not necessarily the answer. Some jurisdictions have other ideas. In New Zealand, the country's Law Commission pointed out in 1998 that three jurors, randomly chosen from three different minority racial groups will not necessarily render the jury more representative nor will one juror of the same racial background as either the accused or the complainant satisfy the demands of the accused for a more representative tribunal of fact.<sup>324</sup> The point is difficult to ignore.

In colonial Nigeria, the law provided for racial quotas in trial by jury. If the defendant was a 'non-native', the court was allowed to direct that not more than half of the jury should be non natives.<sup>325</sup> What is less obvious is the fact that Nigeria is a multiplication of ethnicities with differing cultural and religious backgrounds. Skin colour, in a country of black people, does not necessarily define race nor does it always explain perception. None of these can be or could be justified as the subject of racial representation is a complex one. These tinkering make very little positive difference to the perception or delivery of fairness in criminal trials.

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jury de medietate linguae: A History and a proposal for change. Boston University Law Review 74:777-818, Enright, Multi-Racial Juries (1991) 141 NLJ. 992.

<sup>322</sup> The Royal Commission on Criminal Justice, 1993, Cm 2263, at 207-8

<sup>323</sup> Darbyshire et al op.cit., p19

<sup>324</sup> Cameron, N. et al (2000), The New Zealand Jury in Neil Vidmar's World Jury Systems, pg. 195.

<sup>325</sup> Vidmar, N. (2000) *ibid.* at page 425

The difference, it is argued, is made by education which in this context, is given a narrow interpretation. An educated and informed jury is arguably, likely to be more objective about race and criminal tendencies and thus, evaluate the veracity of evidence on its merit.

This education would include clear guidelines of what is required of a jury relative to its verdict. The lack of accountability on the part of jurors, *prima facie*, has advantages. However, it could lead to all sorts of mishaps. The propagation of prejudice, as articulated above, is a case in question.

Furthermore, a racially balanced jury could be challenged on the grounds that it is more likely than not to be seen as a token to political correctness rather than a genuine attempt to redress the effects of and root out racial prejudice among jurors.<sup>326</sup> In any event, there is no guarantee that both juror and defendant will not resent such a seemingly patronising gesture however well meaning the objective. There is the further argument that attempting to construct a racially balanced jury could undermine the delicate social fabric of any society by giving the impression that justice must reflect colour.

This might be seen as a recognition and acceptance of the racial bias of white English men against fellow non white English men and vice versa.<sup>327</sup> Justice, in the event, may be blind but colour cognisant.

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<sup>326</sup> In his response to the Auld Review, Professor Zander suggests that if those specially chosen ethnic jurors were aware that they were chosen by this special procedure, it would place them in a highly uncomfortable position in the jury room.

<sup>327</sup> The jury in an inner city London, Birmingham or Manchester where the population is predominantly non white would have to be racially balanced too to provide 'justice' for the white man should he be a defendant.

Nonetheless, in England and Wales, there is virtually no means for attempting the elimination of racial bias as in the US through the use of voir dire or ensuring a racially mixed jury.<sup>328</sup>

There remains only challenge for cause<sup>329</sup> since the abolition of peremptory challenge.<sup>330</sup>

However, with this, the defence is given no facts about the jurors upon which to base a challenge. As Darbyshire argues, short of having a swastika tattoo in full view, challenge for cause is practically redundant.<sup>331</sup>

It was observed in a submission to the Auld review that in the modern society, increasingly, cases have become 'multi-handed', involving defendants of many differing ethnic backgrounds. The idea of empanelling a multi-racial jury only has to be stated to highlight the challenges. Besides, it may not be practical to nor can we justify questioning potential jurors about their racial origins. Can there be a justification for conducting such questioning? In the event, racism, as opposed to race, is a subjective matter. In a jurisdiction that does not require explanation from a jury and does not conduct any preliminary enquiry into the potential juror prejudice, masking latent racism is a fairly simple matter. The construction of a racially balanced jury may give the impression of positive act, however, it provides no guarantee and does not address the issues it might raise. The question of racial composition of a jury goes beyond identifying with a particular skin colour. The cultural differences even among people of the same colour have to be recognised and this has a bearing on the concept of a fair trial. Historical and contemporary genocide and ethnic cleansing are

<sup>328</sup> Darbyshire, *op. cit.* p18 argues, quoting Lloyd-Bostock and Thomas at p.25 that it has been argued that this is one serious consequence of the abolition of peremptory challenge.

<sup>329</sup> A party's challenge supported by a specified reason such as bias or prejudice that would disqualify that potential juror, Black's Law Dictionary, 7<sup>th</sup> edition, West Group, St. Paul Minnesota 1999 at p.233

instructive in their demonstration of racial prejudice even amongst people of the same race. In a trial involving such diverse ethnic actors, how do we construct a racially relevant or balanced jury? Furthermore, how is the question of attempting to engineer the dynamics of deliberation to be addressed?

It is observed that jurors are selected randomly<sup>332</sup> from a geographical area in which a crime occurred. The presumed common bond is that of shared values and experience gained, in the most, by belonging to the same society. Could the assumption that they will thus share somewhat common opinions be sufficiently conceded to render it an acceptable platform that negates the ignominy of an engineered jury? A response in the positive would undermine the argument for a constructed jury.

A negative response, on the other hand, would undermine the principle of random selection. In either case, we would be no closer to understanding a jury's reasoning behind a verdict nor would such a reason be easily articulated without justifying a narrow cesspit of prejudice. Attempting to articulate a response to this quest highlights the fact that the impact of a racially engineered or manipulated jury appears to be fraught with many variables. Yet we must continue to search for ways to deliver a racially balanced justice system. The courts, impartial, as they must be, have grappled with this fact.

There used to be an exceptional judicial discretion to amend the composition of all-white juries in trials of non-white defendants.<sup>333</sup> In the event, as observed earlier, the Court of Appeal ruled against such an intervention in *Ford*<sup>334</sup> on the basis of

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<sup>330</sup> One of a party's limited number of challenges that need not be supported by any reason although a party may not use such a challenge in a way that discriminates against a protected minority, Black's Law Dictionary, 7<sup>th</sup> edition, West Group, St. Paul Minnesota 1999 at p.223.

<sup>331</sup> *op.cit.*, 18

<sup>332</sup> Paul Robertshaw argues that randomness of jury selection cannot guarantee representativeness of specific juries either of the local population or of the defendant's community of identification. Responding to Bias amongst jurors, *Journal of Criminal Law*, Vathek Publishing, (2002). JoCL 66(84)

<sup>333</sup> See *R v Binns* (1982) Crim. L Rev 522 593 and *R v Frazer* (1987) Crim. LR 418.

<sup>334</sup> *R v Ford* [1989] 3 All ER 445

separation of powers, arguing that judges should not intervene in administrative matters. Their reasoning is worthy of note. They neither offered an objective justification for abandoning the practice nor did they rule on the efficacy of mixed juries. The appeal was to administration.

This, of course, does not begin to address the issue of the majority verdict<sup>335</sup> which was introduced in order to deal with an irrational and perverse minority holding the rest of the jury to ransom. Would the boundaries have to be changed? What happens when the racially engineered jury divides on racial lines in a majority verdict? Can we justify ignoring the voice of the minority on the grounds of a vocal and forceful majority? Apparently yes. We now accept majority verdicts in criminal trials. How do we know if a racially mixed or constructed jury did not divide along racial lines?

The impact of racial composition of a jury and the impact of racial prejudice is just as relevant a matter to the question of a reasoned verdict.

In the UK, Judge Robert Moore took the unusual step of halting a criminal trial and discharging the jury on suspicion of racial prejudice.<sup>336</sup>

The judge stated that he had become aware, through a juror, that the empanelled jury was racially biased. In reaching his decision, the judge said:

‘I believe, having consulted counsel, that the whole concept of a fair trial...has been so undermined that the jury must be discharged and a new trial ordered’.

What if the conscience-stricken juror had resisted the urge to speak out? Would a racially mixed jury have forced a similar outcome or used its composition to fight prejudice?

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<sup>335</sup> It is interesting to note that the law in England and Wales in 1967 was preceded by that in colonial Nigeria where the jury was encouraged to deliberate to reach a unanimous verdict but failure after two hours would allow the judge to accept a majority verdict of 10 jurors. See Vidmar’s ‘World Jury Systems’ *infra*.

<sup>336</sup> Robert Verkaik, Legal Correspondent, *The Independent*, 16<sup>th</sup> October 2000

In April 1999, a jury was discharged in Stafford Crown Court after the court clerk received an anonymous phone call in which a man said a fellow juror had made racist remarks and had already made up his mind about a mixed-race couple's guilt.<sup>337</sup>

In both cases, the trial was at a point where the presiding judge could intervene and attempt to nullify the impact of racial bias prior to a verdict. The matter might be different and a question for the appellate court if a verdict had been rendered already. It becomes clear from the actions of both judges, that racial prejudice is a factor that affects a final jury verdict. The courts have recognised this and have sought ways to minimise its impact and ensure a fair trial. Some judges respond well to this as noted from the cases above. There is, yet, some way to go. Even the European Court of Human Rights' position is variable. In *Sander*,<sup>338</sup> it was held, by four votes to three in 2000, that:

'a judge's decision to deal with an allegation of racial bias in a jury trying an Asian defendant by means of a redirection rather than a discharge did, in the circumstances,<sup>339</sup> constitute an infringement of the right to a fair trial as guaranteed by article 6.1 of the European Convention on Human Rights'.

Earlier in 1997, the same court in *Gregory*<sup>340</sup> held by a majority of 8 to 1 that the same circumstances involving a black defendant did not constitute an infringement to a fair trial as guaranteed by article 6.1 of the ECHR. *Sander* is the prevailing law.

So how do we explain the diverging response to alleged 'objective' prejudice?

The Human Rights Court distinguished the two cases on the basis that there was no admission of racism in *Gregory* and that the complaint had been vague and

<sup>337</sup> Judge Warner, *The Independent*, op. cit. The judge however, refused an application for a change of venue and the second jury was also discharged following further allegations of racial comments by some jurors.

<sup>338</sup> *Sander v UK* (34129/96)

<sup>339</sup> In the case, a juror had sent a communication to the judge alleging that another juror had made racist comments during deliberation. The juror in question later admitted this. The European Court of Human Rights ruled that the allegation was capable of causing the applicant and objective observer legitimate doubts as to the impartiality of the court.

<sup>340</sup> *Gregory v United Kingdom*, (111/1995/617/707)

imprecise.<sup>341</sup> In reaching its decision in *Sander*, the court considered that clear and precise allegations of racist comments had been made by the jurors and argued that it could not accept that the seeking of vague assurances from the jurors that they would set aside their prejudices was robust enough. It further recognised that in today's multi-cultural European societies, the eradication of racism had become a common priority goal for all contracting states.<sup>342</sup>

There we have it on authority. It is a matter for public policy in light of modern requirements for social cohesion.

The issue of racial prejudice in the jury room is one that is recognised to pose a threat to the concept of a fair trial not just in the UK but in all legal jurisdictions.

However, when there are reports of inappropriate behaviour by the jury during deliberations, the effect of s.8 of the Contempt of Court Act is to prevent any judicial investigations into the matter. Thus, jury deliberation is sacrosanct.

The issue of confidentiality of jury deliberation was recently before the judicial committee of the House of Lords in the two cases of *R v. Connor and another* (Appellants) (On Appeal from the Court of Appeal (Criminal Division)) and *R v. Mirza* (Appellant) (On Appeal from the Court of Appeal (Criminal Division)) (Conjoined Appeals).

*Connor* involves the conviction of an Asian man of indecent assault. *Mirza* concerns a juror's disquiet at the readiness with which his fellow jurors convicted two men accused of wounding with intent because they were getting irritated at the length of

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<sup>341</sup> The court recognised that by virtue of s. 8 of the Contempt of Court Act 1981, the Court of Appeal was barred from investigating what occurred in the jury room to establish the credibility of the allegation. See *R v Miah and Akhbar* (1997) 2 Cr. App. R12 and *R v Qureshi*, *The Times* (11 September 2001), CA. These cases concern the contempt of Court Act and the limits on the Court of Appeal.

<sup>342</sup> As noted in the Declarations of the Vienna and Strasbourg Summits of the Council of Europe.



the trial. In both cases, the Court of Appeal held that it was barred from investigating the whistle-blowing juror's claims.<sup>343</sup>

Dyer remarks, almost as an after-thought, that 'while the police have the power to investigate and charge and the CPS the power to prosecute, juries have the ultimate power - to convict.'<sup>344</sup>

And this, notwithstanding the potential juror prejudice which is largely unchecked and which could remain resistant to many robust judicial instructions. The House of Lords held (Lord Steyn dissenting in part) that the common law position which protected the confidentiality of jury room discussions was not incompatible with art. 6 (1) of the European Convention on Human Rights.<sup>345</sup>

When the matter concerns manifest skin colour differences, prayer to racial representation in a jury further blurs the obscurity of lack of homogeneity but can enhance perceptions of a fair trial.<sup>346</sup> This could be misleading. Race is as diverse as cultural and social differences even amongst people of the same skin colour.

It is submitted that a jury that is charged with explaining its verdict would be mindful of the consequences of citing colour prejudice as indeed it would be of making a decision that is manifestly steeped in such prejudice. Such a requirement would invite the jury to be more objective in its assessment.

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<sup>343</sup> R v Mirza, op.cit.

<sup>344</sup> Clare Dyer, The Dirty Dozen, The Guardian, 28<sup>th</sup> October 2003

<sup>345</sup> R v Mirza ibid.

<sup>346</sup> Johnson, S. L. (1985), Black Innocence and the White jury, Michigan Law review 83: 1611-708, Colbert, D. L. (1990) Challenging the challenge: Thirteenth amendment as a prohibition against the racial use of pre-emptory challenges, Cornell Law Review 76:1-128, Ramirez. D. (1995), Multicultural empowerment: It's not just black and white anymore. Stanford Law Review 47:957-92

The proposal by Darbyshire to Auld on racial engineering, when subjected to research, in the US, proved inconclusive and was viewed as discriminatory.<sup>347</sup>

But race is just one of a whole clutch of factors affecting a jury. The gender effect is as potent as we shall see next.

### **The Gender Effect**

There are conflicting conclusions from studies on the effect of jurors' gender on a jury's final verdicts. Firstly, Baldwin and McConville<sup>348</sup> concluded, in their Birmingham study of 276 jury trials, that in cases where four or more women were sitting as jurors, although their conviction rate was lower than that of an all male jury, their acquittal rate corresponded to the city average.

Furthermore, there were no significant variations regarding questionable verdicts that could be attributed to the number of women sitting as jurors.

On the other hand, Sealy and Cornish<sup>349</sup> found in a mock rape trial that women were significantly more likely to convict on circumstantial evidence.<sup>350</sup> Nonetheless, they concluded that there appeared to be no probability that the juror's gender explained his verdict.

Conversely, Mills and Bohannon<sup>351</sup> analysed data from returned questionnaires received from 117 females and 80 males randomly chosen from the Baltimore jury panels in the USA. They tested for statistical significance between two variables using multivariate analysis to examine the multiple contributions of four variables: race, sex, age and education. Multiple regression analysis showed that from 10% to 16% of

<sup>347</sup> See Fukurai, *op.cit.* at page 496-497

<sup>348</sup> Baldwin and McConville *op.cit.*,

<sup>349</sup> Sealy and Cornish, *Jurors and Their Verdicts*, (1973) 36 *Modern Law Review* 496

<sup>350</sup> They indicate that the attitude was that between the defendant and the victim, it was a simple matter of his word against hers. *Ibid.*, p.503

<sup>351</sup> C.J. Mills and W.E Bohannon, *Juror Characteristics: To what extent are they related to jury verdicts?* (1980), 64 *Judicature*, Number 1, 23. The study finds the group, when compared with demographic information from census records and court records on jurors demographic characteristics, to be highly representative of both the general population and the Baltimore Jury population

verdict variance could be explained by a combination of the four demographic variables.

The report found that females gave more initial guilty verdicts for rape (about 78%) and murder cases (71%) as opposed to males who gave 53% and 50% for rape and murder respectively.

Further analysis of data on race and gender found that black females reported a significantly higher percentage of initial verdicts (73%) than black males (50%).<sup>352</sup>

However, they found no variation between white females and males.

A significant difference was found to exist for the amount of agreement between personal and group decision even though the majority of jurors' personal decisions originally agreed with the final group decision. 67.5% of the males and 81% of the females' personal decisions agreed with the final group decision.

The report makes the point that only 5% of the female jurors reported a mind change from their initial not guilty decisions to guilty whereas 10% of males did. Furthermore, a higher proportion of female jurors' initial guilty verdicts matched with the final group guilty decisions.<sup>353</sup>

Further studies examined the relationship between gender and three personality variables<sup>354</sup> (empathy, autonomy and socialisation).

Bonazzoli found that a link existed between guilty verdicts and high socialisation, low empathy and low autonomy scores with regards to males. The reverse was the case for females.<sup>355</sup>

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<sup>352</sup> Mills and Bohannon, *op. cit.*, p.30

<sup>353</sup> The implication is somewhat inconclusive. The possibilities are that females are either more persuasive or more accurate at determining a final verdict. The authors suggest that any presumption of superiority in persuasion may not be borne out since the study, as well as other studies, found women less influential and assertive than males. *Ibid.* at p.27

<sup>354</sup> M.J Bonazzoli, *Jury Selection and Bias: Debunking Invidious Stereotypes Through Science* (1998) 18 QLR 252.

<sup>355</sup> Bonazzoli pointed out that the three personality variables comprise Hogan's character structure. Socialisation was measured by Gough's Socialisation Scale of the California Psychological Inventory,

In a different finding, a study in Florida by Moran and Comfort<sup>356</sup> compared their findings to those of Mills and Bohannon.<sup>357</sup>

They found that there were no gender effects for final verdicts or pre-deliberation verdicts. They also doubted that either sex is more likely to convict in felony cases in general although such finding is possible for specific felonies such as rape or robbery.<sup>358</sup>

The matter does not rest there. In this study, Moran and Comfort found that there was an interactive effect between the sex of the juror and the other variables.

The analysis showed that male jurors who convicted had more children and lower incomes. Furthermore, male jurors who were inclined to convict during pre-deliberation had more children and higher Gough socialisation scores.

Female jurors who convicted had a stronger belief in retributive justice. The research may have uncovered more social problems than it set out to do.

Overall, there is every indication to sustain the assertion that males participate in the deliberation process more than females.<sup>359</sup>

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analysing the individual's interpretation of societal rules and values as personally compulsory. Empathy was measured by Hogan's Empathy Scale, analysing the individual's capacity to understand the perspectives of others and implications of one's actions on others. Autonomy was measured by Kurtine's Autonomy Scale, analysing perceptions of personal responsibility for one's actions (at FN18)

<sup>356</sup> Moran and Comfort, *Scientific Juror Selection: Sex as A Moderator of Demographic and Personality Predictors of Empanelled Felony Jury Behaviour* (1982) 43 *Journal of Personality and Social Psychology*, No.5 1052-1063. 319 returns to 1,500 anonymous questionnaires sent were analysed. Respondents consisted of people who had served on felony juries that reached verdicts during 1975-6 in the state courts in Miami. The report notes that it was unable to estimate the representativeness of the sample due to lack of existing demographic data profiles on felony jurors. It should also be a matter worthy of consideration that in the state of Florida, except in capital cases which have a jury of 12, all felony cases are heard by juries of 6 members.

<sup>357</sup> Moran and Comfort indicate that their sample jurors only consisted of 4% blacks as opposed to 42% in that of Mills and Bohannon. Other factors included the fact that the Florida research had a higher percentage of jurors over 60 and are better educated.

<sup>358</sup> Moran and Comfort op.cit., at p.1059

<sup>359</sup> Penrod and Hastie argue that the safest generalisation that can be made from all research on gender differences is that females are more likely than males to regard the defendant in a rape case as guilty and that males participate at higher rates of deliberation than females. They refer to a number of other important differences such as the Scroggs Study (1976) where male students gave more lenient sentences in rape and robbery cases when the victim did not resist while females gave harsher sentences under the same conditions, in *Inside the Jury*, op., cit., p141.

The indications are that gender may also have an interactive effect with other factors.<sup>360</sup> Nagel and Wietzman<sup>361</sup> found that jurors may find it easier to empathise with a defendant of the same sex.

The conclusion from this area of study appears to be that jury demographic factors interact with defendant characteristics to produce a bias in favour of defendants who are similar to the jurors in some salient or relevant respect.

In 1972, Nagel and Weitzman<sup>362</sup> found that in civil cases, a male-dominated jury was more likely to award higher damages to male plaintiffs while female-majority juries tended to award larger sums to female plaintiffs.

Fischer's study found that juries composed largely of women tended to convict a male defendant more often than juries with a lower proportion of women in a rape case.<sup>363</sup>

It is submitted that gender could be a positive contributory factor in the deliberation process. Its advantages include not least the fact that a female's perspectives may be significantly different from a male's especially in rape cases.

This could also have adverse implications. However, trained professionals are loath to make a decision based on gender. While it is conceded that jurors are not trained professionals, it is argued that they might benefit from being given professionals' instructions. This can only be encouraged by a requirement delivered as instructions to explain a verdict prior to commencement of a trial and prior to retirement. Jurors may ignore any instructions given to them by the judge but a requirement to explain may not be ignored.

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<sup>360</sup> Penrod and Hastie add that not only do male jurors talk more during deliberations, they also generate more total facts, key facts, different facts and different issues during their speaking time but these differences could not be necessarily ascribed to gender per se. Other differences between males and females such as occupation and education may have had a bearing on the findings. Ibid at p142.

<sup>361</sup> S.S Nagel and L.J Weitzman, *Women as Litigants* (1971) 23 *Hastings Law Journal*. 171, cited by Bonazzoli. *ibid*.

<sup>362</sup> Nagel, S. & Weitzman, L. (1972). *Sex and the unbiased jury*, *Judicature*, 56, 108-111

<sup>363</sup> Fischer, G.J., (1997) *Gender effects on individual verdicts and on mock jury verdicts in a simulated acquaintance rape case*. *Sex Roles*, 36, 491-501

They may also, by extension, ignore all the conventions of justifiable decision-making. However, it is argued that should they be required to explain their verdict, reliance on unquantifiable, irrelevant and prejudicial gender feelings may be reduced to an insignificant level.

So much for factors that may affect a jury. Which factors influence a jury?

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## Chapter Eleven – Articulating The Evidence

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Where jurors give reasons for an acquittal, they mostly mention weakness of the evidence<sup>364</sup> and as we have established, studies indicate that the factor with the greatest influence on juries is the evidence. Based on this, there is indication that jurors' first act, in most cases, is to address the evidence by taking a vote upon retirement.<sup>365</sup> The idea behind the vote taking may be to determine the majority view which may ultimately drive the final verdict or, perhaps more perniciously, determine the verdict by the first ballot in order to hasten the deliberation process.<sup>366</sup> Either way, such votes have a way of influencing jurors as it forces them to declare their hands early and dig into their positions or allow a space for exploring and revisiting personal opinions. It is also a referendum on the evidence before discussions ensue.

As Darbyshire continues, this may lead to verdict driven decisions or individual jurors feeling that they have to justify their initial stance.<sup>367</sup> In the American Jury, the authors argued that deliberation played a minor role in determining jury verdicts because the pre-deliberation majority exercised a tyranny over the rest of the jurors.

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<sup>364</sup> Darbyshire et al op.cit.p.53

<sup>365</sup> Darbyshire et al, op. cit., at p.51

<sup>366</sup> Kalven and Zeisel. Op.cit., at page 4.88

<sup>367</sup> For a greater insight into this evaluation, see Darbyshire et al op.cit. pp.53-54

They suggested that 'with very few exceptions, the first ballot decides the outcome of the verdict' and that therefore, 'the real decision is often made before the deliberation begins'. This conclusion, it can be argued, can only be justified if the first vote taken reflects the distribution of pre-deliberation juror verdict preferences unaffected by the persuasion and bargaining already taken place prior to deliberations or takes place during deliberations. Thus, the position of Kalven & Zeisel may fail to disclose considerable shift in juror verdict preferences as a result of deliberation but before a vote is taken.

Indeed, recent studies since then have questioned the conclusions and suggested that significant discussion often precedes any jury vote taking.<sup>368</sup> Adopting the former position would of course, it is argued, question the need for and validity of deliberations.

However, there are many other factors that might influence a jury's final verdict in a criminal trial. Here, this paper outlines a few and argues that a relationship exists between these and the articulation of reason made more pronounced by the requirement not to explain a verdict.

### **Pre-trial Publicity**

This is a particular type of inadmissible material that may have some influence on the tribunal of fact in a criminal trial. Given the ferocious and unrelenting media interest in high-profile criminal trials, the likelihood of jury prejudice, as a result, cannot be over stated.

The concern is that jury exposure to pre-trial publicity, which largely favours the prosecution, will reduce the defendant's chances of a fair trial.

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<sup>368</sup> Sandy & Dillehay, (1995)

The conflict is therefore between freedom of speech and protection of civil liberties or ensuring a fair trial. There are strong arguments that over-zealous pre-trial publicity affects a fair trial by prejudicing a jury and that when that occurs, there ought to be a stay of proceedings on the grounds of prejudice. Yet, in *McVeigh* it was observed that:

‘Extensive publicity before trial does not, in itself, preclude fairness. In many respects, media exposure presents problems not qualitatively different from that experienced in earlier times in small communities where gossip and juror’s personal acquaintances with lawyers, witnesses and even the accused were not uncommon.

Properly motivated and carefully instructed jurors can and have exercised the discipline to disregard that kind of prior awareness. Trust in their ability to do so diminishes when the prior exposure is such that it evokes strong emotional responses of such an identification with those directly affected by the conduct at issue that the jurors feel a personal stake in the outcome. That is also true when there is such identification with a community point of view that jurors feel a sense of obligation to reach a result which will find general acceptance in the relevant audience’.<sup>369</sup>

This opinion recognises the odious difficulties associated with pre-trial publicity but tempers it with the possible antithesis – that it need not preclude a fair trial. In this statement, the judge also recognises that this phenomenon is not only an age-old problem but it is one that either inflames or reduces juror opinion and merges it with a constructive community spirit. Thus, the juror’s emotions may become sufficiently aligned with that of the community that for them, justice lies in appeasing that community.

Research into the effect of publicity on juror verdicts has so far concentrated on understanding the impact of case-specific pre-trial publicity and less on the influence



of publicity on juror's judgment of witness credibility in unrelated cases. Is there a cumulative effect of exposure to news of crime on a juror's judgment?

How much does unrelenting reporting of criminal activities and crime impact the thinking of a juror in relation to a particular crime and crimes in general? Does this affect his assessment of the credibility of defendant or witness in a trial?

It has been observed that our culture and various socialisation agents shape our views of each other and the media is a powerful agent in this context.<sup>370</sup>

The media is a powerful avenue for disseminating information and is largely seen as a credible one attracting a considerable audience. As such, one may submit that any pre-trial publicity orchestrated by the media of any criminal allegation is likely to influence the public at large one way or another. This, in turn, may have an impact on a jury's verdict.

A theory called 'agenda-setting' has been developed by political scientists to explain the phenomenon whereby particular political issues and social challenges influence society's evaluation of issue importance and its appraisals of political candidates.<sup>371</sup>

This theory argues that news broadcasts determine the issues that are important to the electorate by highlighting certain societal problems while neglecting others.

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<sup>369</sup> Per Matsch, J: U. S. v McVeigh, (1996), p 1473 explaining his decision to move the Oklahoma bombing trial to Denver.

<sup>370</sup> Gerbner, G., Gross, L., Morgan, M., & Signorielli, N. (1980), The Mainstreaming of America: Violence profile no. 11. *Journal of Communication*, 30, 10-29, (1982), Charting the Mainstream: Television's contributions to political orientations. *Journal of Communication*, 32, 100-127, Gerbner, G., Gross, L., Signorielli, N., Morgan, M., & Jackson-Beeck, (1979), The Demonstration of power: Violence profile no.10. *Journal of Communication*, 29, 177-196., McGuire, W.J., (1985), Attitudes and attitude change. In G. Lindzey & E. Aronson (Eds.), *The handbook of social psychology* (Vol. 2, pp233-346) New York: Random House

<sup>371</sup> Iyengar, S., & Kinder, D.R (1985), Psychological accounts of agenda-setting. In S. Kraus & R. Perloff (Eds), *Mass media and political thought*. Beverly Hills, CA: Sage; McCombs, M.E. & Shaw, D., (1972). The agenda-setting function of mass media. *Public Opinion Quarterly*, 36, 176-185.

It has also been argued that news broadcasts of a social issue make newly and previously acquired information about that particular issue more accessible to the decision-maker thereby enhancing its salience.

In turn, these newly highlighted and acquired issues form the criteria by which voters formulate value judgments of political candidates. This theory can be extrapolated to the field of jury decision making relative to pre-trial publicity.

Recent studies suggest that the structure and content of a news broadcast affects judgments of responsibility for social problems.<sup>372</sup> These studies also indicate that crime news may be particularly biased and often less objective.

Analysis of newspaper articles in the US found that news of criminal activities receives disproportionate coverage both in the print media<sup>373</sup> and television.<sup>374</sup>

The interesting but not surprising finding is that the publicity is evaluatively biased in favour of the prosecution.<sup>375</sup>

It has been observed by the jurist Bentham in comments concerning mid-trial publicity that:

'In the darkness of secrecy, sinister and evil in every shape have full swing. Only in proportion as publicity has a place can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the very spur to exertion and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial'.<sup>376</sup>

<sup>372</sup> Iyengar, S. (1990). Framing responsibility for political issues: the case of poverty. *Political Behaviour*, 12, 1940; Iyengar, S. (1991). *Is anyone responsible? How television frames political issues*. Chicago, IL: University of Chicago Press.

<sup>373</sup> Antunes, G.E. and Hurley, P.A (1978). The representation of criminal events in Houston's two daily newspapers, *Journalism Quarterly*, 55, 756-760; Humphries, D. (1981). Serious crime news coverage and ideology: A content analysis of crime coverage in a metropolitan paper. *Crime and Delinquency*, 27, 191-205; Roberts, J.V. and Doob, A.N (1990). News media influences on public views of sentencing. *Law and Human Behaviour*, 14, 451-468.

<sup>374</sup> Graber, D.A (1980). *Crime news and the public*. New York: Praeger

The tilt of this argument suggests that publicity may have some advantages not least in helping to uncover official incompetence or bias. By extension, it could also be argued that publicity in criminal trials has a mixture of effects on the fairness of trials and in being a catalyst for investigating miscarriages of justice where suspected. It is not easy to find a balance.

The UK, nonetheless, has robust laws<sup>377</sup> restricting intrusive reporting of cases in order to provide some degree of protection to the defendant.<sup>378</sup>

However, a blanket ban on media reporting is inconsistent with a free and open society. Until the 1990s, scarcely were proceedings stayed on the grounds of pre-trial publicity.

The judicial consensus appears to have been that jurors are capable of following the judge's instructions to avoid prejudice<sup>379</sup> and this has not been restricted to notorious cases. In *McCann*,<sup>380</sup> the Court of Appeal overturned the conviction of alleged Irish Terrorists.

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<sup>375</sup> Dreschel, R.E. Netteburg, K. & Aborisade, B. (1980). Community size and newspaper reporting of local courts. *Journalism Quarterly*, 57, 71-78

<sup>376</sup> Jeremy Bentham, 1748-1832. *The Principles of Legislation*,

<sup>377</sup> S.8 Contempt of Court Act 1981 provides a setting for the news media to be barred from and possibly prosecuted for publishing prejudicial material before or during a trial and under the doctrine of abuse of process, the court has power to stay criminal proceedings on the ground that a fair trial cannot be guaranteed. For an in-depth discussion of this principle, see: D. Corker and M. Levi, 'Pre-trial Publicity and its Treatment in the English Courts' (1996) *Crim. L. Rev.* 622. On Contempt of Court Act, see S. Bailey, 'The Contempt of Court Act 1981' (1982) 45 *Mod. L. Rev.* 301. See also Vidmar, N. *World Jury Systems* (2000) Oxford University Press.

<sup>378</sup> The news media may even be prohibited from reporting or commenting on a case even after trial for fear of prejudicing a future trial...where the rule on double jeopardy does not apply.

<sup>379</sup> Corker and Levi, *op. cit.*, at 625 quoting Taylor CJ in *Ex. Parte The Telegraph Plc* (1993) 1 *WLR* 980, 987

<sup>380</sup> *R v. McCann*, 92 *Crim. App.* 239 (Eng. C.A. 1991).

At their trial, the defendants exercised their right to silence<sup>381</sup> when questioned by police during interrogation. Towards the end of the trial however, the then Secretary of State for Northern Ireland, Mr. Tom King and Lord Denning former Master of the Rolls, gave television interviews in which they made statements that were prejudicial to the defendants. They suggested that those who refused to respond to police questions were probably guilty. The trial judge failed to discharge the jury in spite of the huge publicity surrounding the trial and the comments. The defendants were convicted. In overturning the convictions, the Court of Appeal held that:

‘we are left with the definite impression that the impact which the statements in the television interviews may well have had on the fairness of the trial could not be overcome by any direction to the jury.’<sup>382</sup>

The case of McCann, however, must be set in its right context and a similar circumstance is unlikely to arise today. However, Corker et al have identified a growth in case law recognising the fact that pre-trial publicity can cause substantial prejudice. They also show a corresponding willingness on the part of the courts to intervene and the above case supports this at least at the Superior level.

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<sup>381</sup> This right had considerable symbolic significance though its actual effects were not quite clear. Under the Criminal Justice and Public Order Act 1994, ss.34-35, a jury may now be told that it may draw adverse inferences from a defendant's refusal to answer questions when in police custody. It may also draw such adverse inferences when a defendant chooses not to testify in his own defence. Recommendations on the essential points to be included in a judge's direction were laid down by the Court of Appeal in *R v Cowan* (1996) Q.B. 373. The changes in the law were justified on the grounds that professional or hardened criminals were taking advantage of the right to silence and thus avoiding conviction although the available research did not support this claim. See Dixon, D., *Law in Policing: Legal Regulation and Police Practices* (1997) 229-30. The judge has discretion as to how he directs the jury on such matters but his directions are likely to be somewhat consistent with that by the Judicial Studies Board. Although the specimen directions are not officially recognised, in practice, their existence and use have been openly acknowledged and encouraged by senior judges. See R. Munday, 'The Bench Books: Can the Judiciary Keep a secret?' (1996) *Crim. L. Rev.* 296

<sup>382</sup> *R v McCann* (1991) 92 *Crim. App. R* 239

Other proceedings have been stayed or convictions overturned in the English courts partially on the grounds that pre-trial publicity made or would make a fair trial impossible.<sup>383</sup>

In 1995, a soap star and her partner were arrested for engaging in a proscribed activity on a motorway exit. The newspapers followed this by publishing details of the man's previous criminal convictions and other bust-ups with the police. When the matter came up for trial, the judge ordered a stay of proceeding declaring that:

'I have absolutely no doubt that the massive media publicity in this case was unfair, outrageous and oppressive'.<sup>384</sup>

In England, it is unusual for jury selection to include screening for contact with prejudicial pre-trial publicity.

However, according to Corker and Levi, potential jurors in the Maxwell fraud case were screened for what they had read or heard in the media and the judge ordered that a transcript of his warning to editors to refrain from future prejudicial publicity be widely distributed.<sup>385</sup>

At the juror level, the effect of pre-trial publicity has been researched frequently using mock jurors.

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<sup>383</sup> Corker at al. op. cit., at p. 624.

<sup>384</sup> Corker and Levi, op. cit. at 628

## The Research

A recent meta-analysis based on 44 juries in the US reported a modest positive relationship between exposure to negative pre-trial publicity and guilty verdicts.<sup>386</sup> In contrast, only five studies have examined pre-trial publicity at the jury level. These studies<sup>387</sup> however, produced evidence of bias with the juror level findings.

The initial jury level study on the topic by Kline and Jess exposed four juries to prejudicial pre-trial publicity.<sup>388</sup> Only one of the four juries exposed to the pre-trial information convicted whereas none of the control juries did. Using a similar design, Padawer-Singer and Burton presented or withheld prejudicial pre-trial information to juries in two samples. In the first sample of 10 juries, there was no difference in the conviction rate as a function of pre-trial exposure.

However, in the second and larger sample, juries exposed to the prejudicial information convicted 45% more often than juries not given such exposure. R. W. Davies examined information slant (negative v neutral) and trial delay (immediate v delayed 1 week) and found effects related to both. Negative pre-trial publicity produced a moderately higher conviction rate than neutral publicity (20% v 0%) whereas trial delay was associated with fewer hung juries and a corresponding increase in the number of acquittals.

<sup>385</sup> Sally Lloyd-Bostock citing Corker and Levi at page 628-31 in Neil Vidmar's *World Jury Systems*, Oxford University Press (2000) at page 80

<sup>386</sup> Steblay, N. M., Besirevic, J., Fulero, S.M. & Jimenez-Lorento, B (1999). The Effects of pre-trial publicity on juror verdicts: A meta-analytic review. *Law and Human behaviour*, 23, 219-235.

<sup>387</sup> See Davis, R.W., (1986). Pre-trial publicity, the timing of the trial and mock jurors' decision processes. *Journal of Applied Social Psychology*, 16, 590-607., Kerr, N.L., Niedmermeir, K.E. & Kaplan, M.F. (1999). Bias in jurors vs. bias in juries: New evidence from SDS perspective, *Organisational Behaviour and Human decision Processes*, 80, 70-86, Kline, F.G., & Jess, P.H., (1966). Prejudicial publicity: Its effect on law school mock juries. *Journalism Quarterly*, 43, 113-116, Kramer, G.P., Kerr, N.L & Carroll, J.S (1990). Pre-trial publicity, judicial remedies and jury bias. *Law and Human Behaviour*, 14, 409-438 and Padawer-Singer, A.M. & Barton, A. H, (1975). The Impact of pre-trial publicity on jurors' verdicts (In R.J. Simon (Ed.), *The jury system in America: A critical overview*( pp.123-139) Beverly Hills, CA: sage)

In the fourth study, Kramer et al manipulated emotional and factual components of pre-trial publicity in conjunction with trial delay.

They found that juries exposed to pre-trial publicity with a strong emotional content were more likely to convict than juries that were not (31% v 11%). Furthermore, juries exposed to high factual pre-trial publicity tended to convict more often when there was no trial delay whereas juries exposed to a low factual publicity tended to convict more after a delay.<sup>389</sup> Although these four studies suggest a consistent impact of negative pre-trial publicity, a recent fifth study found that the impact of negative pre-trial information is contingent on the strength of evidence presented in open court at trial. Kerr et al manipulated exposure to negative pre-trial information in the context of a weak prosecution case or a moderately strong case. They found a weak main effect of pre-trial publicity consistent with earlier studies but the effect of bias also interacted with the strength of evidence in the prosecution's case. When the case was weak, the bias associated with the pre-trial publicity was mitigated by the deliberation and essentially disappeared. When the prosecution's case was moderately strong, deliberation increased the bias related to the pre-trial publicity.

The consistent finding from US studies indicate that juror-level prejudice induced by negative pre-trial publicity is not mitigated by jury deliberation and may, in some instances, even be enhanced by it.

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<sup>388</sup> Four juries that were not exposed to the information were used to serve as a control.

<sup>389</sup> After examining changes in pre and post deliberation verdict preferences of jurors, the researchers concluded that deliberation exaggerated the biasing effect of pre-trial publicity and that there was no reduction in bias associated with the judge's instruction to disregard the pre-trial information.

## Juror Participation

Juror participation in the trial process has been recognised to have an emotional and psychological impact.<sup>390</sup> In a BBC documentary in 1997, the matter was explored and jurors who served on a number of murder cases spoke of long-term psychological problems resulting from the experience.<sup>391</sup>

Some spoke of the stresses induced by exposure to horrific evidence and in some cases, intimidation. Some others had lingering doubts about the wisdom of the outcome. As a result of these findings, the then Lord Chancellor's Department offered counselling to the jurors in traumatic cases to deal with their distress (now abolished by the Department for Constitutional Affairs). Lessons from the Rosemary West case have prompted the court to appoint welfare officers and made them available to speak to jurors on request or in cases deemed exceptional by the judges.

Some ex jurors have reported that jury trials are time consuming and in some cases, boring for jurors.<sup>392</sup> Yet others express concerns such as the emotional impact of distressing evidence, the strain of giving the verdict, the tedium of frequent delays and periods of inactivity and the sense of exclusion that comes from being repeatedly sent out of the courtroom so that matters can be discussed in the jury's absence.<sup>393</sup>

In the Crown Court study, jurors were asked to complete questionnaires asking whether or not they had any difficulties understanding and remembering the evidence, including scientific evidence and following the judge's instructions.

<sup>390</sup> Sally Lloyd-Bostock, *op. cit.*, at page 77

<sup>391</sup> *Modern Times* (BBC2, 16 April 1997)

<sup>392</sup> Hedley Goldberg comments that 'It has been said that the most interesting thing that can happen to a juror during a trial is being allowed to sit in a different chair'. H. Goldberg, 'A Random Choice of Jury?' *The Times*, 13 June 1995 at 41

<sup>393</sup> T. Grove, 'A Juror's Tale' (1998).



Most jurors reported few problems and 90% responded that it had 'not at all' been hard or 'not very difficult' to follow the instructions.<sup>394</sup> Zander et al point out that the fact that jurors think they understood the evidence and instructions is not an adequate indication that indeed they did understand and follow.<sup>395</sup>

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### Active Participation

Several studies in the US have examined the impact of allowing jurors a more active role in the trial process instead of sitting as 'potted plants' as Damaska described it. These studies have included juror note-taking (Flango, V. E. (1980). Would jurors do a better job if they could take notes? *Judicature* 63, 436-443,. Heuer, L., & Penrod, S. (1988). Increasing jurors' participation in trials: A field experiment with jury note-taking and question asking. *Law and Human Behavior*, 12, 231-261, Heuer, L., & Penrod, S. (1994). Juror note-taking and question asking during trials: A national field experiment. *Law and Human Behavior*, 18, 121-150: Sand, L. B., & Reiss, S. A. (1985). A report on seven experiments conducted by district court judges in the second circuit. *New York University Law Review*, 60, 423-497), four with juror question-asking<sup>396</sup> (Heuer & Penrod, 1988, 1994a: Sand & Reiss, 1985: Severance, L. J., & Loftus, E. F. (1982). Improving the ability of jurors to comprehend and apply criminal jury instructions. *Law and Society Review*, 17, 153-1982 and one with juror anonymity: Hazelwood, L., & Brigham, J. C. (1998). The effects of juror anonymity on jury verdicts. *Law and Human Behavior*, 22, 695-713.

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<sup>394</sup> M. Zander and P. Henderson, *Crown Court Study*, Research Study No. 19 for the Royal Commission on Criminal Justice (1993) at pp. 206, 216-17. The questioning of jurors was conducted within the constraints of s.8 of the Contempt of Court Act 1981

<sup>395</sup> Zander et al, *op. cit.*, at 205

<sup>396</sup> The procedure for asking questions or making any kind of request of the judge by the jury is for the juror to write it down and catch the attention of the usher who will then pass the note to the judge. If the matter arises during deliberation, the whole court must be reconvened so that there is nothing hidden between the parties, the judge and jury. Of course, there may be reasons why a juror's question may not be put to a witness.

With the exception of the latter, all were conducted in the field with real juries in the US leading to increased confidence in their findings<sup>397</sup> – a matter which cannot be replicated in the UK due to the strict laws on jury research.

Of particular note however are the findings of Heuer & Penrod who took advantage of a rare opportunity to conduct two field experiments with actual juries<sup>398</sup> looking at juror note-taking.

Several findings have emerged from these field studies. First, jurors generally take notes when afforded the opportunity.<sup>399</sup> Secondly, juries allowed to ask questions do not generate an excessive amount and would usually focus on the definition of key legal terms.<sup>400</sup> Third, counsels and judges have not had a negative reaction to these procedures.

However, it is not clear whether note-taking and question-asking influence important deliberation outcomes such as juror and jury level comprehension of the judge's instructions. Heuer & Penrod, in their 1994 study, noted that allowing jurors to ask questions was anecdotally reported to be helpful in dealing with legal and evidence complexity.

<sup>397</sup> Due to the restrictions imposed by S.8 of the Contempt of Court Act 1981, this kind of research cannot be replicated in the UK.

<sup>398</sup> The first was in a Federal Court in Wisconsin: Heuer & Penrod, 1988, 1989 and the second was a national sample of cases spanning both the state and federal Court system (Heuer & Penrod (1994). Juror note-taking and question asking during trials: A national field experiment, *Law and Human Behaviour*, 18, 121-150 (1994). Trial Complexity: A field investigation of its meaning and its effects. *Law and Human Behaviour*, 18, 29-51

<sup>399</sup> Flango, V.E. (1980). Would jurors do a better job if they could take notes? *Judicature*, 63, 436-443, Heuer, L. & Penrod, S. (1988). Increasing juror's participation in trials: A field Experiment with jury note-taking and question asking. *Law and Human Behaviour*, 12, 231-261, Heuer & Penrod, (1994), Juror note-taking and question asking during trials: A national field experiment, *Law and Human Behaviour*, 18, 121-150

<sup>400</sup> Heuer & Penrod, *ibid*, Sandy, L.B & Reiss, S.A (1985). A Report on seven experiments conducted by District Court Judges in the Second Circuit, *New York University Law review*, 60, 423-497, Severance L.J & Loftus, E.F. (1982). Improving the ability of jurors to comprehend and apply criminal jury instructions. *Law and Society Review*, 17, 153-198.

Flango also reported anecdotally, that jurors who took notes were more participative and influential during deliberation simply because they 'seemed to remember' more of the trial process and the evidence tendered.

No study reported an association between juror involvement and the conviction rates nor would one expect this to be the case.<sup>401</sup>

In a recent case, the Arizona Supreme Court allowed jurors to discuss the facts of the case while the trial was in progress, and allowed trial judges the discretion to prevent some juries from discussing the case prior to deliberation.<sup>402</sup> The initial report, based on the questionnaire responses of trial participants suggests a mixed but generally positive reaction.

Most jurors who were allowed to converse prior to deliberation reported doing so. Jurors, as well as judges generally felt that pre-deliberation discussions produced beneficial results. At the same time, lawyers and litigants were somewhat less enthusiastic about the reform and the impact on the final verdict is, as yet, unclear.

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### Personality Traits

There have been thirteen studies in the US that have examined the relationship between juror personality traits and jury verdicts. Most studies in this area have measured a focal juror personality trait, dichotomised the trait distribution at the median or mean and then composed homogeneous juries wherein all members were high or low on the focal trait. On the other hand, a few studies have simply measured the trait levels of individual jurors and correlated mean values with verdict preferences or jury verdicts. Some of the studies have measured personality traits while others have concentrated on authoritarianism or the related trait of dogmatism.

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<sup>401</sup> While juror note-taking and question-asking may lead to a more thorough understanding of the evidence, it is not expected that it would systematically favour one side or the other.

<sup>402</sup> The impact of this was assessed through a field experiment by Hans et al 1999.

High authoritarian people are likely to be rigid, conventional, conservative, deferential to authority and power-oriented.<sup>403</sup> Dogmatism is similar to authoritarianism in emphasising close-minded rigid thinking but without right-wing political overtones.

Unlike other dispositional characteristics, there is also some indication that juror personality traits are least modestly related to juror verdict preferences. Narby, Cutler and Moran<sup>404</sup> conducted a meta-analysis of studies that measured juror verdict preferences and two forms of authoritarianism: traditional and legal. They found that both forms of authoritarianism were reliably but modestly associated with juror verdict preferences across 20 studies with legal authoritarianism a somewhat better predictor than traditional authoritarianism.

Jury-level authoritarianism/dogmatism has been consistently linked to jury outcomes. In particular, juries containing a high proportion of authoritarian/dogmatic jurors have tended to convict more often<sup>405</sup> than juries with a low proportion of such individuals. Shaffer & Case found that conviction juries had a significantly higher percentage of dogmatic jurors (61%) than acquitting juries (33%). Shaffer et al<sup>406</sup> (1986) composed juries in which the majority of members were either dogmatic or non-dogmatic and found that all the juries that hung contained at least one non-dogmatic juror who held out against the rest.

<sup>403</sup> Adorno, T.W. Frenkel-Brunswick, E. Levinson, D. J & Sanford, R.N. (1982). *The Authoritarian personality* (abridged). (New York: Norton)

<sup>404</sup> Narby, D. J., Cutler, B. L. & Moran, G. (1993). A meta-analysis of the association between authoritarianism and juror's perceptions of defendant culpability. *Journal of Applied Psychology*, 78, 34-42

<sup>405</sup> McGowan & King, op. cit., Shaffer, D.R, & Case, T. (1982). On the decision to testify in one's own behalf: Effects of withheld evidence, defendant's sexual preferences and juror dogmatism on juridic decisions. *Journal of Personality and Social Psychology*, 42, 335-346

<sup>406</sup> Shaffer, D.R, Plummer, D. & Hammock, G. (1986). Hath he suffered enough? Effects of jury dogmatism, defendant similarity and defendant's pre-trial suffering on juridic decisions. *Journal of Personality and Social Psychology*, 50, 1059-1067.

The findings provide apparent<sup>407</sup> strong support for the existence of a relationship between the number of authoritarian/dogmatic jurors in a jury and the final verdict.

These dogmatic individuals exert what Bion<sup>408</sup> calls 'basic assumption dependency' which corresponds to a culture of willed and willing subordination, a resource-less dependency on an accepted wisdom (such as the Bible, party leader or father figure). In such instances, the dogmatic individual will not tolerate dissenting voices and tends to exert a belligerent influence on the rest of the group.

### **Juror Values**

There has been an extensive quest to understand the relationship between juror values and verdict preferences and this has led to a large body of work. In the UK, for instance, there has been some commentary based on actual trials where juries have refused to convict when capital punishment could be imposed or taking measures to reduce the value of items stolen by a defendant in order to altogether avoid convicting him or convict him of an offence with less severe punishment.<sup>409</sup> In recent times, in the US, studies have been conducted in the area of capital punishment (Bernard, J. L. & Dwyer, W. O. (1984). *Witherspoon v. Illinois: The court was right*. *Law and Psychology Review*, 8, 105-114. Cowan, C.L. & Thompson, W. & Ellsworth, P. C. (1984). The effects of Death qualification on jurors' predisposition to convict and on the quality of deliberation. *Law and Human Behavior*, 8, 53-80, Horowitz, I.A & Seguin, D. G (1986). 'The Effects of Bifurcation & Death Qualification on Assignment of Penalty in Capital Crimes. *Journal of Applied Social Psychology*, 16, 165-185, Moran, G. & Comfort, J. C. (1986). Neither 'tentative' nor 'fragmentary': Verdict preference of empanelled

<sup>407</sup> The research has not as yet been carried out using actual jurors and so the findings must remain on the fringes of academic research.

<sup>408</sup> Bion Talamo, P. Borgono, F and Merciai, S. (eds)(1998) *Bion's Legacy to Groups*, London: Karnac Books

<sup>409</sup> For informed insights into Medieval Britain and Jury development, see Langbein, J. H. in *The Origins Of Adversary Criminal Trial* (2003) and T. A. Green in *Verdict According to Conscience* (1985).

felony jurors as a function of attitude toward capital punishment. *Journal of Applied Psychology*, 71, 146-155).

There have been further studies on child sexual abuse (Gabora, N.J., Spanos, N.P. & Joab, A (1993). The Effects of Complainant age and Expert Psychological Testimony in a Simulated Child Sexual Abuse Trial. *Law & Human Behavior*, 17, 103-119), rape (Spanos, N.P., DuBreuil, S.C & Gwynn, M.I., 1991) The Effects of Expert Testimony Concerning Rape on The Verdicts & beliefs of Mock Jurors. *Imagination, Cognitive Personality* 11, 37-52, criminal defendants ( Davis, J.H., Spitzer, C.E., Nagao, D & Stasser, G.T: Bias in Social Decision by Individuals and Groups – An Example from Mock Juries – in H. Brandslatter, J., Davies and Schuler, H. (Eds.) *Dynamics of Group Decisions*, Beverly Hills, California. Sage, 1978. and the jury system (Sealy, P. (1981). Another Look at Social Psychological Aspects of Juror Bias. *Law & Human Behaviour*, 5, 187-200.

There has also been research into moral values (Bernard, J. L., Cohen, R. & Lupfer, M. (1985). The influence of juror's level of moral reasoning and the nature of closing arguments in determining the verdict in a civil case: A report of two experiments. *Law and Psychology Review*, 9, 93-102, Rotenberg, K. J., Hewlett, M. G. & Siegwart, C. M. (1998). Principled moral reasoning and self-monitoring as predictors of jury functioning. *Basic and Applied Social Psychology*, 20, 167-173.), organised religion (Johnson, D. 1985. Communication, class and consciousness in Late Imperial China. In *Popular Culture in Late Imperial China* (eds) D. Johnson, A. J. Nathan and E. S. Rawski. Berkeley: University of California Press and Foley, L. A. & Pigott, M. A. (1997b). Race, age and jury decisions in a civil rape trial. *American Journal of Forensic Psychology*, 15, 37-55 and Kline, F. & Jess, P. (1966). Prejudicial Publicity: Its Effect on Law School Mock Juries. *Journalism Quarterly* 43, 113-116).

Right through these studies, value composition has rarely been manipulated but has been treated more as a supplementary measured variable. Furthermore, few studies have addressed the impact of juror attitudes on jury verdicts. Most have focused their analysis on the relationship between juror attitudes and voting behaviour. There are other studies that have examined the attitudes that might affect criminal trials.

It has been found that juries composed of individuals with more cynical dispositions toward defendants in rape trials were more likely to convict than those juries composed of more sceptical jurors.<sup>410</sup> Attitudes towards rape affect jurors' assessment in rape trials and research by Field<sup>411</sup> and Field & Bienen<sup>412</sup> showed that participants' scores on the Attitudes Towards Rape Scale<sup>413</sup> were a better predictor of their judgments in a rape trial than either their demographic characteristics or the nature of the rape case itself.

Two other studies indicate that juror moral reasoning level also affects jury verdicts. Bernard et al (1985) in two experiments, found that all juries composed of individuals with higher levels of moral reasoning (according to Kohlberg's theory) acquitted the defendant whereas mixed juries and juries consisting of individuals with a lower level of moral reasoning tended to hang.<sup>414</sup> Kalven and Zeisel<sup>415</sup> examined the extent to which judges agreed with jury verdicts in two rape trials:

aggravated rape (those cases where the act of rape was accompanied by other violence, where there were several assailants or when the defendant and the victim were complete strangers and thus the likelihood of consent or contributory behaviour was very low) and simple rape. In the aggravated rape cases, the jury acquitted when the judge would have convicted on the same evidence just 12% of the time.

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<sup>410</sup> Davis, J. H., Spitzer, C. E Nagao, D. H. Stasser, G. (1978). Bias in social decisions by individuals and groups - An Example from mock juries. (In H. Brandstatter, J. H. Davis & H Schuller (Eds.), Dynamics of group decisions (pp.33-52). Beverley Hills CA: Sage. The researchers created three types of homogeneous juries based on pre-trial opinions about the likelihood of defendant guilt and found that pro-defence juries composed entirely of individuals from a category with the lowest rated likelihood of defendant guilt produced significantly fewer convictions than moderate or pro-prosecution juries.

<sup>411</sup> Field, H.S. (1978). Juror background characteristics and attitudes towards rape: Correlates of jurors' decisions in rape trials. *Law and Human behaviour*, 2, 73-93

<sup>412</sup> Field, H.S & Bienen, L.B (1980). *Jurors and rape: A study in psychology and law*. Lexington, MA: Heath.

<sup>413</sup> Field, H.S. (1978a). Attitudes towards rape: A Comparative analysis of police, rapists, crises counsellors and citizens. *Journal of Personality and Social Psychology*, 36, 156-179

<sup>414</sup> A possible explanation for this was provided by Rotenberg et al (1998) who found that jurors with high moral reasoning were more dominant during deliberation and their pre-deliberation ratings of guilt were significantly related to jury verdicts.

In simple rape cases in which no aggravating circumstances were present, jury acquittal rose 60% on the same evidence where the judge would have convicted. In addition, in all but one of the ten cases in which there was judge and jury agreement on conviction, the jury convicted on a lesser charge only thus refining its policy.<sup>416</sup>

Where there were no aggravating circumstances, if the victim and assailant were known to each other or the victim contributed to her fate, the jury simply refused to convict of rape. The jury position appears to be not so much that involuntary intercourse under these circumstances is no crime at all but rather that it does not have the gravity of rape.<sup>417</sup> In this seminal study, judges explained the judge/jury disagreement by allusion to the victim's behaviour and the presumption by the jury that women engaging in certain behaviours deserved the fate that befell them.<sup>418</sup> Since this study was carried out, society has moved on and rape convictions have risen as societal values change, more women sit on juries (indicating that gender does play a part in some cases), the advent of women's movement, increased public support for women's rights, more sympathetic handling of complaints and changes in procedure of instruction and of questioning victims about their sexual lives.<sup>419</sup>

Nonetheless, there are many studies that indicate that the jury's value judgements affect their verdicts and that focus is still heavily on the victim's behaviour.

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<sup>415</sup> H. Kalven, Jr and H. Zeisel, *The American Jury*, The University of Chicago Press 1966

<sup>416</sup> *ibid.* p.250

<sup>417</sup> Kalven and Zeisel, *op. cit.*, p.250

<sup>418</sup> This is illustrated by the case where a young defendant was acquitted of raping a 17 year old girl. The judge said 'A group of young people on a drinking party. The jury probably figured the girl asked for what she got'. Kalven and Zeisel, *op. cit.*, p.249-50

<sup>419</sup> Levine, J.P (1983), *Using Juries Verdict forecasts in criminal defence strategy*. *Judicature*, 66, 448-461. Also, Levine, J.P. (1983), *Jury Toughness: The impact of conservatism on criminal court verdicts*, *Crime and Delinquency*, 29, 71-87



## The Impact Of Experience

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Several studies have investigated the influence of jury previous duty experience on juror verdict preference. These studies appear to provide some support for the view that jurors are affected by prior jury service. The general expectation has been that those who have prior jury service experience tend to become hardened by their experience and are more likely to favour conviction in subsequent trials.<sup>420</sup>

According to Hans and Vidmar, a survey of jurors from 36 criminal juries in Louisiana in the US found that jurors with prior jury experience were more likely to have voted for conviction. Three further mock jury studies have since examined the matter but the result has been inconsistent. They found that the jurors with prior jury experience were less likely to vote for conviction when their second case involved rape but more likely to convict when the case involved vandalism.

In contrast, Kerr in 1981<sup>421</sup> found no impact of prior experience when juries were asked to consider nine armed robbery cases in succession. Kassin and Juhnke in 1983<sup>422</sup> created mock juries with varying proportions of experienced jurors and observed that inexperienced jurors were more likely to change their votes in juries with a high percentage of experienced jurors compared with juries made up largely of inexperienced jurors. Further, archival studies have shown that in actual trials, juror experience is related to jury verdicts but not in a straight forward manner.<sup>423</sup>

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<sup>420</sup> See generally Hans, Valerie & Vidmar, N. (1986). *Judging the Jury*. Persueus Publishing.

<sup>421</sup> Kerr, N. L. (1981). Social transition schemes: Charting the group's road to agreement. *Journal of Personality and Social Psychology*, 41, 684-702.

<sup>422</sup> Kassin, S. M. & Juhnke, R. (1983). Juror experience and decision making. *Journal of Personality and Social Psychology*, 44, 1182-1191.

<sup>423</sup> See generally Hastie, Reid (1993) Cambridge University Press

Two of these studies focused on the relationship between the proportion of experienced jurors and jury verdicts.

On the basis of 175 criminal trials, it was found that the number of experienced jurors in a jury was positively correlated with a five-point jury verdict scale where the highest value was conviction on a primary charge.

However, Werner et al<sup>424</sup> observed only a weak relationship.<sup>425</sup> A third study by Kerr, Harmon and Graves<sup>426</sup> found evidence of a contrast effect whereby experienced jurors apparently compared the evidence in the present trial to the strength of evidence in past trials. Focusing on 40 'close' trials where the evidence did not strongly favour either side, juries were less likely to convict to the extent that they contained experienced jurors who had been exposed to particularly strong prosecution evidence in an earlier case, especially if it was their first experience as jurors. In the event, jurors with prior jury service experience tend to be somewhat more pro-conviction and influential during deliberation than their inexperienced counterparts.<sup>427</sup>

They also appear to evaluate the evidence in the light of their past experience as jurors. To the extent that this is true, it would appear to adversely affect any direct relationship between the proportion of experienced jurors in a jury and their final verdicts. According to Hans & Vidmar, serving on a jury creates prejudice.<sup>428</sup>

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<sup>424</sup> Werner, C. M., Strube, M. J., Cole, A. M. & Kagehiro, D. K. (1985). The impact of case characteristics and prior jury experience on jury verdicts. *Journal of Applied Social Psychology*, 15, 409-427.

<sup>425</sup> This study involved 206 criminal trials

<sup>426</sup> Kerr, N. L., Harmon, D. L. & Graves, J. K. (1982). Independence of multiple verdicts by jurors and juries. *Journal of Applied Social Psychology*, 12, 12-29.

<sup>427</sup> Hans and Vidmar argue that although the reasons have not been made very clear, it would appear that presumptions of innocence and reasonable doubt will be more readily accepted by new jurors and that experienced jurors, having heard lawyers' oratorical tricks before will be more callous and sceptical of defendants' rights. Furthermore, that emotional summation should have greater impact on novice jurors than on experienced ones.

<sup>428</sup> Hans, V and Vidmar, N, *Judging the Jury*, Perseus Publishing, 1986 at page 145, quoting Melvin Belli (1954) *Modern Trials*, Vol. 1 Indianapolis: Bobbs-Merrill: Bailey F.L., and Rothblatt, H.B (1974). *Fundamentals of Criminal Advocacy*. Rochester, NY: The lawyers Cooperative Publishing Co.:

A study by psychologist Nobert Kerr<sup>429</sup> concluded that there was a slight indication that experience led to a greater likelihood of conviction by jurors.

Hans and Vidmar argued that there is no clear evidence that juries composed of experienced jurors are more prejudiced however.

Jury service may occasionally prejudice individual jurors but on the other hand, it may also make some more sensitive to matters that are favourable to the defendant.<sup>430</sup>

### **The Defendant Characteristics**

A number of studies have investigated the relationship between jury verdicts and defendant characteristics.<sup>431</sup> Physical looks or at the very least, relationship between the juror's perception of physical attractiveness of the defendant and the defendant's looks, appears to have an effect on jury final verdict. In their study, Izzett and Leginski<sup>432</sup> showed pictures of attractive and unattractive defendants to their mock jurors.

They found post deliberation verdict preferences to be more lenient for the attractive defendant and severe for the unattractive defendant after deliberation. McCoun (1990) also manipulated defendant attractiveness in a similar way. He found that the attractive defendant was more likely to be acquitted than the unattractive one.

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Rothblatt, H (1961). *Successful Techniques in the Trial of Criminal Cases*. Englewood Cliffs, N.J.: Prentice-Hall

<sup>429</sup> Kerr, N. (1981). Effects of prior jury experience on juror behaviour. *Base and Applied Social Psychology*, 2, 175-193. Hans and Vidmar at page 146 attempt to explain this by suggesting that these attribute apparent conviction-proneness not to prior jury experience but rather to the fact that prosecutors attempt to select people who served on previous juries that convicted the defendant and to reject those who acquitted. It is common practice, they argue, in many jurisdictions for prosecutors to keep detailed lists of jurors and the verdicts of the juries on which they served. Thus, attorney selection strategies, under voir dire, instead of juror experience may explain the finding that experienced jurors are conviction-prone.

<sup>430</sup> Ibid. a page 146

<sup>431</sup> These include race, gender, attitudes, physical attractiveness, relation to victim, similarity to jury, remorse, testimony at trial and past criminal background

<sup>432</sup> Izzett, R. R. & Leginski, W. (1974). Group discussion and the influence of defendant characteristics in a simulated jury setting. *The Journal of Social Psychology*, 93, 271-279.

These two studies indicate that jury deliberation produced a sizeable leniency shift in favour of attractive defendants but not for unattractive defendants.<sup>433</sup>

However, the matter appears to turn on the question of credibility more than any other factor. Does the jury believe the defendant?

Thus, the moral character tends to mix in with issues relating to the defendant's testimony. The conclusion by Kalven and Zeisel was that

'...although it is ... clear that the jury is often alienated by the unattractiveness of the defendant, we find no cases in which the jury convicts a man, so to speak, for the crime of being unattractive. In the cases examined, it is apparent that there is always a considerable link, in the eyes of the jury, between the unattractiveness of the defendant and his credibility.'<sup>434</sup>

Yet, the authors also found that in some cases, the jury is not swayed by the attractiveness of the defendant but would, instead or in addition, look for the evidence that may lead to conviction.<sup>435</sup> The matter however, is not limited to defendant's physical attributes alone.

The conduct of the defendant at trial has been shown to have an effect albeit a not-so-conclusive one on verdict outcomes and this is linked somewhat with credibility.

Kalven and Zeisel found that where a defendant exaggerates some parts of his story, the jury, once it decided it did not believe any part of his story, tended to apply the maxim *falsus uno, falsus omnibus*<sup>436</sup> and would convict.<sup>437</sup> It has been suggested that this is why it is risky for a counsel to put his client in the witness box.<sup>438</sup>

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<sup>433</sup> The validity of the yardstick of attractiveness remains a controversial one. Attractiveness is a subjective matter and it is difficult to see what a universal concept of attractiveness is. Nonetheless, there appears to be an acceptable and accepted degree to measure from. Secondly, the studies do not qualify the question whether the mock jurors reacted the way they did because the pictures were presented to them in the expectation that their value judgements of attractiveness would correspond to the researchers'. The nature of attractiveness is an elusive one.

<sup>434</sup> Kalven and Zeisel. *Op. cit.*, at page 385.

<sup>435</sup> *Ibid.* page 386

<sup>436</sup> An old Latin credibility maxim translated into 'false in part, false in everything'.

Myers,<sup>439</sup> studies in 1979 suggest that a defendant's testimony could be associated with a somewhat higher likelihood of conviction. Hans & Vidmar go on to suggest that there are also other studies showing a lower probability of convictions.

Shaffer and Case in 1982<sup>440</sup>, found that where a defendant refused to testify or refused to answer questions during or prior to trial, the jurors spent much time during deliberations discussing his motives for so doing, made more pro-conviction statements during deliberations and ultimately, convicted. The issue of witness testimony is closely related to previous criminal record.<sup>441</sup> In a case where the defendant does not testify for whatever reason, many laypersons infer guilt from this. In response to the question as to what they thought of a defendant that did not testify, Hans and Vidmar discovered that people responded by asking the question 'what does an innocent person have to hide?' These findings are not conclusive but do suggest a complex relationship between defendant testimony and final jury verdicts. It is submitted that such a relationship would almost certainly also involve higher-order interactions between the content of that testimony, the prosecution's strength of evidence and perhaps other variables.

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<sup>437</sup> See *R v Britzman* (1983) C.A per Lawton L.J. See also Kalven and Zeisel, *The American Jury* at page 386 tells of a defendant, in an apparent effort to make a good case better, tells a story which neither the judge nor the jury believes. The jury, having not found parts of his story credible applied the Latin maxim and rejected his testimony

<sup>438</sup> See *R v Haman* (1985) Crim LR.

<sup>439</sup> Myers, M. A (1979) quoted by Hans & Vidmar, *op. cit.*

<sup>440</sup> Shaffer, D. R. & Case, T. (1982). On the decision to testify in one's own behalf: Effects of withheld evidence, defendant's sexual preferences, and juror dogmatism on juridic decisions. *Journal of Personality and Social Psychology*, 42, 335-346.

<sup>441</sup> In the UK, a defendant who does not testify nor raises the issue of his character through his counsel does not lose the shield. Defendants may also exercise their right not to testify although the judge may invite the jury to draw inferences from this during his summation.

## The Impact Of Legal Players

In their 1979 studies, Baldwin & McConville<sup>442</sup>, show indirect support for the relationship in the attributions of judges, counsels and other law enforcement agents. Hans and Vidmar ask the question whether jurors put the lawyers and the judges on trial rather than the defendant.

It has been found that defence lawyers can and do make a difference.<sup>443</sup>

In this study, the judges commented that some acquittals were due largely to the personality or status of the defendant's lawyer.<sup>444</sup>

In the UK, the style of advocacy practiced in the early years of the 20<sup>th</sup> Century had led some to conclude that it has left behind it, 'a legendary aura of high drama and histrionic rhetoric.'<sup>445</sup> Sealy observed that 'defence counsel relied heavily on emotional pleas to the jury's sense of mercy and fair play' and recounts impressively Lord Birkett's writing on Marshall Hall whom Cornish calls 'one of the last of a line of great advocates of this school'.

'When he came to his peroration and depicted the figure of Justice holding the scales until the presumption of innocence was put there to turn the scale in favour of the prisoner, not only were the jury manifestly impressed, but they and indeed the whole court were under a kind of spell. The intensity and passion of Marshall Hall in moments like these had to be seen to be believed. It was simply overpowering and juries were swept off their feet'.<sup>446</sup>

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<sup>442</sup> Baldwin, J. & McConville, M. (1979). Trial by jury: Some empirical evidence on contested criminal cases in England. *Law and Society Review*, 13, 861-890

<sup>443</sup> Kalven and Zeisel, (1966), *op. cit.*, pp. 351-372, 392-394

<sup>444</sup> A judge commented in a robbery case that the 'defendant had not been trouble before. He was defended by a young, honest and sincere lawyer who had known the defendant and believed the fantastic tale told by the defendant. The honesty and decency of defence attorney rubbed off on the jurors who were hearing their first case'. In the UK, George Carman QC commented that the lawyer can make a difference of between 10-50% in a case.

<sup>445</sup> W.R Cornish, *The Jury* (1968), The Penguin Press London

<sup>446</sup> W.R Cornish *op. cit.*, pp 153-154

Hans and Vidmar make a similar observation in discussing jury sympathy as a factor in jury final verdicts.

They recount the story of Moe Green, a noted trial lawyer who provided an interesting example of a lawyer adopting the sympathy tactic to win a case. Mr. Green had represented a plaintiff who had lost both limbs and in his summation, he recalled:

'the only thing I said to the jury was that it would be an insult for me to tell them what it could mean to have both arms off and all they had to do was close their eyes and think of the things during the day requiring at least one arm. Then I paused and said 'You know, I had lunch with him. He eats like a dog.' Then I continued my summation'.<sup>447</sup>

The jury found for the plaintiff. It is not clear whether Mr. Green's appeal to sympathy and his graphic depiction of his client's eating habit was responsible for the verdict, but it appears that jurors pay attention not just to counsel preparedness but also to his dramatic skills and mastership of his art.<sup>448</sup> There is indication of jurors praising the counsel for the clarity of presentation, skilful use of language or the perceptivity of cross-examination.<sup>449</sup> In their study, Kalven and Zeisel found that the unpolished performances and the lack of ability on the part of an advocate contributed to conviction or acquittal. This project studied judge/jury disagreement where the judges were asked to indicate cases in which either the prosecution or the defence was superior. The judges held that in 76% of cases, they were at par but that defence counsels were superior in 11% of cases with prosecution at 13%. The disparity of counsel emerged as the one reason for judge/jury disagreement in 9% of cases.

<sup>447</sup> Hans and Vidmar, *op. cit.*, at page 136 citing Block, M. (ed) (1964) *The Art of Summation*. New York: New York State Association of Trial Lawyers, p.41

<sup>448</sup> In fact, Mr. Green argued that it was not an appeal to sympathy. It was factual. 'It just occurred to me that I had eaten with this man and he had no arms and he has to get down and eat like a dog. I said it, that's all and the jury knew it'.

<sup>449</sup> W.R Cornish, *op. cit.*, p 154.

Superiority of counsel accounted for an estimated 3.4% of all such disagreement where the judge but not the jury was willing to convict.

Thus, Cornish concludes, that if a defendant secured the services of a better counsel, his chances of this preventing a conviction where the judge would have convicted him was about one in every nine cases where defence counsel was superior.

Where the jury might have convicted as opposed to the judge, it appeared the superiority of prosecution counsel could account for 2.5% of the cases.<sup>450</sup> There is also the point that often, the counsel is a local resident who had tried many cases in front of the local jurors for many years. The effect is that some of the jurors feel indebted to him and regardless of the evidence in the case, would vote in his favour.

Nonetheless, the consensus appears to be that the skills or lack of them of the counsel has a strong bearing on the jury's final verdict.<sup>451</sup>

### **The Judge's Summing Up**

Prior to jury retirement, the last item on the agenda during a trial is that the judge would give a summing up of the case which would include the evidence. The judge's comments appear to have a bigger impact on the final jury verdict as his words would weigh heavily on the jury. Hints from the bench, it has been observed, are likely to be a powerful influence on jury verdicts.<sup>452</sup> The judge has considerable scope to influence the case. To the jury, he represents the authority of the state and is accorded due reverence by all in attendance.

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<sup>450</sup> Kalven and Zeisel *op. cit.*, p

<sup>451</sup> Hans and Vidmar note that the difference made by the counsel is more likely due to their skills and preparation and arguments about the evidence than through their ability to make pure appeals to the jurors' emotions. Of course, this contrasts sharply with the account of Cornish.

<sup>452</sup> See for e.g. Z Bankowski, 'The Jury and Reality', in *The Jury Under Attack*, pp. 8-26



In the UK, the judge has a wide scope to comment on the evidence during his summing up which could last several hours.<sup>453</sup> A biased summing up could result in a conviction that might have been avoided. The case of Derek Bentley in 1952 highlights this point where the summing up of the trial judge gave the jury little choice but to convict.<sup>454</sup>

Studying the impact of judges on the jury verdicts has not proved to be an easy task to undertake. In a sample of more than 800, the Crown Court Study<sup>455</sup> explored the views of the jurors about the judges' summing up.

Nearly half the jurors surveyed did not think they would have found their task any more difficult if the judges had not summed up on the facts. However, about 19% of the respondents said the absence of judges' summation would have made their task 'much harder'.

It emerged that the longer the case lasted, the more the jurors found the judges' summation useful.<sup>456</sup> When the question was asked as to whether the jurors found the judges' summation pointed towards conviction or acquittal and to what extent they felt any 'tilt' was borne out by the evidence, the results were complex. 33% of respondents said the summing up was 'tilted in one direction or other – almost exactly equally in each direction.'<sup>457</sup> As Lloyd-Bostock et al observed,<sup>458</sup> the tilt in the summing up was, as expected, very closely associated with the result of the case but

<sup>453</sup> A position that contrasts sharply with the US where, in the most, interpreting the evidence is the responsibility of the jury.

<sup>454</sup> R v Bentley (1998) T.L.R492. Here, in July 1998, Lord Bingham LCJ overturned the conviction for murder after more than 40 years of campaigning by Bentley's family. Lord Bingham heavily criticised the summing up by Lord Goddard who tried the case saying that 'it deprived the defendant of his birthright as a British citizen, a fair trial'. See R v Bentley (Deceased) [2001] 1 Cr. App. R. 307

<sup>455</sup> M. Zander and P. Henderson, Crown Court Study, Research Study No. 19 for the Royal Commission on Criminal Justice (1993).

<sup>456</sup> Ibid., at pp. 214-19, 249

<sup>457</sup> Ibid., at 218. 16% said it pointed slightly or strongly to acquittal and 16% that it pointed slightly or strongly to conviction. Where they felt it had been tilted one way or another, 88% thought the tilt was supported by the weight of evidence

<sup>458</sup> Sally Lloyd-Bostock and Cherry Thomas, *The Continuing Decline of the English Jury in World Jury Systems*, Neil Vidmar, Oxford Socio-legal Studies, Oxford University Press 2000 at page 85

there were cases where the jury acquitted even though the judge was perceived as summing up for conviction.

Thus, 9% of jurors who viewed the summing up as pro conviction reported that the jury had nonetheless acquitted. Of those viewing the summing up as pro conviction, 13% reported that the jury acquitted.<sup>459</sup>

There is evidence from here that juries acquitted sometimes or convicted against what they saw as the weight of evidence because of the way the judge had summed up.<sup>460</sup>

### **The Factors – a summary**

The list of factors given here is not exhaustive. Given the observations made here, we can form an idea of the formidable array of factors influencing the final verdict of a jury. These elements are what Damaska calls 'non-communicable'. On a closer analysis, given these factors, it is difficult to see how a jury, untrained in the art of articulating reasons could explain its verdict in open court in a way that is both objective and balanced so as to avoid instigating any judicial or political problems. The matter, however, does not rest there.

### **Conformity Prejudice**

Vidmar<sup>461</sup> identifies what he calls 'conformity prejudice'. This, he claims, 'exists when a juror perceives that there is such strong community reaction in favour of a particular outcome of a trial that he or she is likely to be influenced in reaching a

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<sup>459</sup> This suggests that juries are capable of ignoring the influence of the judges if they disagree with his opinions.

<sup>460</sup> Using a score of average juror responses, Zander et al conclude that when the judge was said to have summed up for an acquittal against the weight of evidence, the judge directed an acquittal in four cases and the jury acquitted in nine. By the same method, they concluded that when the judge was said to have summed up for conviction against the weight of evidence, the jury acquitted in four cases but convicted in four and in the remaining four cases, convicted on some charges.

<sup>461</sup> Vidmar, N. (2002) case Studies of Pre and Mid-trial Prejudice in Criminal and Civil Litigation, Law and Human Behaviour, Vol,26, No.1

verdict consistent with the perceived community feelings rather than an impartial evaluation of the trial evidence'. This point was made earlier in relation to pre-trial publicity. Vidmar amplifies it.

He uses the case of McVeigh to illustrate the point where the community wanted and expected McVeigh to be convicted of the crimes for which he stood trial. This principle, it is argued, is present in most criminal trials.

In the UK, many notorious criminal cases have resulted in verdicts that appear consistent with the expectations of the country or the community.<sup>462</sup>

Indeed, it may be argued that conformity prejudice is a strong factor that may impact the outcome of a trial and may be as insular to a jury to the extent that a juror with a minority view may, in the end, cave in to the majority opinion, as it may be to the community.

The society or local community frowns upon the criminal activity being prosecuted and the need to eradicate such an activity combined with the whipped up emotions results in the jurors applying this prejudice to convict in the face of questionable evidence. Thus, we see this latter phenomenon as a contributory element in jury verdicts. When a verdict is reached on such frenzied and subjective grounds as have been articulated, it is no wonder that the requirement not to explain is irresistible.

The research studies reviewed above indicate that the jury decision-making process is affected by many influences. These influences are not obvious in the same degree. Some are more subtle than others. They operate neither directly nor in linear fashion. A change in a given variable such as gender or racial composition cannot necessarily be assumed with a precise amount of change in the verdict.

In the words of Ellsworth:

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<sup>462</sup> See Gudjonsson (2002), *Unreliable Confessions and Miscarriages of Justice in Britain*. International Journal of Police Science and Management. Vol.4, No.4, pp.332-343 Vathel Publishing.

‘A review of the relevant research indicates that the usual hoary or trendy stereotypes are not very useful (race, class, gender, occupation and nationality – on the hoary side – power speech, colour preferences. Locus of control and dress – on the trendy side – authoritarianism somewhere in-between... We have argued that the process may involve the accumulation of many slight differences in perceptions of the plausibility of witnesses, in the availability of different scripts or stories for the crime, in the unarticulated sense of how much doubt is reasonable doubt. Sometimes, the accumulation of these differences would be sufficient to move a juror across the line from one verdict to another, sometimes not.’<sup>463</sup>

Given the above, it would appear that the jury, under the circumstances, cannot but return a cryptic verdict. We shall now examine this phenomenon

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## Chapter Twelve – The Cryptic Verdict

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At the heart of the criticism of the jury is the perceived frustration stemming from its cryptic verdict. Opponents and Human Rights Lawyers argue that ‘verdicts are not in themselves reasoned judgements’ and that ‘defendants are being denied justice if they are not told the reasons for their convictions’.<sup>464</sup>

Anyone who has ever attended a trial and watched the proceedings would not have failed to notice the impact the process has on the jury.<sup>465</sup> Intermittently, attention shifts between the oratories of the counsels as they make their case, the judge as he punctuates the trial with his questions, directions or clarifications and the witnesses as they file in and out of the witness stand. However, invariably, attention shifts to and almost permanently rests on the jury- a randomly selected group of 12 members of the public who have the unenviable task of deciding guilt or innocence.

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<sup>463</sup> Ellsworth., P. C (1993), ‘Some Steps Between Attitudes & Verdicts, in Reid Hastie, ed. *Inside the Juror: Psychol. Juror Decision-making* 42-64, 61 (NY: University of Cambridge Press.

<sup>464</sup> Robert Verkaik, Legal Affairs Correspondent writing in the Independent 25 August 2000

Research carried out in New Zealand indicates that in general, jurors are unprepared for the experience and tend to become marginalised and feel like outsiders.<sup>466</sup>

What do we make of it? Damaska describes them as potted plants.<sup>467</sup> Auld LJ, a proponent of 'reasoned verdicts' observes:

'...once they are in the jury box, we still subject them to archaic and artificial procedures that impede them in their task. They are given very little objective or conveniently summarised guidance at the start of a trial as to the issues they are there to decide and as to what evidence is and is not agreed. They are expected to have prodigious power of concentration and memory both as to the, mostly oral, evidence and the advocates' submissions. And at the end of the trial, the judge orally gives them complex directions on the law and a summarised regurgitation of the evidence, much of which must become a blur for many of them by the time they are considering their verdict'.

'In the more complex or serious cases, judges increasingly provide them with a brief written list or summary of the questions they have to decide, but that is about as far as it goes'.<sup>468</sup>

This provides an excellent starting point for an academic review of the matter of the cryptic verdict and by extension, the unreasoned verdict. However, these observations are to be set in the context of the jury's knowledge and the development of rules of evidence.<sup>469</sup> Thayer and Wigmore used the issue of self-informing jury to provide a powerful explanation of many legal developments. These rules, such as the rules of evidence, were not necessary in the middle ages because witness' testimony was rare.<sup>470</sup>

<sup>465</sup> Derbyshire argues that the impact of the trial on the jury has not been scrutinised, highlighting the physical and emotional impact.

<sup>466</sup> Young, W., Cameron, N and Tinsley, Y. *Juries in Criminal Trials*. New Zealand Law Commission Preliminary Paper no. 37 (1999) at <http://www.lawcom.govt.nz>.

<sup>467</sup> Damaska M. (1997), *Evidence Law Adrift*. Yale University Press

<sup>468</sup> *Review of the Criminal Courts of England & Wales 2001*, Chapter 5, Clause 77

<sup>469</sup> *Jurors were self-informing*. A matter that attempts to explain a number of legal developments.

<sup>470</sup> J.B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898), 85-136; J.H. Wigmore, *A Treatise on the Anglo-American System of Evidence* (Boston, 3<sup>rd</sup> Ed. 1940), 1.235, 5.10-12. Recent research suggests that rules regulating oral testimony did not develop until the 18<sup>th</sup> Century and thus, that the decline of the self-informing jury was a necessary condition but not the immediate cause of the emergence of the law of evidence.

Given the observations above, it is difficult to see how trial by jury could ever be described as 'the best trial in the world'<sup>471</sup> or the 'grand bulwark of every Englishman's liberties'.<sup>472</sup> Set in its right context, trial by jury appears to be a compromise between the ideal and the available or as Louis Blom-Cooper put it, 'the apotheosis of amateurism'.<sup>473</sup> Having developed as the only way for the public to check the abuse of power by the crown short of outright hostility, the system has evolved into a semi-parliament as described by Devlin in 'Trial by Jury'.

To the extent that it can be glorified in such terms, a distinction must be made between the medieval jury and its modern counterpart.

The former was composed of local people who swore to what they knew and information they directly gathered in expectation of the trial or which they learned by living in small close-knit communities where rumour, gossip and local courts kept everyone informed about their neighbour's affairs. Witness testimony in court was not necessary. Thus, very little evidence was presented in court and judges knew precious little about the full facts of a case. As a result, they could not prevent the tribunal of fact from returning a verdict according to its conscience or opinion of culpability.<sup>474</sup>

The modern jury is, arguably, ignorant of the facts of a given case<sup>475</sup> in question and are drawn at random from the electoral role.

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For a wider discussion of the subject, see J.H Langbein, 'Historical Foundations of the Law of Evidence: A view from the Ryder Sources,' *Columbia Law Review* 96 (1996);pp.171-72; T.P Gallanis, 'The Rise of Modern Evidence Law,' *Iowa Law Review* 84 (1999), 499, 537-40

<sup>471</sup> Sir Matthew Hale 1713

<sup>472</sup> Blackstone's commentaries on Laws of England.

<sup>473</sup> 'Twelve Angry Men can be Wrong. Supra.

<sup>474</sup> J. H Langbein, 'Origins, p314; J.H Langbein, *Prosecuting Crime in the Renaissance* (Cambridge, Mass, 1974), pp 22,43,118-22, 204-5

<sup>475</sup> This is impossible to guarantee in an age of mass media.

Auld LJ's observation is of course correct of the modern jury and so is Damaska's. However, it is clear that although the origin remains the same, the modern jury differs significantly in terms of its activity from the medieval one.

The early jurors were witnesses and came to court more to speak than to listen<sup>476</sup> and thus, at odds with Damaska's and Sir. Robin's observations. The two juries however, are bound together by the requirement to return a cryptic verdict. The former could be justified on the grounds of self-information and the lack of court room evidence. The latter inherited the privilege and no modern justification exists for this privilege except the mantra that jurors might be afraid of being ridiculed or harassed by the public who disagree with their verdict. Furthermore, the medieval jury, historically, returned a verdict which was largely viewed as a substitute for the verdict of God expressed originally through trial by ordeal or trial by combat.

Thus, juries inherited the tradition of divine inscrutability and therefore, did not have to give reasons for their verdicts.

Their decisions were not expected to be conceived in reason or open to rational criticism.<sup>477</sup> Nothing could be more damning than this statement. The latter needs further exploration.

The hypothesis appears to be that the modern jury has difficulties giving reasons even though reason is absolutely necessary in the modern setting. The two, thus far, appear to be mutually exclusive. It remains to be seen how the modern jury can justifiably explain its verdicts while the trial process, with all its nuances as presently constituted, remains intact.

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<sup>476</sup> F. Palgrave, *The Rise & Progress of the English Commonwealth* (London 1832), I.243-44; JF Stephen, *A History of the Criminal Law of England* (London, 1883), pp.255-65; F Pollock & FW Maitland, *The History of English Law* (Cambridge, 2<sup>nd</sup> Ed. 1898), 2.622-28; JP Dawson, *A History of Judges* (Cambridge, Mass., 1960), 418,421,424; JH Baker, *Introduction to English Legal History* (London 3<sup>rd</sup> Ed.1990), pp. 88-90.

<sup>477</sup> Langbein, 'Torture and the Law of Proof' (Chicago), (1977), pp.6, 77, Devlin, *Trial by Jury* at p14.

Borrowing heavily from the Spanish<sup>478</sup> experience but with very little attempt to contextualise it, Auld LJ suggested that the best way to help juries produce reasoned decisions was by answering what he called ‘structured list of questions’ already agreed to by barristers and the judge before the start of the trial:

‘In my view, the time has come for the trial judge in each case, to give the jury a series of written factual questions, tailored to the law as he knows it to be and to the issues and evidence in the case. The answers to these questions should logically lead only to a verdict of guilty or not guilty’.<sup>479</sup>

Prima facie, this appears to be a perfectly sensible suggestion. Such requirements would concentrate the minds of the jurors on the evidence and perhaps avoid what Sir. Louis called ‘factors outside the court...’

Furthermore, such an approach, similar to the practice in some Continental European states and the Russian Federation, in the event, limits the impact of juror’s prejudices on the trial process. However, there is much difficulty with this approach.<sup>480</sup> Sir Robin did not explain when this list of questions would be given to the jury – at the beginning of the trial so they know what they should be concentrating on, prior to commencing their deliberations to remind them of their newly invented accountability or when the verdict is delivered so as to determine what evidence they accepted or rejected and possibly the grounds for appeal? It appears that the last is to be preferred as the only justification for such an approach. It is also the only time such a list can be circulated so as not to prejudice the deliberations.

<sup>478</sup> The Spanish Constitution expressly requires the jury to produce an explanation for its verdict in all criminal trials.

<sup>479</sup> Review of the Criminal Courts in England & Wales 2001 by Auld LJ. p535, para. 50. Auld LJ went on to argue that the jury’s written answers which could be given by their foreman would show, step-by-step, how the jury reached its decision. Written reasons would also help victims of crime understand why the jury did not convict in certain cases.

<sup>480</sup> In the face of fierce opposition, the government distanced itself from this thinking as part of an almost en bloc rejection of some of the views of Sir Robin.



The questions, of themselves, must touch on evidence deliberated upon. A pre-deliberation list of questions would run the risk of making some piece of evidence more salient than others and would ultimately, assail efforts for a fair trial.

This approach also assumes that trial by jury is an exact science where the output is commensurate with the input and both can be quantified, identified and measured.

This paper does not share that view. However to what extent a judge that was not part of the deliberation process can correctly articulate a logical conclusion from the answers to a list of questions is not clear. Verdict, necessarily, refers to the trial and deliberation processes. Thus, only the jury is competent to explain itself in its own way following a given format for the sake of guidance.

By agreeing to questions at the beginning of the trial, counsels and judges would be inviting jurors to begin the trial and subsequent deliberation by following sign posts identified for them by experts. This might make it easier for the jurors to pay attention to particular evidence as tendered.

However, it may also have the effect of prejudicing the presumption of innocence and the principle of impartiality. They would have to pay an underserved, perhaps unhelpful, deference to the suggestions<sup>481</sup> and the dramatic oratory of the barristers. They would also pay particular heed to the judge, both as a figure of state authority and in his directions.

The outcome, arguably, would be that the jury's independence would be compromised at the outset. Given that trial by jury is exactly that – trial by the ordinary members of the society who have to deliberate and reach a compromise decision - the adoption of Sir. Robin's approach would seriously undermine this pseudo-democratic process and the fairness of the trial.

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<sup>481</sup> Such suggestions would include counsel's interpretation of the evidence which may be at odds with the views of the jury.

Secondly, it ignores that element of unpredictability of the human nature and group dynamics.

The point of lay participation in the form of a jury is not to countenance the state's position nor is it to sit in opposition to it.<sup>482</sup> The point is to 'truly try the defendant and return a verdict according to the evidence'.<sup>483</sup>

That evidence, to the extent that it is articulated in open court, is open to interpretation by all those involved in the trial process. Some of that evidence may also be ignored by the jury should they choose to do so.

The jury, as the tribunal of facts, as a matter of practicality, renders its interpretation in private during its deliberation. Whereas a judge is sworn to uphold the law, the jury is sworn to try a case according to the evidence and by definition, its experience. Thus, the judge may find the evidence leading him to apply the law.

The jurors may find the evidence leading them to ignore the law - a matter recognised by Lord Steyn in *R v Mirza*. If the jury is to be permitted participation in the judicial process, it is difficult to justify fettering it with further rules of procedure in addition to the rules of evidence. Of course, the need for some degree of certainty cannot be overemphasised. However, the CJS is, like all man-made institutions, not a perfect system and it is not by coincidence that justice is perceived to be blind. If it were otherwise, certainty would be a guaranteed commodity. If jurors are capable of assessing evidence objectively and to return a verdict they can explain at the end of the deliberations within the constraints of existing procedure, then, we would have no further need for trial by jury. Judges are quite capable of doing this and so do. Objectivity is not an element we hope a jury would lean too heavily on.

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<sup>482</sup> Originally, it was to prevent the arbitrary use of force against a freeman. Today, it is to inject some element of democracy in the judicial process. Some would say the former reason is still relevant today and continues to hold some potency.

<sup>483</sup> The Jury's Oath.

This is a matter for professionals in the open court process. Subjective objectivity is the domain of the jury. Therein, it appears, lies the mystery.

Indeed, Auld LJ concedes that this approach would lead to a 'special verdict' whose chief purpose would be to reduce the jury's capacity to give a verdict it believes to be right.<sup>484</sup> The point being made is that a jury's ability to deliberate with full independence would be seriously damaged were it to be fettered with a series of questions at the outset in an attempt to decode its cryptic verdict.

On the other hand, the modern jury is not self informing. It is expected to come to court quite blank about the facts of a case.

Unless they are imbued with tremendous powers of memory and concentration, it is difficult to see how they can absorb and endure the trial process and still return a verdict that could be sustainable without explaining the process. It is interesting that judges make notes while a trial is in progress. This allows them to make a succinct summing up of the case and instruct the jury of their role. There is no magic to the seemingly articulate discipline of the judge. Deprive him of his notes and his memory might be taken to task. Why jurors are not allowed to take notes except in some recent developments is difficult to explain.

The third point is linked to the second. Such a list of questions would encroach on the very important safeguard against unjust laws.<sup>485</sup> It is a sort of two forked attack.

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<sup>484</sup> By this, he meant any verdict that is not strictly consistent with the judge's view of the law and the weight of evidence. Professor Zander, in his response to the Auld Review strongly disagreed with the report claiming that such verdicts are infrequent and that where they resulted in an acquittal, the matter could always be rectified by the Court of Appeal. He also declared at page 65 that he would be prepared to accept the occasional perverse acquittal that cannot be justified by any sensible person as a small price to pay for our jury system.

<sup>485</sup> For a compelling discussion on the subject, see 'Writing by candlelight' by Thompson, E. P. (1978) and 'Essay on trial by jury' by Lysander Spooner (1852).

On the one hand, the jury would be compelled to find a verdict that can be justified by the evidence and the law thus nullifying its subjective qualities and turning the clock back to the time of Bushel. On the other hand, the jury would be invited to ignore all the non verbal and unquantifiable aspects of a trial - the nuances. This would have the effect of emasculating its humanity and its essence. It would then be far better to employ computers to get the job done or better still, leave it all to the judges who are professionally trained to make objective decisions.

In the final analysis, the question to be determined is whether what is desired is justice according to the law or fairness according to human interpretations and conscience. The two need not be mutually exclusive in the hands of the jury. It could be argued that by operation of the mechanism of law, the court's role is the former.

By the operation of democracy and therefore public acceptance in an advanced society, the jury's role is to judge according to justice and fairness.<sup>486</sup> Forcing the jury into a funnel by compelling it to attempt to articulate answers to preconceived questions appears unreasonable<sup>487</sup> and may satisfy the demand for reason but will do very little to resolve the problems it might create.

Implicit in the suggestion is the tacit acknowledgment that the cryptic verdict is more a function of practical evolution than design. When, in the past, the jury refused to return a verdict consistent with the law and the view of the courts, the jurors were subjected to sanctions and physical violence.

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<sup>486</sup> Or in the strict sense, according to its conscience.

<sup>487</sup> In the CJS Bill Justice for All CM 5563 at 4.50, the government said 'we do not propose to go further and require a judge to devise and put to the jury a series of questions and possibly to ask them to answer those questions publicly...'

If they had to explain their repugnance with the law, the process or the prosecution, it is argued that their position would have been quite untenable and perhaps the jury would have disappeared long ago.

We learn from Vaughan's Reports of Bushell's case<sup>488</sup> that the freedom to return a verdict 'contra plenam et manifestam evidentiam' was a hard fought one and until that case, jurors were frequently punished for returning such verdicts 'in contempt of the king etc'.<sup>489</sup>

Set in its historical context,<sup>490</sup> it is not so surprising that the verdict was cryptic. It could be argued that rather than suffer the ignominy of incarceration, Edward Bushell and his fellow jurors might have found it more prudent to give reasons for their verdict in the event that they refused to alter it or deliver a special verdict. There appear to have been wider principles at stake and the jurors appreciated this. It was not just a matter of being reasonable, history records that the barons were at logger heads with the Crown. In many ways, the Crown held sway in the lives of all subjects of the realm.

We have already established the evolution of trial by jury. Its role was that of witnesses of local knowledge.

Implicit in that is the fact that it needed not, nor was it required to explain itself, given that it was attesting to its knowledge.

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<sup>488</sup> 22 Charles II AD 1670. This was a case that established new conventions regarding the jury's independence. The Quakers, William Penn and William Mead were tried for illegal tumultuous assembly. The jury acquitted them much against the evidence and the views of the judges. The jurors were fined by the Recorder of London and subsequently imprisoned without food and other basic necessities until they paid the fine which some of them refused. One of the jurors, Edward Bushell, obtained a writ of habeas corpus and was subsequently discharged by the Court of Common pleas. Chief Judge Vaughan declared afterwards that jurors were the sole judges of fact in a trial, the judge could advise a jury on matters of law but not direct it to convict. The verdict was overturned for lack of jurisdiction but the principle of the case remains.

<sup>489</sup> Bushell's case. 22 Charles II. A.D. 1670, (Vaughan's Reports), 135. Lord Erskine made observations on this case in his argument in the Court of King's Bench supporting an application for a new trial in the case of the Dean of St. Asaph (Shipley) in Michaelmas Term 1784

<sup>490</sup> Eligibility for jury service was the preserve of the nobles and the landed gentry. No ordinary man or person had the right.

By the end of the 14<sup>th</sup> Century, the jury had ceased to be witnesses and become judges of facts.<sup>491</sup> The transition as the assize courts travelled in circuits with jurors in tow meant local knowledge was no longer necessary.

They soon became reliant on oral contested evidence tendered in open court. The adversarial system<sup>492</sup> in its present form was born and witnesses were subjected to scrutiny of their testimonies. One would then have expected a requirement for an explained verdict with this development.

However, it is clear that by the time of Bushell,<sup>493</sup> the jury's approach of delivering an unexplained verdict was already underway and even in this celebrated case, the explanation of their verdict was implicit in its delivery: 'guilty...but only of preaching...'

The issue of this assertiveness in the face of the undeniable sovereignty of the Courts supported by an almost tyrannical crown, merits some exploration.

In 1215, King John was prudent enough to sign the Magna Carta guaranteeing the liberty of his noblemen and establishing the 'right' to trial by a jury of one's peers.<sup>494</sup>

He was not terribly enthusiastic about it.<sup>495</sup>

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<sup>491</sup> J H Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3<sup>rd</sup> Ed, 1940) 1364 at 12-15.

<sup>492</sup> The foundation for the right to confront one's accusers in court was secured with the abolition of the Star Chamber. The Star Chamber Act of 1640 observed that 'decrees of the court have, by experience, been found to be an intolerable burden to the subjects and the means to introduce an arbitrary power and government. The Act went on to ban all courts from exercising jurisdiction similar to the Star Chamber. The confrontation of one's accusers in open court allowed the jury to test the credibility of a witness. This gave them the further opportunity to observe the demeanour of the witness and use 'reason' and 'experience' as part of their instruments of judgement. In 1720, the case of the Duke of Dorset v Girdler (1720) 24 ER 238 had established that '...the opportunity of confronting witnesses and examining them publicly...has always been found to be the most effectual method for discovering the truth.'

<sup>493</sup> Ibid.

<sup>494</sup> A 'right' which this paper has established applied only to the freemen of the realm.

<sup>495</sup> According to Echard's *History of England*, p.1067, King John violently protested on seeing the Magna Carta and 'with a solemn oath, protested that he would never grant such liberties as would make himself a slave.' However, afterwards, 'fearing seizure of his castle and the loss of his throne, he relented, placing the liberties of the people in their own safekeeping.'

In fact, it was a product of some armed conflict and rebellion by his barons.<sup>496</sup> In 1670, Bushell and his compatriots found themselves defending and upholding these rights they thought were settled. The process involved considerable violence to their persons. Bushell and his co-jurors, put up a consciously spirited challenge to the then status quo and a personally violent defence of their independence. For this approach, the modern society has rightly paid tributes.

Nearly two hundred years ago, Kant wrote:

‘A violent challenge to law and justice in one place has consequences for many other places and can be experienced everywhere’.<sup>497</sup>

This writing embodies the struggle of past centuries which provide the safeguard for the liberties we now enjoy.

In Bushell’s case, William Penn, one of the accused, was described as a ‘most modish man’ who was also a nobleman. The trial was biased against the accused and unfair from the start. The prisoners were invited to self incriminate and maltreated. The jury was patronised and the bench showed itself to be manifestly unfair, constantly bullied and menaced the jury.<sup>498</sup>

In its verdict, the jury was quite circumspect, preferring to find the prisoners guilty only of ‘preaching’ rather than the more ignominious crime of rioting or preaching to an unlawful assembly. There was insufficient evidence for the later and this was quite clear.

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<sup>496</sup> Ibid.

<sup>497</sup> Kant, I (1970) Kant’s political Writings, edited and introduced by H. Reiss, Cambridge: Cambridge University Press.

<sup>498</sup> When William Penn complained of this, the Lord Mayor said ‘stop his mouth’ and the Recorder told the jury ‘I will have you carted about the city as in Edward III’s time’.

What followed was a demonstration, if any was needed, of some of the factors that influence a jury's verdict, most of which are incapable of being articulated in open court or explained as part of the reason without prejudicing or undermining the independence of the jury. Certainly, this would not be possible with the current trial procedure and not in the way that would have been demanded by many.

Having emerged from the shadows of tyranny, the jury was being asked to countenance the court's view. This order was accompanied by ill-treatment of both prisoner and juror in this case.

It is argued that the jury had no choice but to find as it did as neither the bench nor the crown endeared itself to the people in the conduct of the trial. Resentment was built up because of the way the prisoners were treated. Even in these times, what has become obvious to social scientific researchers was well known – the fact that the attitude of players in a trial has an impact on jury verdicts.

The Crown made a mockery of jury participation by demanding a 'verdict' consistent with its opinion.<sup>499</sup> Mr. Bushell, being a 'freeman' together with some of his fellow jurors, saw the danger of capitulation. They stood their ground against all odds. To underline its position, the jury refused to withdraw its verdict and refused to explain its position. The result was an impasse that threatened more violence on the persons of the jurors.

The result of this was recognition, in the end, by the court that a jury cannot be punished for their verdict. In doing so, the court recognised not only the independence of the jury but also its right to return a verdict according to its conscience and the right not to explain itself.

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<sup>499</sup> Juries were seen as a judicial nuisance and were frequently punished if they returned a 'false verdict' manifestly against the weight of evidence and they appreciated that to be the case. Howell's State Trials, Vol. 6, page 999 (6 How.999).



The jury, by the stubborn exercise of all the rights of a jury – exercised, despite the fact that four jurors spent nine weeks in prison for refusing to heed the instructions of the court – was instrumental in establishing not only the rights of juries but freedom of religion, the right to peaceful assembly, freedom of speech and habeas corpus.<sup>500</sup> It is submitted by way of reinforcement, that their stubbornness in not explaining their verdict and the court's acceptance of that fact, recognised the complex nature of the process. Their verdict could be said to have been made up of several complex issues including their treatment by the court authorities.

Damaska, quoting Pascal, observed that

'the heart has its reasons that reason knows nothing about'.<sup>501</sup>

This lends credence to the status quo of non explanation and recognizes the difficulties that abound when attempting to reconcile reason with emotions.

It also established that articulating the many reasons behind a jury verdict is a very difficult process.<sup>502</sup> As the French philosopher Renan observed, *la verite est dans une nuance*.<sup>503</sup>

The origin of the cryptic verdict is perhaps not so obscure after all.

As observed, the original jury consisted of freemen with local knowledge who swore as to what they knew. Thus, being from the local area where the crime was committed, the law presumed they were knowledgeable enough to try the case.

<sup>500</sup> Dubrovsky, A. K, article to The Power of Juries, Orange County Register, Media Awareness Project.

<sup>501</sup> Damaska, M, Evidence Law Adrift, Yale University Press, 1997 at page 42 quoting Pascal, Pensees 4:277. He went on to say that 'Pascal's emphasis on the melange of logic and emotion should not be dismissed as a lapse into Jansenist obscurantism. Contemporary students of cognitive processes increasingly acknowledge that decision-making has its volitional and emotive components'.

<sup>502</sup> See Goldman, Epistemology and Cognition (Cambridge, Mass., 1986), 326-28; In philosophy, of course, the view that practical deliberation implicates the entire human personality – and therefore more logical reasoning – can be traced back to classical Greece. See Martha Nussbaum, The Fragility of Goodness (Cambridge, Mass., 1986), 309

<sup>503</sup> The truth is in the nuance, Ernest Renan, 1823- 1892

Whatever the evidence was and whatever they had knowledge of, the judge was none the wiser. Their verdict was thus a subjective matter based on their knowledge. If the little evidence<sup>504</sup> tendered in court against the accused was inconsistent with their knowledge, they returned a verdict according to their knowledge and their conscience.<sup>505</sup> The judge's knowledge did not extend beyond what was presented in open court which may or may not be consistent with the true facts. The original juries, as we see, had personal knowledge of the facts and so were in a position to deliver a verdict which was and remains cryptic.<sup>506</sup>

There is however, the further fact that the freemen did not consider that they needed to explain themselves to the court which was, after all, a mechanism of the crown. They worried about being manipulated by the crown to further its aims. They were also eager to restrain the crown from further encroachments on their liberties. That the crown could enact laws it pleased was tolerated up to a point.<sup>507</sup> That it could be allowed to be arbitrary by the judicial process was quite another and appears to have been the main point of the great charter. As Lysander Spooner observed,

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<sup>504</sup> It is possible that jurors probably learned a great deal from the trial. The accused probably spoke at the trial although in the modern setting, the accused was not competent to testify in his trial until 1898. In appeals in private prosecutions, the prosecutor who was usually the victim, also spoke and the jurors could have learned something of the facts from this process. See Daniel Klerman in 'Female Private Appellants in the 13<sup>th</sup> Century England' who argued that women constituted more than a third of the appellants.

<sup>505</sup> According to Damaska, 'psychologists maintain that factors that contribute to human responses to evidence are not fully transparent to the cognizer or even amenable to rendition in propositional form'. What he does not allude to is the fact that unless we make conscious efforts to understand and articulate some of these factors, the status quo will prevail and the criminal justice system will continue to stagnate in this area.

<sup>506</sup> Their local knowledge might have included the fact that the accused was infamous and stigmatised or some other ignominy connected with his respectability which they could not and were not required to disclose to the court. The court was a stranger to this and remained so.

<sup>507</sup> The Bill of Rights sought to curtail the power of the Crown to do this.

‘The question here arises, whether the barons and the people intended that those peers (the jury) should be mere puppets in the hands of the king, exercising no opinion of their own as to the intrinsic merits of the accusations they should try, or the justice of the laws they should be called on to enforce?’<sup>508</sup>

Thus the verdict did not just reflect the ‘conscience’ of the jurors, it also reflected their opinion of the law under which the accused was charged.

We have observed that the courts frequently punished jurors for returning verdicts against the opinion of the courts. Bushell’s case, together with the Seven Bishops’ case,<sup>509</sup> was a turning point. The freemen finally had enough of crown tyranny and asserted their liberties. Not only were juries not to be fined henceforth, but they could also return a verdict according to their conscience. In other words, they need not explain themselves to the court. This was because only in withholding a reason could they reserve unto the ordinary man that last scrap of lay participation in the judicial process in any meaningful way.

The origin of the unexplained verdict, however, as shown, lies in the fact that the judge did not know what evidence the jury was considering or what the jurors knew. In that circumstance, the jury could only return a verdict of ‘guilty’ or ‘not guilty’<sup>510</sup> in the alternative. A juror swears to what he can infer<sup>511</sup> and conclude from the testimony of witnesses and evidence tendered in court, by the act and force of his understanding.<sup>512</sup> The implication is that any evidence tendered in court is not binding on the jury.<sup>513</sup>

<sup>508</sup> Lysander Spooner, (1852) ‘An Essay on Trial by Jury’.

<sup>509</sup> Seven Bishops’ case 1688, 12 State Trials 183

<sup>510</sup> There are records that indicate that the 13<sup>th</sup> Century jury trials were more like dialogues between judge and jury than adversarial; D. M. Stenton (ed.) *Rolls of the Justices in Eyre Being Rolls of Pleas and Assizes for Yorkshire in 3 Henry III (1218-19)* (Selden Society, vol. 56, 1937), pp. 299-301; 30-31 YB ed. 1 529-32. Contrary to the Year Book editor’s suggestion, this case is from Yorkshire Eyre. D Crook, ‘Triers and the origin of the Grand Jury’, *Journal of Legal History* (1991), p 116 n. 71

<sup>511</sup> Whisperings of intuition, volitional impulses, even raw emotions combine to produce a decision

<sup>512</sup> A matter that forms part of the argument articulated in this research regarding the competence of the jury to explain its verdict. It is argued that inferences, by virtue of their nature are not capable of being

Today, S. (8.1) of The Contempt of Court Act 1981 ensures that the jury deliberation process remains secret and jurors cannot be questioned on their reasons. In the modern setting however, the emphasis is on a fair trial. The jury is supposed to be almost completely ignorant of the facts in the case except as presented in open court.

The evidence presented must, subject to rules on similar facts, relate to the case in issue and not to any previous history of the accused.<sup>514</sup>

This is supposed to protect the accused from prejudicial material which may have no bearing on his propensity to commit the crime in question.<sup>515</sup>

The rules of evidence are designed to give the accused a fighting chance and would seem to stem from lay participation in the trial process.<sup>516</sup>

With so many complex rules,<sup>517</sup> unexplained verdicts have come to be the only acceptable end to a trial which employs a bewildering array of mechanisms. It would appear that the well-meaning reforms of the 18<sup>th</sup> Century that resulted in adversarial criminal trial had the effect of perpetuating the central blunder of the inherited system: the failure to develop institutions and procedures of criminal investigation

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communicated in a way that leaves it with some defence against a charge of unreasonableness. Furthermore, leaving these inferences to the understanding of the individual juror invites a plethora of opinions which can only make sense when presented as a collective. Any attempts to verify it on an individual basis would render the verdict vulnerable to various charges.

<sup>513</sup> The Judicial Studies Board: Crown Court Bench Book: Specimen Direction 1999 citing Archbold 2001 (2001) 4-380 page 459 et seq. and Blackstone (2001) F3.1 page 1986 at seq. 'I must also remind you of the prominent features of the evidence. However, it has always been your responsibility to judge the evidence and decide all the relevant facts of the case and when you come to consider your verdict, you and you alone, must do that'.

<sup>514</sup> A matter narrated with some distress by Trevor Grove in his book 'The Juryman's Tale', Bloomsbury Plc. 2000

<sup>515</sup> In Cmd. paper 5563 2002, the government outlines a raft of proposals that impact on the rules of evidence which will have a wide ranging effect on the CJS if adopted. These include streamlining of process, increasing efficiency and the promotion of public confidence. See 'Police and Justice Bill'. Bill 119 of 2005-06. Research paper 06/11 February 2006 at [www.parliament.uk/commons/research](http://www.parliament.uk/commons/research)

<sup>516</sup> 'Writing in 1898, the great American evidence scholar Thayer described the law of evidence as 'the child of the jury system'. JB Thayer, 'A Preliminary Treatise on Evidence at the Common Law' (1969: first published 1898) 266. in Choo, Andrew L-T op. cit.

<sup>517</sup> Many rules of evidence can be understood only in terms of the judge's need to rigidly control a group of ignorant illiterates – the jury. But change is...apparent here. The present day juror is much more sophisticated and educated than was the juror sitting when the rules of evidence solidified in the last century. JB Weinstein, 'Some Difficulties in Devising Rules For Determining Truth in Judicial Trials' (1966) 66 Columbia Law Review 223, 225.

and trial that would be responsible for and capable of seeking the truth.<sup>518</sup> We have now come to live with the jury and its verdict. It does not appear to be the best system of trial in the world nor does it represent the best way to establish the truth.

On the other hand, given the role it plays, symbolic or otherwise, it is difficult to envisage its abolition.

But the matter does not rest. It is not intellectually honest to claim that reason would be undesirable or impossible. The position, it could be argued, is that it could be desirable but that the nuances of a trial make it impossible.

So much depends upon the impression which witnesses make.<sup>519</sup> Cornish observed that 'witnesses are not collected together and asked to give evidence on a particular point one after another'.

He went on,

'...the structure of the trial thus emphasises that what is required of the jury is a judgement by general impression on the evidence as a whole'.<sup>520</sup>

Perhaps Damaska's position, when comparing the Inquisitorial method of trial on Continental Europe with the English Adversarial method should be viewed with some sympathy:

'Even so, reasoned opinions should not hastily be dismissed as pro forma only.'<sup>521</sup> Even sceptical commentators concede that the articulation of reasons makes the exercise of adjudicative powers less impenetrable than a regime of totally unexplained decisions. Even if brimful of formulaic language, written reasons provide the dissatisfied party with a stationary target: the court's findings are identified and at least some grounds advanced for the belief that these findings are rationally defensible. The opportunity to attack these findings and arguments after the decision has come down reduces pro tanto,

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<sup>518</sup> Professor Langbein, *The origins of Adversary Criminal Trials*, OUP (May 2002).

<sup>519</sup> Frederick Lawton in *Reviews and Notices*, LQ Review October 1973 at page 567

<sup>520</sup> W. R. Cornish, *op. cit.*, at page 151 citing D. Broeder, 'Functions of the Jury: Fact or Fiction' (1954) 21 *University of Chicago LR* 386.

<sup>521</sup> Damaska argues that not every outcome can be justified according to the prevailing canon; comparison of the grounds advanced by the trial judge against the record enhances the capacity of appellate courts to evaluate the adequacy of those grounds.

the need to challenge the quality of information supplied to the court before the fact finders retire to deliberate. Inevitably, the issues preliminary to proof-taking become less prominent than in jury trials that culminate in unexplained general verdicts'.<sup>522</sup>

So jury trials produce verdicts that might be skewed not just by the trial process and jury deliberation but also by the process of evidence gathering and the quality of tendered evidence.

As it stands, demanding an explanation would shine a bright light on these. This is, altogether, not an attractive option but a lack of it may become indefensible.

The recent case of *Pendleton*<sup>523</sup> has highlighted the difficulty of the cryptic verdict. It was held that the Court of Appeal

'was not a primary decision maker and had an imperfect and incomplete understanding of the full process which led the jury to convict'.

Thus, The House of Lords re-affirmed the position that it was not prepared to go behind a jury's verdict to determine their reasoning. We have to live with the cryptic verdict for now<sup>524</sup> and the recent decision of the House of Lords re-affirms the common law position as to confidentiality of jury deliberation but does nothing for reasoned verdicts. Meanwhile, the decision in this case acknowledges the statutory limitations of the Court of Appeal. With such accepted limitation, justice appears to be deliberately fettered and an injustice can be allowed to remain to guarantee the principle of the common law - a position Lord Steyn found himself unable to accept. We may have to appeal to the European Court of Human Rights for the final word. Meanwhile, with the lack of an explained verdict come charges of perverse verdicts.

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<sup>522</sup> Damaska *ibid.* page 46

<sup>523</sup> *R v Pendleton* [2002] UKHL 66;1 CR. App. R 34

<sup>524</sup> Unless we can make significant changes not only to the trial process but also to other areas of our national development so as to prepare our citizens to fulfil their civic responsibilities.

The matter of an unexplained verdict begs the question. 'How do we determine a decision is perverse when the jury has not produced its reason for a particular verdict?'

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### **Chapter Thirteen - The 'Perverse' Verdict**

To a great extent, the legal system of any nation is based on the cultural dispositions and heritage of that country.<sup>525</sup> Custom, itself, develops over a long period of time and is ingrained in the society. A criminal justice system can be effective and legitimate only if it reflects the country's culture and tradition.

The idea of trial by jury was adopted and flourished in England precisely because it is sufficiently aligned to the tradition and sense of justice of the country. Throughout its development, the jury has also retained the right to return a 'perverse' verdict – verdict against the weight of evidence. Opponents of this ancient institution cite this 'right' as one of the reasons why a modern democracy must not fetter itself with a body which they argue, is a relic and an anachronism. The matter is pronounced because of a lack of accountability in the form of an explained verdict.

The argument is well documented and articulated. This paper does not seek to rake over them. To indulge in that would be a futile exercise.

One of the reasons advanced for abolishing trial by jury is that juries do not come reliably, or often enough, to 'correct' verdicts. The argument goes that this is supported by the frequency of verdict disagreement between trial judges and juries. One reason postulated by judges for the retention of jury trials is that juries invariably, more often than not, arrive at verdicts with which judges concur.

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<sup>525</sup> See Mary Ann Glendon et al, *Comparative Legal Traditions* 46-47 (2<sup>nd</sup> Ed.); Rene David & John E. C. Brierley, *Major Legal Systems in the World Today* (3<sup>rd</sup> ed. 1985).

The Chicago Jury Project results showed that judges agreed with the juries' verdicts in seventy-five per cent of cases surveyed.

Where there was disagreement, juries tended to be more lenient, often acquitting in cases where prosecution methods could have been considered to be unfair.<sup>526</sup>

Devlin has recognised the great value which flows from the freedom of juries to view the criminal law as flexible rather than rigid and to take an equitable approach in line with community attitudes.

'If you want certainty or predictability, you must keep the judgment running close to the law. If you want the best judgment in the light of all the facts when they have emerged, then it will be one that has moved nearer to the *aequum et bonum* [equity and good conscience]. The unique merit of the jury system is that it allows a decision near to the *aequum et bonum* to be given without injuring the fabric of the law, for the verdict of a jury can make no impact on the law'.<sup>527</sup>

Consistent jury acquittals, however, may well have an impact on the law. The offence of culpable driving was created largely because juries consistently acquitted bad drivers charged with manslaughter. Jury verdicts are a way of informing legislators of public attitudes to the criminal law. As Devlin observed, trial by jury is 'an insurance that the criminal law will conform to the ordinary man's idea of what is fair and just'.<sup>528</sup> Cornish counters this assertion by holding that juries have not consistently defended the public interest in equity and justice but have been more likely to submit to oppressive laws such as the attack on freedom of speech by the sedition laws and the attack on freedom of association by anti-industrial union laws.<sup>529</sup>

However, to what extent a verdict can be described as perverse is a matter that deserves some investigation.

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<sup>526</sup> H. Kalven and H. Zeisel, *The American Jury* (Chicago University Press, 2nd ed., 1971), at pp.318ff.

<sup>527</sup> Devlin, P., 'Trial by Jury' (Stevens and Sons Ltd., 1956), at pp.156-157.

<sup>528</sup> *Ibid*, at page 160



It is submitted that no verdict emanating from a jury at the end of a criminal trial can be correctly described as perverse within the meaning of the word to the extent that a verdict of guilt or innocence is a matter for a jury as a result of deliberations on the evidence consequent upon a trial. Furthermore, to the extent that a jury's verdict is largely a subjective matter,<sup>530</sup> judging a verdict to be perverse, by all other objective observers, is tantamount to a usurpation of the role of the jury and thus inconsistent with trial by jury.

Let us explore this further. The opinion of Vaughan, C.J is instructive in this pursuit.

Where, in a Crown Court trial, an accused pleads 'not guilty' to a charge and the plea has been rejected by the prosecution, that matter will be arrayed before a jury for trial.

This will involve a panel of 12 randomly chosen citizens.<sup>531</sup> It is the duty of the jury to listen to all the evidence relating to the charge, listen to the judge's direction on the law applicable to the case and then deliberate as a collective on what they consider to be the facts of the case and to bring in a general<sup>532</sup> verdict of 'guilty' or 'not guilty' on the charge.

A juror's oath is to 'truly try the defendant and return a verdict according to the evidence'.<sup>533</sup>

Do juries perform their role accordingly?

<sup>529</sup> W.R. Cornish, *The Jury* (Penguin, London, 1968), at pp,127-139

<sup>530</sup> The jurors consider evidence tendered in court. They are also expected to and do bring common sense and reason to the process. Thus, they call upon a number complex elements for assistance in their deliberations. They are allowed to do this as a body of 12. An independent objective observer or a magistrate, although may also employ these elements, arrives at a decision from an entirely different perspective which could be as sterile as it is singular.

<sup>531</sup> S.1, Juries Act 1974. They are required to be between the ages of 18 and 70, on the electoral role and UK residents for at least 5 years since the age of 13.

<sup>532</sup> In cases such as insanity, a special verdict may be acceptable.

<sup>533</sup> Juries Act 1974 supra.

There is much evidence of juries acquitting against the weight of evidence especially in cases that involve the Official Secrets Act<sup>534</sup> although their willingness and ability to strike down unpopular law in other cases has been questioned.

The judge's role is to direct the jury on the law and the jury is to apply that law and direction to the facts as they find them. The principle of jury supremacy in matters of fact in a case is without equivocation. The notion of perverse verdict, therefore, undermines this principle. However, there is evidence that juries sometimes work on an entirely different plain,<sup>535</sup> rejecting, in one case, the evidence of the chief prosecution witness whom they described as a 'tin pot dictator' and 'pipsqueak' civil servant and in the other, ignoring the finger print evidence presented in court.

In his review, Auld LJ recommends that:

'the law should be declared, by statute if need be, that juries have no right to acquit defendants in defiance of the law or in disregard of evidence and that judges and advocates should conduct criminal cases accordingly'.<sup>536</sup>

Prima facie, this appears reasonable enough given that a verdict that can be proved to be against the weight of evidence seriously undermines the criminal justice system. However, on further reading, it becomes clear that the reasoning is at best defective and at worst, impractical. Predictably, many have condemned this recommendation as displaying deep distrust of the jury system,<sup>537</sup> wholly unacceptable – a serious misreading of the function of the jury – and that the right to return a perverse verdict in defiance of the law or the evidence is an important safeguard against unjust laws, oppressive prosecution or harsh sentences.

Professor Zander is in good company. Many from the legal profession who responded to the review identified with these sentiments.

<sup>534</sup> Zuckerman A.A.S: *The Principles of Criminal Evidence* (Oxford) 1989 p.36

<sup>535</sup> Ely Devons: 'Serving as a Juryman in Britain' 28 *Modern Law Review* (1965) p.561

<sup>536</sup> *Criminal Courts Review*. Chapter 5 at 107

Legal historical tradition has been cited in support of the right that Auld LJ recommends against. Indeed, Bushell's case, cited above, is a case in question where the jury returned a verdict supposedly against the weight of evidence.

There is further, the famous cases of Clive Ponting, Randle and Pottle as well as other modern cases where the jury has done just that. In such cases, it has been observed that the tyranny of the judges has been replaced by that of the jury. Auld LJ added:

'...flagrant mistakes, in particular unjustifiable verdicts of 'not guilty' are bound to occur only too often. The layman may be inclined to regard this as one of the chief advantages of the system that it can act as an unofficial pardoning agency. However, if this is the idea, it should be clearly expressed instead of being disguised as justice'.<sup>538</sup>

The issue is that neither the system nor the government wishes for this to be the case and worse, although such practice is condoned by a collective acquiescence and institutional ignorance, it has never been definitively proven that a verdict is perverse given that the fact finder is supreme.

These sentiments are well understood though. They clearly are the frustration felt by those who are charged with investigating and prosecuting crime and those who play a role in the judicial process.<sup>539</sup> It also shows a direct tension between the government's stated purpose of the CJS – the control of crime – and the position sometimes<sup>540</sup> taken by lay assessors in criminal trials. However, it exposes another dimension – the diverging perception of justice by the public and the institution. More importantly, it underlines the need for accountability from the jury.

<sup>537</sup> Professor M. Zander in his response to the Auld LJ review.

<sup>538</sup> *Criminal Justice and Social Reconstruction*, p 246, Kegan Paul, Trench, Trubner & Co. Ltd (1946) See also Sir Louis Blom-Cooper, QC, *Article 6 and Modes of Trial*, pp 1-19.

<sup>539</sup> In the English Courts, the role of the judges is not to obtain a prosecution but to be the servant of justice.

<sup>540</sup> It would be quite incorrect to claim that juries always disregard the evidence and return a verdict that is contrary. History is instructive in this regard and it has been suggested that some of the blows for justice were not struck by the jury but by appellate judges over the years. See *The Auld Report* (2001)

It is argued further, that the issue turns on the meaning of 'perversity' in a jury trial. Do juries really return perverse verdicts? One is inclined to answer in the negative. There are good reasons for this.

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### **The Grounds for Perversity**

A criminal trial in an English Crown Court is a matter before a judge and jury. As has been noted above, the jury is charged with deciding on matters of fact, the judge, on matters of law. The judge's role, by no means easy, is relatively straight-forward relative to that of the jury. Objectivity<sup>541</sup> is required and he must rule on what evidence is admissible or otherwise, staying dispassionate at all times. He must bring nothing but a sound legally trained mind and professional experience to his role. Even though he may have access to the defendant's adverse history, his focus is on the fairness of the trial. The judge need not be concerned with the veracity of a witness testimony, whether he made eye contact, his manner of dress or speech, his occupation or indeed his social status. He need not second-guess a witness' statement or compare his life experiences and aspirations with that of the accused. He need not pay attention to the oratory of counsel. These are rightly left to the jury. His attention is, at all times, focused on the evidence and whether or not it is sufficient for the matter to be put before a jury for a determination of the facts. Proof beyond a reasonable doubt does not apply to the judge in a criminal trial.<sup>542</sup>

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<sup>541</sup> Even here, objectivity is by no means a given factor. The guidelines on sentencing in England and Wales indicate that judges are allowed to make subjective evaluations within a set of given guidelines when handing down sentences. These include age, family backgrounds and propensity to commit further crimes. Even the demeanour of the victim or the support of the family are factors that a judge is advised to take into consideration. See the Judicial Studies Board at [www.jsboard.co.uk](http://www.jsboard.co.uk).

<sup>542</sup> The decision as to whether or not the prosecution has discharged its burden to the standard set is a matter for the jury. The point is not that the burden of proof beyond a reasonable doubt is not required but that the judge, in determining the evidence in a trial, only has to consider the relevance, probative and prejudicial value of a piece of evidence and the fairness of the trial. In so doing, as a matter of clinical sterility, he need not be mindful of any subjective elements in the trial. He must stay objective as far as that evidence or witness is concerned. Doubt is a subjective principle turning on the principle

Whether or not the judge can honestly remain dispassionate is quite another matter and a subject for some other research. Given that Crown Court trials in England are set before a judge and jury and that the judge never has to deliver a verdict, we are yet ignorant of his ability for avoiding the complicity potentially inherent in the swathe of adverse and prejudicial information available to him.<sup>543</sup>

This is because the prosecution is not there to persuade him but the jury.<sup>544</sup> It is purely a matter of the relevance and admissibility of an item of evidence<sup>545</sup> once the judge has ruled that there is a case to answer. It remains to be seen whether or not a person (for that is, after all, what a judge is) is able to stay objective given the exposure he has to adverse evidence.<sup>546</sup> Lord Lane made it clear in *Galbraith*<sup>547</sup> that the judge has no discretion as to whether or not to put a matter before a jury if he feels that there is sufficient evidence upon which a reasonable jury, properly directed, might convict. He must put it to the jury.

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of belief based on the lack of knowledge. The judge, presented with evidence and other matters of evidence must decide if the weight of evidence before him is sufficient to allow the matter to go before a jury. It is a matter of the relevance and sufficiency of evidence – an altogether measurable outcome – before a matter can be put to a jury, which is why a ‘judge’ is better placed to explain his verdict in the higher courts when he sits alone or with a panel. The subjective elements are irrelevant.

<sup>543</sup> An argument could be made about the Diplock Court in Northern Ireland where a judge sits without a jury in the determination of prescribed criminal cases. However, it must be pointed out that a judge’s verdict is subject to automatic appeal to the superior courts. On 1 August 2005, the Northern Ireland Office announced that the Diplock Courts were to be phased out, and in August 2006 they announced that the courts were to be abolished from July 2007. Non-jury trials would still be used in Northern Ireland, but only in exceptional cases. See ‘Replacement Arrangements for the Diplock Court System, Northern Ireland Office Consultation Paper, August 2006’ at [www.nio.gov.uk](http://www.nio.gov.uk).

<sup>544</sup> There is an element of prejudgement in a criminal trial. This could happen when the judge has to rule on matters of abuse of process or in response to an application for a ‘no case to answer’ from the defence. Following *R v Galbraith* (1981) 73 Cr app. Rep 124, 145 JP 405, ‘where...the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness’s reliability or other matters which are, generally speaking, within the province of the jury and where on one possible view of the facts, there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury’.

<sup>545</sup> ‘In a Civil Trial by judge alone, the judge will hear evidence, consider the law and deliver a reasoned judgement summarising the legal principles governing the case and the facts to which they must be applied and giving his decision. If his decision is challenged, an appellate court may ordinarily review both the legal ruling and the factual findings and the applications of one to the other’. Lord Bingham of Cornhill in *R v Pendleton*. Ibid.

<sup>546</sup> For a stimulating discussion of the separation of evidence and its relevance to the charges brought in a trial, see M. Damaska, ‘Evidence Law Adrift’, Yale University Press 1997 at page 48.

<sup>547</sup> *R v Galbraith*, (1981) 73 Cr. App Rep. 124, 145 JP 406

The jury, on the other hand, swears to 'truly try the defendant and return a verdict according to the evidence'.

For the jury, it is not a simple matter of objectivity. Their task is the more onerous one. Not only must they sift through the admissible evidence tendered in court that is relevant to the case, they must also purge pieces of inadmissible evidence from their minds.<sup>548</sup> They must consider the demeanour of the witnesses as part of their deliberation process and the trial. They must watch the actors in court. They must make a judgement on the oratory and theatricals skills of the counsels, assess the body language of the witnesses, measure the weight of a piece of evidence and determine from the tone of the judge where the court's sympathy lies without allowing such bias, if any, to affect its decision. They must also call upon their own experiences, prejudices, social status, sense of justice, morality and community inclinations. In addition, each juror must consider the role played by police officers and others investigating the crime, the state of the nation – do they feel safe in their homes, do they have a sense of civic responsibility, do they think the offence charged should be a crime etc?

When they retire for deliberation, the jurors must consider their relative positions and be part of a negotiating process that pitches one juror's wit and understanding against another's, one juror's interpretation of the evidence against another's and one juror's skill of persuasion and negotiation against another's.

The jury then considers the offence charged, the prohibited act and the corresponding law.<sup>549</sup>

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<sup>548</sup> Damaska argues that 'despite the separation of the finders of fact from the judge, Anglo-American jurors are also exposed – for a variety of reasons – to inadmissible but persuasive information and then asked to ignore it'.

<sup>549</sup> They may consider the action proved but the law not broken or no offence caused – a classic case of jury nullification of law.

They then have to apply the law to the facts and consider if the mental element is present.

If there is evidence for the offence and if the trial process has produced a situation from which they must draw a particular inference, has the Crown proved its case beyond a reasonable doubt? Further from that, they must now search their consciences to see if the decision they have reached is one that they can live with given all the circumstances of the case. Sometimes, this is in spite of or because of the evidence.

Some jurors may be religious. Others may be atheists. Some may be fundamental in their moral perspectives, yet others might be dispassionate or care-free about life. Some may believe in strong society values as a whole reflected in a strong government and yet others may prefer the individualistic approach - taking liberty at face value. Then there is the question of culture and community values that intermingle with the desire to achieve social cohesion.

The fact of trial by jury is that a case is heard before a judge and jury. The judge stays objective while the jury has the task of mixing objectivity with subjectivity. 'But a criminal jury gives no reasons. Its answer is guilty or not guilty...the process of reasoning by which its decision is reached is never disclosed and can only be a matter of inference'.<sup>550</sup>

Given then that the jury is allowed certain amount of evidence, has the right to return a verdict according to its conscience, is allowed all the human qualities necessary for the reasonable man to live and that there are twelve of them randomly selected to hear the case, how do we define perversity?

'Perversity in this context is the rendering of a decision so unreasonable that no reasonable observer could support it'.<sup>551</sup>

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<sup>550</sup> Lord Bingham *ibid.*

<sup>551</sup> Louis Blom-Cooper, *Twelve Angry Men Can be Wrong*, Sunday October 21 2001

If this is the case, then the system appears to be held hostage to fortune. The fatality of the above statement lies within itself. First, it implies that having heard all the evidence, a decision has been reached by a 'reasonable observer'— objectively - and the jury must concur. If we adopt this approach, we have invented a surrogate jury whose role is to determine the case ad rem and the real jury can only countenance such verdict.

Secondly, it arrogates objective isolation to the surrogate jury - this 'reasonable observer,' who has deliberated the case entirely on the evidence without the wisdom and contribution of eleven other people to draw from.

Third, the decision of this single reasonable objective observer, having been made, now awaits countenance by the jury on a subjective level to legitimise it.<sup>552</sup>

The fourth position is even more troubling for the institution. It is a culmination of the above and assumes that the interpretation of the evidence should only go in one direction. As a result, if the jury does not interpret it in that way, any decision emanating from its deliberation is deemed perverse.

There is the question of reasonableness. How do we define this? Do we not pre-judge 12 people randomly chosen from the community reasonable enough to be members of a jury? Do we not, at the same time, consider them far too ignorant to decide matters we consider complex? How do we justify looking both ways at once?

Put in this context, it becomes clear that that which is proposed is that all verdicts must be perverse that involve a subjective element. Since all jury decisions involve subjective assessment, all jury verdicts are, by definition, perverse.

This is a repugnant proposition.

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<sup>552</sup> The decision maker could be the judge bowing to the promptings of his objective analysis and by implication, the position of the prosecutor or otherwise.



It is also clear that in this context, on an application of Galbraith, once a judge has decided to put a matter before a jury with the understanding that they might convict, any acquittal would constitute a perverse verdict. As observed, such a point of view usurps the position of the jury and makes a mockery of its independence. As a matter of observation, we have no test for reasonableness. What we do have however, is a presumption of it. Since we do not test for this, how do we know that a jury is or is not reasonable?

The aforementioned Bushell's case makes the point eloquently. William Penn and William Mead were charged with preaching on a Sunday afternoon to an unlawful and tumultuous assembly. The jury delivered a special verdict deciding that they were only guilty of preaching in Grace church but not unlawfully. The evidence was enough to support a charge of preaching in Grace Church on a Sunday afternoon. There was insufficient evidence that they were preaching to an unlawful and tumultuous assembly. The verdict returned by Bushell and his men was entirely consistent with the weight of evidence and as far as interpretation of the evidence and their conscience went, consistent also with the juror's oath. Yet, if they had just declared a guilty verdict without qualifying it, that might have been the end of the matter. If preaching in Grace Church was an offence, then the defendants were guilty. However, of preaching to a tumultuous assembly, the answer was in the negative. The jury found its conscience sufficiently aligned to its purpose to qualify its verdict. If it had simply answered guilty, justice would not have been done.

In the case of Pat Pottle and Michael Randle, the jury listened to the evidence which was quite conclusive as to guilt given that the accused wrote a confession of what they did.

The jury considered the law that was being applied and decided that the sentence imposed on Blake was 'so inhuman that it is alien to all the principles on which a civilised country would treat its subjects.'<sup>553</sup> They acquitted. They clearly sympathised with the actions of the accused in helping Mr. Blake to escape even though the offence was proved. They also disagreed with the law under which the prosecution was being brought and although they did not admit as much, they voted with their feet or voices as the case may be.

In the 19<sup>th</sup> Century, according to Devlin, capital punishment was meted out to people for stealing sheep, horses and cattle and for robberies to the value of 40 shillings – raised to £5 in 1827. Juries undervalued goods to avoid the death penalty.

The issue is the definition and degree of perversity as an extension of one person's interpretation over another. Thus, to the extent that guilt or innocence is a matter for the jury and no one else, calling a jury's verdict perverse would appear at best unhelpful and at worst ignores the process of deliberation and subjective evaluation.

If what we are saying is that the courts or other observers have decided what the evidence is and interpreted it and that the jury has no business deciding otherwise, why not then dispense with the jury altogether or better still have it as a façade but fetter it with Auld L.J.'s recommendation? If the issue is that of allowing twelve randomly chosen citizens to deliberate as they see fit, then the issue of perversity does not arise. Given that evidence can be interpreted in more ways than one, to the extent that we cling to the word, every verdict is potentially perverse regardless of which court delivers it because some other 'reasonable observer' could always disagree with it. Even reasoned judgements, delivered by judges can be attacked as perverse.

As a further attack to juries, Auld LJ commented in his report that:

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<sup>553</sup>Michael Randle, *The Observer*, Sunday October 14, 2001 quoting Jeremy Hutchinson in the Appeals Court case in 1961.

'Sadly, juries did not prevent the miscarriages of justice uncovered in the late 1980s and early 1990s arising, in the main, from falsification or concealment of evidence that so shook public confidence and gave rise to the appointment of the Runciman Royal Commission...'<sup>554</sup>

Auld L.J was referring to such high profile cases as the Birmingham Six,<sup>555</sup> the Guildford Four<sup>556</sup> and the Maguire Seven<sup>557</sup> which were full of allegations of police brutality and perjury, Judith Ward<sup>558</sup> and Stefan Kiszko<sup>559</sup> which alleged non-disclosure of relevant evidence, the Darvell Brothers<sup>560</sup> and The Maxwell Confait<sup>561</sup> cases which alleged extraction of false confessions, the Bridgewater Four<sup>562</sup> and the Luton Post Office murder case<sup>563</sup> which alleged witness manipulation. These cases show a pattern of deception and evidence abuse by the West Midlands Police Serious Crime Squad<sup>564</sup> that had nothing to do with the jury. If experts conspire to deceive and other experts are deceived, even the jurymen of 'average ignorance' will be deceived. One may well wonder why the judges who had more access to the facts did not invoke the concept of due process.

<sup>554</sup> Review of Courts *ibid.*

<sup>555</sup> R v McKenny & Ors (1991), 93 Cr. App. R. 287

<sup>556</sup> R v Richardson & Ors. The Times 20.10.89.33

<sup>557</sup> R v Maguire & Ors. (1992), Cr. App. 133

<sup>558</sup> R v Ward (1993), 96 Cr. App.1

<sup>559</sup> R v Kiszko (unreported) 18 February 1992, CA

<sup>560</sup> R v Darvell (unreported), The Times, 15 July 1992, CA

<sup>561</sup> R. v. Lattimore (1975), 62 Cr. App. R. 53; 119 Sol. Jo. 863. See also the Fisher Report (1977) which investigated and reported on the case (Report of an Inquiry by the Hon. Sir. Henry Fisher into the circumstances leading to the trial of three persons in charges rising out the death of Maxwell Confait and the fire at 27 Doggett Road, London SE6 (H.C.P 90 of 1977-78)

<sup>562</sup> R v Hickey, (unreported) July, 30 1997

<sup>563</sup> R v Cooper & McMahon [2003] EWCA Crim 2257. 9

<sup>564</sup> The West Midlands Serious Crime Squad was a police unit in the English West Midlands which operated from 1974 to 1989. It was disbanded after an investigation into allegations against some of its officers of incompetence and abuses of power. Several resulting miscarriages of justice arising out of its activities were later overturned on appeal. There have been a number of appeals concerning the method by which evidence was obtained and convictions secured by the now West Midlands Police Serious Crimes Squad. See generally: R v Wellington, The Times, 26 March 1991, R v Binham, (1991) 141 N.L.J 189, R v Khan, Independent, 2 March 1990 and R v Edwards [1991] 1 W.L.R 207. For a riveting discussion on the subject, see T. Kaye, 'Unsafe and Unsatisfactory: The Report of the Independent Inquiry into the Working Practices of the West Midlands Police Serious Crimes Squad. (Civil Liberties Trust, 1991).

Seeing the poor quality of the evidence prepared for trial, they might have determined that there was insufficient evidence to put the matter to the jury. The statement by Auld LJ ignores the rules of evidence that apply to English criminal law. It also ignores the fact that the jury plays a passive role in an adversarial criminal trial. It does not have any investigative powers and therefore must yield to what is presented in court. It does not and cannot cross-examine a witness and therefore must listen with passivity to the court drama. As Damaska put it, 'what remains open to challenge is the suitability of the database supplied to the inscrutable decision maker'.<sup>565</sup>

In a defence of the jury and in response to Auld LJ., Professor Zander observed that:

'The high profile miscarriages of justice were, in the main, the result of human factors such as police officers who fabricated evidence, scientists who made mistakes or suppressed evidence. No system is or could ever be, fully proof against human error or human wickedness.'<sup>566</sup>

Professor Zander appears to be echoing Kant who opined that:

'From the crooked timber of humanity, nothing completely straight can ever be made.'<sup>567</sup>

This really sums up the position and our attitude to all our institutions but particularly to lay participation. It is worth noting that the fact that perfection or certainty is elusive should not deter us from pursuing it.

Transposing this to the requirement for an explanation, unless we start making some demands of the tribunal of facts relative to its verdict, we will continue to quibble over the supposed perversity of its decisions.

It may well be that Auld LJ is right. Perhaps the jury gave too much weight to the prosecution's case, took for granted the veracity of the evidence of the police officers and the evidence tendered and convicted given the publicity surrounding the atrocities.

<sup>565</sup> Damaska. Ibid at page 44

<sup>566</sup> M. Zander, 'What is going on', *New Law Journal*, 143 (1993), 1507-8

<sup>567</sup> Kant, I. *ibid.* See also *R v Smith* (2000) 4 AER 289 per Lord Hoffman.

Perhaps, had the jury decided, against the weight of evidence, to return a 'perverse verdict,' such an injustice might have been avoided and no doubt, the public outcry would have been exactly the same against the jury's verdicts of acquittal 'in the face of overwhelming evidence, evidence that would be later proved to have been prejudicial and wrong'.

This paper takes the position that as a matter of law and fact, the idea of a perverse verdict is inconsistent with the principle of jury trials.

This is particularly relevant to acquittals since a conviction can always be appealed against on the grounds of some irregularity with the trial, a point of law or indeed the basis of a lurking doubt<sup>568</sup> in a trial properly conducted but the conviction quashed because of unease with the verdict.

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### **The Story Board and The Appellate Court's Perspective**

Indeed, section 1 (7) of the Criminal Appeal Act 1907 was intended, not to undermine the traditional role of trial by jury but to give the Court of Criminal Appeal sufficient power to rectify miscarriages of justice. It says:

'...the Court shall, for the purposes of and subject to the provisions of this Act, have full power to determine, in accordance with this Act, any questions necessary to be determined for the purpose of doing justice in the case before the court'.

If jurors in a significant number of cases are not returning verdicts on the evidence or are influenced by other considerations, should we not find out about it? It certainly is a question that is worth asking.<sup>569</sup>

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<sup>568</sup> R v Cooper (1968) 55 CAR 82, per Lord Widgery CJ who declared that 'a transcript of a page of the trial was not enough to raise a reasonable doubt', Lawton, LJ in R v Long (1973) 57 Cr. App.87 – 'a transcript of the trial does not capture the atmosphere of a trial'.

<sup>569</sup> To the extent that S.8 Contempt of Court Act 1981 will allow

But if this is what is desired, it should be stated. It will not do to call a verdict perverse simply because we do not know how it was reached or the reasons behind it. Calling a verdict perverse would suggest that the jury has departed from a road marshalled out for it by pretenders and that would be in violation of the separation of powers thus requiring the jury to rubber stamp the opinion of the powers that be. Our criminal trial reposes the domain of fact finding to the jury and for good reasons too. In this task, they are not expected to apply the law passively and mechanically like automatons but are compelled both by a sense of duty and their juror's oath to do, as they understand it. justice in the light of the law, the evidence and their own knowledge of the world. Thus, the power to return a perverse verdict is, arguably, comparable to the Irish constitutional concept of 'congruence' or 'normativism'.<sup>570</sup> In the US, some State Constitutions explicitly provide that jurors shall judge questions of fact and law.<sup>571</sup> The jury thus retains a position as the ultimate arbiters of the state of the law. By having a jury of twelve randomly selected individuals, the ordinary people are admitted into the legal process to assess, for the community, within the confines of a specific case, the laws which determine the parameters of the constitutional traditions and arrangements of their society. In this way, political and moral discourses enter what would otherwise be the exclusive arena of legal discourse.

Perverse verdict is inherent in the jury's role as the conscience of the democratic community and a cushion between citizens and overly restrictive legislative

<sup>570</sup> See, in relation to Irish Constitutional Law, Chubb, *The Politics of the Irish Constitution* (Dublin, 1991), pp. 4-8.

<sup>571</sup> Georgia, Indiana and Maryland; cf. Butler, 'Racially Based Jury Nullification: Black Power in the Criminal Justice System' (1995) 105 *Yale L. J.* 667.

intervention. When they return verdicts perceived to be as such, juries justify their very existence.<sup>572</sup>

There are many cases of perverse verdicts where the laws involved were not applied because they did not reflect popular conceptions of justice. Such verdicts, it has been observed, in British Colonial Irish Republic and other jurisdictions, indicate the unsavory nature of laws considered unjust by the people but imposed on colonies.<sup>573</sup>

Such cases include the treatment of black people during the slavery era,<sup>574</sup> the death penalty,<sup>575</sup> religious minorities,<sup>576</sup> abortionists<sup>577</sup> and infanticides.<sup>578</sup> There are many instances where juries refused to convict contrary to the weight of evidence and directions of the courts.

<sup>572</sup> Munday. 'What do the French Think of Their Jury?' 'Views From Poitiers and Paris' (1995) 15 Legal Studies 65, 71 cites one juror who recounted with pride how the jury had disregarded the 'aberrant, strict letter of the law to do justice'.

<sup>573</sup> In such cases the laws are seen very much as not being those of the jurisdiction in which they are being applied. In respect of Ireland, see Mackey. *Windward of the Law* (Dublin, 1992), chapter 5. See also the oblique allusions by Kingsmill-Moore J. in *Melling v. O' Mathghamhna* [1962] I. R. 1, 34 and Henchy J. in *The People v. O' Shea* [1982] I. R. 384, 432. In respect of the U. S., see *Zenger's Case* 17 *Holwell's State Trials* 675 (1735), where the accused was charged and acquitted of seditious libel for criticising British Colonial rule and see generally, Alschuler and Deiss, 'A Brief History of the Criminal Jury' (1994) *U. Chicago L. Rev.* 867, 871-875. Indeed, the Diplock courts in Northern Ireland were established partly to counter a perceived 'problem' of jury nullification – Jackson, 'Trial by Jury and Alternative Modes of Trial' in McConville and Bridges (eds.) *Criminal Justice in Crisis*.

<sup>574</sup> Trials of defendants 'guilty' of helping to free black slaves have been cited in this respect – *U. S. v. Dougherty* 473 F. 2d. 1113, 1130 (D. C. Circuit, 1972). Jurors with abolitionist sympathies used their powers as jurors to subvert Federal law that supported slavery and in *U. S. v. Morris* 26 F. Cas. 1323 (C. C. D. Mas. 1851) (No. 15,815) in considering whether the defendants were guilty of aiding and abetting a slave's escape, the jury passed judgment against criminalising it and acquitted. Consequently, charges against five other people charged with the same crime were dropped – cf. Carrington, 'The Seventh Amendment: Some Bicentennial Reflections' [1990] *U. Chicago Legal Forum* 33, 45-46.

<sup>575</sup> In the Nineteenth Century the practice of nullifying to avoid capital punishment for minor offences became so widespread in England that Parliament had to act to reduce the number of capital crimes – Weinstein, 'Considering Jury 'Nullification': When May and Should a Jury Reject the Law to do Justice?' 30 *American Crim. L. R.* 239, 242, who also notes that in many States in the U. S. the failure of numerous juries to convict in spite of overwhelming evidence helped to remove mandatory death penalties.

<sup>576</sup> See *Bushell's case*. *supra*

<sup>577</sup> The cause célèbre of jury nullification in Canada, *Morgantaler*, involved a physician who was charged several times with setting up free-standing abortion clinics contrary to the law and was acquitted by jury trial, even in the predominantly Catholic province of Quebec – cf. Fennell, *Crime and Crisis – Justice by Illusion* (Cork, 1993) p. 61.

<sup>578</sup> 87 A "classic example" of jury nullification, according to Enright and Morton, *Taking Liberties – The Criminal Jury in The 1990's*, p. 36, is that of infanticides, in respect of which the law was crude

When John Wilkes, the champion of liberty was repeatedly charged, juries bluntly refused to convict him.<sup>579</sup> Furthermore, as has been mentioned in this paper, juries in rural England refused to convict for poaching. Parliament responded by making it a summary offence. This prompted the commentator William Blackstone to lament the imminent demise of the jury.<sup>580</sup>

On a wider implication, withdrawal of jury trial for certain offences was one of the catalysts for the American Revolution.<sup>581</sup> Perhaps the modern British government may learn a thing or two from this experience.

From all indications, these verdicts constitute the ultimate social barometer not only leading to changes in the law but having a socio-psychic role in the recognition of rights of those persecuted by such unpopular laws.<sup>582</sup> In returning perverse verdicts in some cases, juries are not being perverse. The perversity lies with the bureaucrats and legislators who fail to see that when a succession of juries refuse to convict in respect of a particular crime, there is more likely something wrong with the law than with the jurors.<sup>583</sup>

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and inflexible, involving the death penalty. Jurors frequently did not convict because cases often related to maidservants who had fallen pregnant by their masters.

<sup>579</sup> cf. Brewer, 'The Wilkites and the Law' in Brewer and Styles (eds.), *An Ungovernable People* (New York, 1980) p. 128. Wilkes was a politician who helped establish the right of electors to choose their own representatives and he also vindicated the freedom of the press.

<sup>580</sup> Blackstone, *Commentaries on the Laws of England* – Vol. 4 (1765) pp. 277-278

<sup>581</sup> cf. Olson, 'Parliament, Empire and Parliamentary Law' in Pocock (ed.), *Three British Revolutions: 1641, 1688, 1776* (Princeton, 1980) p. 299.

<sup>582</sup> The socio-psychic submission of rights holds that legal recognition of rights is dependant on the social recognition and vice versa – cf. Stone, 'Should Trees Have Standing? – Towards Legal Rights for Natural Objects' (1972) 45 *Cal. L. Rev.* 450. By affording legal recognition the jury can enhance social recognition of the subject

<sup>583</sup> Lord Devlin 'The Conscience of the Jury' (1991) 107 *L. Q. R.* 398, 403-404 cites a number of examples of where the relatively consistent refusal of juries prompted legislative reform in England – e. g. the penalties statutorily imposed for certain driving offences, such as mandatory imprisonment for dangerous driving and a seven year sentence for death caused by dangerous driving had to be revised due to the 'perverse' verdicts entered.



More recent examples of jury nullification include the aforementioned Ponting case<sup>584</sup> where, on a charge laid under the Official Secrets Act, the jury acquitted the defendant in the face of a judicial summing-up which made it quite clear that in law the defense presented had to be disregarded. More pointedly, there is the U. S. case of *State of Massachusetts v. Allain, Carter, Clay & Ors.*<sup>585</sup> This involved student demonstrations against C.I.A. recruitment techniques on American college campuses.

The defense raised against the disorderly conduct charge was one of necessity and it included a claim that the actions were justified on moral grounds in order to prevent more serious crimes by the C.I.A. The jury accepted the submission and acquitted the defendants. Goodrich notes that this was the first reported case in which the defense of necessity, which has been regularly ruled out in nuclear weapons protest cases, was raised successfully. Admittedly, while its admission in a first instance Massachusetts case is unlikely to have significant ramifications in the common law world's conception of the defence of necessity, it does stand as a salutary reminder of the power of the jury.

South Australia provides an equally salutary example in the *Axe-Murder Case*.<sup>586</sup> This involved the killing by a wife of her husband who had subjected her and their family to lengthy periods of physical abuse and, on the night in question, had attempted to rape their daughter.

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<sup>584</sup> *R. v. Ponting*, referred to in Goodrich, *Languages of Law – From Logics of Memory to Nomadic Masks*, p. 207. Lord Devlin questions the citation of the "unjust and oppressive law" in this case as an example of jury nullification, for the jury did not react *inter alia* against judicial bias since the unwillingness to apply bad law is not bias – 'The Conscience of the Jury' (1991) 107 L. Q. R. 398, 402.

<sup>585</sup> *State of Massachusetts v. Allain, Carter, Clay & Ors.*, Transcript April 14-15, 1987, cited in Goodrich, *ibid*.

<sup>586</sup> Cited in Brown and Neal, 'Show Trials: The Media and the Gang of Twelve' in Findlay and Duff, *The Jury Under Attack*, pp. 130-131

This pressured the wife to murder the husband. A jury acquitted her and effectively seemed to be saying that justice demanded an acquittal in spite of the legal rules,<sup>587</sup> illustrating 'the difference between the application of legal technicalities and public morality.'<sup>588</sup>

It is further argued that the jury also confers legitimacy on specific prosecutions by the State in that every serious prosecution of an individual must be justified by twelve of their peers chosen at random from the community.

Devlin posited the common consensus by holding that:

'No tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen.'<sup>589</sup>

It is the legislative fear of the democratic power of the jury - the forceful opportunity granted the citizenry to give their opinion directly on the laws enacted on their behalf which has led to restrictions on the jury. This is clearly to be seen in the Criminal Justice and Public Order Act, 1994, among others, where numerous summary offences gravely restrict such vital political freedoms as rights of expression and assembly. By scheduling them only as summary offences the danger of the legislature usurping the 'casting vote' of the jury is avoided as is the danger that other non-legal discourses will be introduced into the determination of guilt or innocence. In support of this contention, Cornish has asserted that:

'Juries have played a minor role in the prosecution of political offenders. In the delicate areas of the right to express public opinions, the activities of Salvationists, suffragettes, Irish Home Rulers,

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<sup>587</sup> Primarily relating to the fact that the defence of provocation was not left to the jury. See generally, Donnelly, 'Battered Women Who Kill and the Criminal Law Defences' (1993) 3 I. C. L. J. 161; McColgan, 'In Defence of Battered Women Who Kill' (1993) 13 O. J. L. S. 508

<sup>588</sup> Loff, 'Provocation and Domestic Murder: The Axe Murder Case' (1982) 7 Legal Services Bulletin 52.

Fascists, Communists and others have kept the courts busy when disturbances have been created, but nearly always it has been the magistrates who have heard the cases'.<sup>590</sup>

Cornet's position is that jurors rarely strike a 'blow for democracy' and so should not really be celebrated for its stubbornness. But what is the position of the courts?

When the idea was floated for establishing a court of appeal, one of the arguments against such an idea was that allowing an appeal against conviction would undermine the role of the jury.<sup>591</sup>

This was, thus the recognition that following a judicial direction on the law, the jury is charged with the task of deciding the facts of a case and to determine whether or not the defendant has been proved guilty of the crime charged or a lesser crime.

The Criminal Appeal Act 1907 explains the ambit of its authority in section 4 (1):

'The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgement of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case, shall dismiss the appeal'...

Lord Bingham, in *Pendleton*, was at pains to demonstrate that the Criminal Appeal Act made provisions for the Court of Criminal Appeal to 'tamper' with a jury's verdict only if 'it appears' or 'they are of the opinion' that a conviction is unsafe upon a consideration of fresh evidence.

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<sup>589</sup> Devlin, *Trial by Jury*, p. 164

<sup>590</sup> Cornish, *The Jury*, p. 128. The potential of the jury as guardian of 'political prosecutions' is recognisable in the fact that, since *Ponting*, 'secret cases' in England have been pursued through the civil law, notably via injunctive relief thereby avoiding the inquisitiveness of the jury: e. g., *Spycatcher (A. G.) v. Guardian Newspapers* [1987] 3 All E. R. 316; (No. 2) [1988] 3 All E. R. 545

<sup>591</sup> Radzinowicz and Hood, *A History of English Criminal Law*, 1986, vol. 5 at p.765

A further assessment of his judgement would indicate that in any such case, the matter turns on new evidence.<sup>592</sup> Clearly, the only Court or body reasonably permitted to call a jury's verdict perverse would be the Court of Criminal Appeal and even then, upon a consideration of fresh evidence on an appeal against a conviction. This latitude to call a verdict perverse, it is submitted, the Court denies itself and for good reason too.

The evidence is fresh precisely because it was not available at the jury trial.

That being the case, any decision reached by the jury could only, hopefully, have been based on admissible evidence present at the time. The discovery of fresh evidence does not alter that position much less be the premise for declaring a verdict perverse.

There is some currency in the statement that the 'value of a jury's verdict lies in its unanimity, not in the process by which they arrived at it'.<sup>593</sup> However, given that unanimity has been swept away, attention may justifiably turn to that process.

Louis Blom-Cooper continues:

'...there can be no room in the due process of criminal justice for the jury to import factors outside the ambit of factual evidence'.<sup>594</sup>

This proposition is most startling in its breadth given that juries are used in criminal trials precisely in order to inject democratic values into the CJS – values which ordinarily, are outside the ambit of factual evidence and mostly outside the court. Those values include the qualities inherent in humanity.

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<sup>592</sup> S. 2 of the Criminal Appeals Act 1968, 'The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to whether the evidence appears to the Court to be capable of belief...'

<sup>593</sup> Lord Hewart C.J. in *R v Armstrong* (1922) 2 KB at 568; *Ellis v Deheer* (1922) 2 KB 113 per Bankes LJ at 118.

<sup>594</sup> Louis Blom-Cooper *ibid.*

If jurors are prevented, as Sir Louis proposes, from importing factors outside the ambit of factual evidence into the trial, that could well be the most powerful argument against the institution and indeed any process that involves human judgement. This is because the subjective element of a trial would become unnecessary. Thus, trial by jury or by experienced judges would become superfluous.

The issue then relates to evidence. Is there sufficient evidence to return a particular verdict? Is there any evidence to put the matter before a jury?

Who is best placed to interpret the evidence? Who is best placed to sift the evidence?

What is the quality of the evidence presented to a jury?

Damaska, as mentioned earlier, says that it turns on what evidence is presented to the fact finder. The Privy Council went further in *Crossdale*<sup>595</sup> when discussing procedural issues regarding submissions of no case to answer in jury trials.

An extrapolation of the reasoning provides some insight into the argument. That reasoning appears conclusive in support of the argument advanced here that to the extent that a verdict in a criminal trial is a matter for the jury, a perverse verdict does not exist.

Lord Steyn in *Crossdale* held that:

‘A judge and a jury have separate but complementary functions in a jury trial. The judge has a supervisory role. The judge carries out a filtering process to decide what evidence is to be placed before the jury’.

This is the prejudgement referred to earlier. Lord Steyn continued:

‘...the judge may be required to consider whether the prosecution has produced sufficient evidence to justify putting the issue to the jury’.

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<sup>595</sup> *Crossdale v R* (1995) 1 WLR 864, 871-3 (PC)

In other words, might a jury, presented with such evidence and properly directed, convict?<sup>596</sup> Lord Devlin was very succinct in declaring that:

‘...there is, in truth, a fundamental difference between the question whether there is any evidence and the question whether there is enough evidence. I can best illustrate the difference by an analogy. Whether a rope will bear a certain weight and take a certain strain is a question that practical men often have to determine using their judgement based on their experience. But they base their judgement on the assumption that that is what it seems to the eye to be and that it has no concealed defects.

It is the business of the manufacturer of the rope to test it, strand by strand if necessary before he sends it out to see that it has no flaw; that is a job for an expert. It is the business of the judge as an expert who has a mind trained to make examinations of the sort to test the chain of evidence for the weak links before he sends it out to the jury; in other words, it is for him to ascertain whether it has any reliable strength at all and then for the jury to determine how strong it is...

The trained mind is the better instrument for detecting flaws in reasoning; but if it can be made sure that the jury only handles solid argument and not sham,<sup>597</sup> the pooled experience of 12 men is the better instrument for arriving at a just verdict. Thus logic and common sense are put together to make a verdict’.<sup>598</sup>

This passage receives approval and is cited by Lord Steyn in his dissenting opinion in the Privy Council case of Crossdale cited above.

As observed, proof beyond a reasonable doubt is a matter for the jury and not the judge.<sup>599</sup> The judge will decide on whether or not there is sufficient evidence to go the jury. The jury will decide if the evidence presented is enough to reach a decision. If it has any doubt, it is expected to give the benefit of it to the defendant.<sup>600</sup>

<sup>596</sup> Or in the event of an appeal against a conviction and the admission of new evidence, the matter might be resolved by the Court asking ‘whether the jury, if they had knowledge of the fresh evidence would necessarily have come to the conclusion that they did’. R v McNamee (unreported), December 17 1998, Court of Appeal Criminal Division at page 5 and quoted by Lord Bingham in R v Pendleton *ibid*.

<sup>597</sup> Damaska argues that attention should thus focus on the quality of the evidence the jury has to consider.

<sup>598</sup> Devlin, P. ‘Trial by Jury,’ The Hamlyn Lectures, 8<sup>th</sup> Series (1956 republished 1988)

<sup>599</sup> The standard in a civil case tried by judge alone is ‘on balance of probability’.

<sup>600</sup> Reverse onus cases are fatal to this ruling.

Once that is done, the weight to be given to the evidence and the outcome of the case are matters for the jury. Neither the judge, nor any one else is as equipped or placed to return a verdict. If the judge determines that there is insufficient evidence to be put before a jury, he will declare a no case to answer. If he decides there is enough, the matter is left to the jury. If the judge thinks the matter should be stopped for reasons of due process, he will stop it and he will say that there is no evidence or no evidence capable of belief.

If the judge is not prepared to stop the case, he will reject the submission of no case to answer and say that the matter is one of credibility and weight for the jury.<sup>601</sup>

For as long as trial by jury remains a central part of our criminal justice system, the notion of a perverse verdict is a myth. It may be convenient to label a verdict perverse as part of the attempt to undermine or second-guess the system, but as Viscount Dilhorne observed in *Stafford*<sup>602</sup>:

‘While...the Court of Appeal and the House of Lords may find it a convenient approach to consider what a jury might have done if they had heard the fresh evidence, the ultimate responsibility rests with them and them alone for deciding the question’.

By extension and as a matter of observation, in the absence of fresh evidence and subsequent consideration by the Court of Appeal, there are only four other people that can legitimately call a verdict perverse. The first would be the guilty defendant who, due to what we might call ‘technicalities’, has been acquitted and who knows of his guilt. The second would be the victim in the event that he categorically knows of the defendant’s guilt but unable to prove it in court.

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<sup>601</sup> A Samuels, ‘No Case to Answer: The Judge Must Stop the Case: Galbraith’, *Archbold News*, 14 November 1996, 6,6.

The third would be an innocent defendant who has been convicted and the fourth would be the jury who, having agreed or unable to agree on guilt or innocence, nonetheless decides to acquit or convict<sup>603</sup> for reasons best known to it. However, since the acquitted 'guilty' defendant is unlikely to complain, the matter rests there. Since the 'knowing' victim has failed, by his counsel, to discharge the burden of proof, that is the end of the matter. And since the jury does not have to explain itself, the decision rests.

If the convicted defendant is able to identify an irregularity in the trial process or a question of law raised by the trial, he can resort to the appeal process to challenge the verdict.

It is submitted that the use of the word 'perverse' to describe a profound disagreement with a jury's verdict based on an objective assessment of the evidence is an understandable one. Nonetheless, it should be vigorously resisted as an affront to the principles of trial by jury. Thus, it might be helpful to refer to a verdict as 'unsatisfactory' rather than perverse. This is because an objective assessment, limited to factual admissible evidence, may predict the outcome of a trial. However, if on a combination of objective and subjective assessments, the jury delivers a verdict deemed inconsistent with the factual evidence, the objective observer may be forgiven for referring to that verdict as being an unsatisfactory outcome of a trial.

Unsatisfactory would be the description of a result whose subjective element explains the leanings of the jury and recognition that it may or may not have paid homage to factual evidence.

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<sup>602</sup> *Stafford v Director of Public Prosecutions* (1974) 56 Cr. App. R 256, (1974) AC 878 at page 281 and page 906

<sup>603</sup> Since s.8 Contempt of Court Act 1981 makes it an offence to divulge events during jury deliberations, we are to be informed by any jury that its decision was perverse. The only people likely to find out are those close enough to sit at the various dinner tables where each juror discourses his experience away from prying eyes and ears.



Perverse, on the other hand, acknowledges the usurpation of roles. However, as has been stated above, the weight to be given to any piece of evidence and a decision as to the outcome of a trial is a matter for the jury alone – at least until we change the role of the jury in our criminal trials.

In the recent case of *R v Wang*,<sup>604</sup> the Law Lords were confronted with the question ‘In what circumstances, if any, is a judge entitled to direct a jury to return a verdict of guilty?’

The appellant had argued that the judge may never do so. The Crown contested that view. The ruling is worthy of note. Citing *Stonehouse*<sup>605</sup> in Devlin’s ‘Trial By Jury’, Lord Salmon stated:

‘It is common ground that if a judge is satisfied that there is no evidence which could justify the jury in convicting the defendant and that it would be perverse for them to do so, it is the judge’s duty to direct them to acquit...it is agreed that a judge should withdraw a defence from the consideration of the jury if there is no evidence whatsoever to support it and he need not direct the jury on an issue not raised by any evidence’.

Finally, a jury’s verdict can never be said to be perverse unless the same jury judges it accordingly at a later date based on the same circumstances. This, of course, would be an impossible feat because those jurors would be operating with the benefit of hindsight quite apart from the fact that once a jury has been discharged, the matter is closed and they are never summoned as the same collective to rehear the case. The exact trial moments could never be recreated.

Nonetheless, judgement according to conscience appears to undermine the notion of a perverse verdict. This is because there is, inherently, a trade-off between the subjective and objective elements of assessment, we must assume, during

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<sup>604</sup> *R v Wang*, (2005) UKHL 9

deliberation. In such cases, a 'perverse verdict' is easier traced to the collective conscience of the jurors.

The question to be determined is whether a modern society should allow such conscience to be part of a democratic process and what benefits, if any, there are.

In an age of accountability, the mirage of legitimacy conferred upon a jury by tradition appears unstable. Yet, a verdict according to conscience appears to be the 'catch all' phrase used as the only way to explain the system's failure to make robust demands of the tribunal of fact.

On the other hand, if the jury is prevented from returning a verdict according to its conscience, there would be no need to have the system.

The matter would be left in the hands of experts who are better able to articulate a reason and dispense justice according to the letter of the law. But the matter is not left in the hands of professional non-deliberating judges. The jury must decide and according to Wang, the jury has the last word and this remains:

'An insurance that the criminal law will conform to the ordinary man's idea of what is fair and just...'

We shall now consider how it goes about doing this through the deliberation process.

Before that however, where do we stand on perversity? The simple requirement for an explained verdict would lay the ghost to rest.

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<sup>605</sup> DPP v Stonehouse (1978) AC 55 at 70, 79-80 and 94, Devlin, Hamlyn Lectures, 'Trial by Jury', 1956, p.78

## **Section Four - Chapter Fourteen – The Deliberation Process**

### **How Do Reasoning Skills Interplay With Juries' Decision-Making?**

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The ancient jury did not necessarily retire into a jury room to consider its verdict. At the Old Bailey in London, it has been reported that sometimes, the juries just huddled together in a corner of the room to discuss their position out of earshot. Thus, it was sometimes possible to arrange for the same jury to try several cases the same day because deliberations often lasted just a few minutes.

The deliberation process was not always arduous given that juries often had to acquiesce to the wishes of the judge or face punishment and the same jury would often return verdicts within a few minutes of getting together.

The modern jury, on the other hand, is 'quarantined' for the duration of the deliberation process. There is no restriction on how long they can deliberate although in the English courts since 1967, after two hours of deliberation, the judge may indicate that he would accept a majority verdict thus reducing the burden of protracted incarceration.

Just before they retire, the jurors receive instructions from the judge coupled with a summation of the case it has just heard. That is the extent of it.

As to the efficacy of deliberation, methods and system of deliberation or insights into reasoning and bargaining skills, the jury is left to its own devices. How the factors affecting a juror's judgment and the deliberation process interplay with juror strength of reasoning is a matter deserving further exploration subject to the provisions of the Contempt of Court Act (1981).

Here, this paper explores the effect of the deliberation process on the juror and the jury.

Is deliberation essential to democratic criminal trials? Or are its bargaining credentials circumscribed by the jury's inherent ignorance? Perhaps the answer lies somewhere in between. Deliberation may have an epistemic value, improving the quality of information and arguments. It may also be transformative, shaping beliefs and opinions. Deliberations may also be part of a conception of justice that constrains the authority of the jurors by requiring that procedures be justified in terms of reasons acceptable to those burdened with authoritative decision-making but outside the benefit of those without. Although appealing, on closer scrutiny, the epistemic and transformative arguments are limited by the scale and complexity of the trials and the pseudo-opinion upon which a verdict is based. But the reason-giving argument however, is persuasive whenever collective decisions, epitomized in a general verdict allow the burden of a decision to be imposed on the jury. Beyond delivering the verdict, the extent of the acceptance of presented evidence or any other criteria should be exposed.

The deliberation process is the phase where individual opinions are expressed and hashed out to produce a group decision. Through these discussions most juries reach a consensus.

Research indicates that deliberation can reduce biases that operate at the individual juror level.<sup>606</sup> This would suggest that deliberations have the potential to produce jury verdicts that are more consistent with legal and rationally defensible norms and probably affect the level of juror prejudice.

This effect, it is argued, may be limited to situations where legal instructions are robust and clear and tendered evidence is persuasive.

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<sup>606</sup> Kaplan, M.F. & Miller, L.E (1978). Reducing the effects of juror bias. *Journal of Personality and Social Psychology*, 36, 1443-1455.

Deliberation offers a panel of decision-makers the chance to pool information together, correct misunderstanding to the extent that they can and bargain with their opinions. By extension then, if jurors engage in deliberation, feeding on each other's reasoning skills, correcting each other's mistakes and recollections,<sup>607</sup> their comprehension of trial evidence and testimony should improve during deliberations. This is a debatable point because the process can also have an adverse effect depending on many factors including the personalities of the players. It is also possible that deliberation has the potential to promote personal ignorance and misunderstanding by re-enforcing prejudicial views when expressed by a majority or some outspoken juror. As we learn from *R v Connor*,<sup>608</sup> and *R v Mirza*,<sup>609</sup> the tyranny of prejudice is palpable especially when there is a minority opinion which can be assailed by the majority.

The recent cases of *Smith & Mercieca*<sup>610</sup> however indicate the difficulties and challenges inherent in jury deliberation and how sheer bloody-mindedness and prejudice can have a debilitating effect on participation and deliberation.

The current position is that the judicial system errs on the side of caution by not requiring an explanation and declaring the deliberations room sacrosanct.

We are admonished to start with the proposition that a tribunal, such as a jury, is presumed to be impartial until there is proof to the contrary.<sup>611</sup>

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<sup>607</sup> Diamond, S.S. & Levi, J.N (1996). Improving decisions on death by revising and testing jury instructions, *Judicature*, 79, 224-232. The authors claim that jurors showed a significant improvement in comprehension of legal instructions but only when a substantial majority began deliberations with a correct understanding of the relevant instructions.

<sup>608</sup> [2004] HL 2. There is recount of a letter sent by a juror to the judge days after the verdict indicating that 'when I raised objection to this and said that we must look at whether it was one or the other, they maintained their guilty stance and said that we could be here for another week...'

<sup>609</sup> [2004] UKHL 2. In this case, a juror who had written a letter to the judge days after the verdict indicated that when she pointed out the issue of prejudice, she was shouted down by the other jurors during deliberation.

<sup>610</sup> *R v Smith & R v Mercieca* [2005] UKHL 12. In this case, the HL published a letter written by a juror which detailed some of the discussions in the deliberation chamber.

This, in turn, potentially assists the perpetuation of prejudice. While the position can be justified on the basis that the reverse would be absurd, clearly, such a tribunal must be equipped with more than soft words to guide it through the deliberation process.

R v Smith shows that mere admonitions and judicial instructions, however robust are not enough to make straight a crooked jury mindset. Speaking on the competency of jurors to make decisions, Ellsworth<sup>612</sup> argues that the lack of attention to evaluating juror competency may be due to the fact that competent decision making is not clearly or operationally defined. Thus, to begin to evaluate a juror's competency, one must have a theoretical model of competent decision making.

The judicial system in England and Wales has no such models when it comes to trial by jury except its legal assumptions which are not always borne out by empirical studies by definition. In other words, deliver the evidence and we will consider divine your reasons based on our consideration of the evidence and our experience. Yet experience is a poor predictor of conduct.

Ellsworth's argument, when applied to the judicial system, would suggest that the lack of a requirement to explain may be due to the fact that the judicial system, at best, does not understand how individuals, untrained in the art of making decisions could articulate an explanation and at worst, is extremely reluctant to be prescriptive. Yet, prescription as to reason need not be autocratic. Trial by jury is a public service and the force of the judicial system is always available to prevail on those who answer the call. Requiring an explanation for a verdict can only be seen as part of the discipline of the system that negates what Louis Bloom-Cooper calls 'the apotheosis of amateurism'.

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<sup>611</sup> Le Compte, Van Leuven and de Meyere v Belgium (1981) 4 EHRR 1,21, para 58: Remli v France (1996) 22 EHRR 253, 262, para 38 in the opinion of the Commission: Sander v United Kingdom (2000) 31 EHRR 1003, 1008, para 25.

A modern criminal trial is, by all indications, an exercise in conjecture mixed with fluid rules developed over many years but again, based on conjecture. These rules which are hypothetical in nature preside over a real dramatic event. Yet, even when the theoretical positions of the exercise are recognised, the challenges posed by the trial process may lack sufficient details or be too complex for a single correct response from the tribunal of fact. In this context, if the decision-maker is neither taught nor instructed to minimize subjective elements and maximise objectivity as a platform for articulating a response to the question 'can you explain your verdict?' degeneration into legal chaos may be forgiven but not excused. There is little justification for leaving the outcome of such an exercise shrouded in speculation. Furthermore, decision-making is not a fine art and relies as much on evidentiary evaluation as it does on intuition. Group decision-making does not guarantee accuracy. However, it is submitted that a theoretical model of reason articulation needs to be developed in order to provide the yardstick that guides the jury. All groups, including trial juries are characterised, in part, by emotional dynamics that threaten to undermine their deliberations and decision-making.

This thesis contends that if a plausible account of such a process is made in a way that re-enforces the values expected of the process, the CJS would be benefited.

According to Thaman, the Spanish Constitution makes such a demand of the jury. It is, arguably, the closest that any legislature has come to demanding a succinct accountability of the basis for a verdict.<sup>613</sup>

It is worth noting that there has been no exploration of the relationship between the requirement to explain and accountability.

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<sup>612</sup> Ellsworth, P. (1989), Are twelve heads better than one? *Law and Contemporary Problems*, 524(4), 205-224

<sup>613</sup> See Thaman, S. C 'Europe's New Jury Systems: The Cases of Spain and Russia in Neil Vidmar (Ed.s) *World Jury Systems* (2000) Oxford University Press. Pp 319-348

It is also worthy of note that very little accountability is required of the jury beyond the remit of impropriety during the trial and the provisions of the Contempt of Court Act 1981 afterwards.

Juries are merely required to sit in on a trial and deliver a verdict following deliberations. In fact, strictly speaking, there is no requirement to deliberate. Juries are merely asked to retire and consider their verdict. Given that there is no way of determining the occurrences, in the main, of events in the jury room, one cannot categorically state that deliberation takes place when the jury retires. This, however, is a red herring.

Nonetheless, as has been stated, deliberation as a group has the advantage of providing a higher form of reasoning skills amongst jurors and is preferred to individual opinions proffered post-deliberation.

In arguing that juries will exhibit better reasoning skills than individual jurors, Tetlock<sup>614</sup> found that having to justify one's position to others with unknown views increases accountability. Thus, the deliberation process provides a platform for a juror to defend his opinions on an issue in a collective surround.

This leads to an increase in integrative complexity and helps to prevent individuals from becoming cognitively lazy in their decision-making.

A study by McCoy et al<sup>615</sup> into juror reasoning skills indicates some competence to explain a chosen verdict at a juror level.

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<sup>614</sup> Tetlock, P.E (1983). Accountability and complexity of thought. *Journal of Personality and Social Psychology*, 45, 74-83.

<sup>615</sup> McCoy et al. op. cit. at page 561



The study was designed to examine whether involvement in the jury process encouraged jurors to reason in a more sophisticated way than they would prior to deliberation and therefore individually and to identify, following Kuhn's<sup>616</sup> study, whether group deliberation yields better jury reasoning than individuals.

Their findings, when applied to the concept of juror decision-making and explanations, indicate that when given clear and specific instructions, it is possible that jurors can articulate an explanation.<sup>617</sup> In the event, we are really interested in good judgment and although this is a subjective element, good judgment requires an analysis of content in addition to laws, principles and axioms.<sup>618</sup> Good judgement, when exercised, may make it easier for the decision maker to explain himself as a collective.

The experience from Spain is also instructive. There, juries are required to answer a series of questions that lead the judge to articulate the reason for their judgement.<sup>619</sup>

This is what Auld L.J recommended in his report. The difficulties with this approach have been articulated in previous chapters.

It is submitted that jury deliberation allows a good interchange of ideas to take place that may sharpen reasoning skills.<sup>620</sup>

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<sup>616</sup> Kuhn, D., Weinstock, M. & Flaton, R. (1994). How well do jurors reason? Competence dimensions of individual variation in a juror reasoning task. *Psychological Review Science*, 5 (5), 289-296.

<sup>617</sup> The study utilised a video-tape of an actual murder trial. The participants were 104 undergraduate students at the University of Wyoming who received research participation credit for their general psychology course. The researchers concede that using students in this sort of work has its shortcomings and represents a narrow range of age and education. They point to the usual caution that should be exercised when mock jurors are used and the study was aimed at juror reasoning skill as opposed to jury level.

<sup>618</sup> Girgerenzer, G. (1991). How to make cognitive illusions disappear: beyond 'heuristics and biases'. *Eur. Rev. Social Psychology*. 2: 83-115, Girgerenzer, G. (1996). Rationality: why social context matters. In *interactive minds: Life-span Perspectives on the Social Foundation of Cognition*, ed. P. Baltes, UM Staudinger, pp.319-46. Cambridge: Cambridge University Press.

<sup>619</sup> Thaman. Op. cited.

<sup>620</sup> The advantage to be gained include a verdict that is more objective and less subjective but still contains elements of human experience. With higher reasoning skills, it becomes easier to articulate an explanation for any subsequent decision.

This, in turn, may lead to decisions consistent with the weight of evidence on the one hand or the jury's sense of justice on the other.

Either way, it will provide clarity but may not necessarily comfort one side or the other. The rationale for such a decision will be manifest and based on it, an informed system of criminal trials will develop.

Although a jury deliberates in secret in a trial that is, in the main, public, it is not a private institution. Most of the research into jury decision-making would probably become superfluous if we did have the system of accountability embedded into the judicial process when it comes to juries.

Whether or not this requirement would alienate potential jurors is worthy of further research. However, it is argued that an engaged panel of decision-makers is likely to be perceived as useful, robust and sufficiently an attractive option thus nullifying any potential adverse effect of the requirement to explain.

It is the submission of this paper that where the requirements are clear and unambiguous, a jury is much more likely to follow as directed and that much of the factors that may affect a jury's verdict are either sustained or weakened by the deliberation process.

The jury deliberation process is, by definition, a private matter<sup>621</sup> involving no other actors in a criminal trial except the twelve members of the jury.

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<sup>621</sup> McCoy, M.L, Nunez, N. & Dammeyer, M.M (1999) The Effect of jury deliberations on Jurors' Reasoning skills, *Law and Human Behaviour*, vol. 23, No.5, 557-559.

Statutory provisions in the UK<sup>622</sup> and judicial rulings in the US<sup>623</sup> deny access to the jury room, observation, recording, listening or asking questions of the jurors of decisions reached, arguments advanced or votes cast. As a result, there is scant material on which any conclusion can be drawn.

The literature that exists is largely based on studies of mock jurors and post-deliberation interviews where these are allowed by law. The literature is also largely from the social scientific community.

The research on juror's cognitive reasoning has concentrated, in the main, on the decision-making process of individual jurors. One of the categories developed has been the cognitive model of decision-making. This category borrows from cognitive theory and information processing approaches.<sup>624</sup> Other models have been developed. However, all of them attempt to describe decision-making by examining how evidence is mentally represented by jurors, how evidentiary facts are stored and later retrieved, the cognitive strategies used during the trial process and how the system monitors the decision-making process.<sup>625</sup> With such emphasis, cognitive theorists tend to reduce the jurors' task into identifiable steps in order to investigate the interplay between the information load due to trial complexity,<sup>626</sup> task specific strategies such as note taking<sup>627</sup> and how that interplay affects jury decision making.

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<sup>622</sup> S. 8 Contempt of Court Act 1981

<sup>623</sup> For further details, see Wrightsman, L.S., Nietzel, M.T. & Fortune, W.H. (1994). *Psychology and the legal system*. Pacific Grove, CA: Brooks/Cole

<sup>624</sup> Horowitz, I.A., Forsterlee, L. & Brolly (1996) Effects of trial complexity on decision-making. *Journal of Applied Psychology*, 81, 757-768. See also Pennington, N. & Hastie, R. (1986). Evidence evaluation in complex decision making. *Journal of Personality and Social Psychology*, 51, 242-258.

<sup>625</sup> Hastie, R. (1993) Introduction in R. Hastie (Ed.), *Inside the juror*, New York: Cambridge University Press.

<sup>626</sup> Horowitz et al, *ibid*.

<sup>627</sup> Forsterlee, L. & Horowitz, I.A. (1997). Enhancing juror competence in a complex trial. *Applied Cognitive Psychology*, 11, 305-319

In their study of mock jurors, Hastie, Penrod and Pennington<sup>628</sup> discovered that jurors make sense of the trial evidence by constructing a story, in their minds, to fit the events being played out in court. Thus, they proposed a story model.

The story was based on the evidence the particular juror found to be most compelling and any evidence that was inconsistent with the juror's story was rejected. The model was made up of three stages:

First, the evidence is organised into one or more plausible accounts of events. This is influenced by the juror's experience and general knowledge about human purposive action and episode schemas.

Secondly, the verdict categories are established, essential characteristics for each verdict are considered as well as assessment rules for each verdict.

Finally, the best match between story and verdict is chosen.

There are several problems with these models. As Hastie<sup>629</sup> concedes, '...at present, none of these models is pre-eminently successful' in predicting the behaviour of jurors whether actual or mock. In addition, there is no recognition for the possible individual differences in juror reasoning skills nor the impact of demographic considerations on these skills. It is possible that some jurors may only entertain one story during the trial process and thus would be less competent or sophisticated in the way they process information. Thus, the evidence presented would be set against just one possible story.

If this happens and if it becomes evident that a juror was unable to overcome some personal mental and ideological reticence in reaching a verdict, doubts would rightly be entertained about his fairness.

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<sup>628</sup> Hastie, R., Penrod, S.D. & Pennington, N. (1983) *Inside the jury*, Cambridge, MA: Harvard University Press

<sup>629</sup> Hastie, R. (1993) *ibid.* at page 3.

However, since a verdict is general and is never followed by an explanation, the reasoning skills of jurors as individuals remain an unknown territory. The implications for the fairness of a trial are far reaching. A juror's deficiency at reasoning skills would affect the interpretation of the evidence in a certain direction. Yet, there is no way of testing this skill.

On the other hand, a juror with better reasoning skills would possibly have a number of possible stories against which to set the evidence.

He would know that there are always several possibilities in a given situation and would have the ability to conceive of or develop alternative and possibly counter arguments. This would allow him to generate other theories and alter his position as the evidence is presented and the debate ensues. He would also be able to make coherent contributions to the debate. As Kuhn argued:

'The ability to conceive of counter arguments is thus as fully critical as the ability to conceive of alternative theories. In the absence of the ability to generate counter arguments, the ability to evaluate the correctness of one's own theory is at best, limited.'<sup>630</sup>

In this context, the story model is limited to the extent that it does not acknowledge a juror's ability to construct a theory outside of his sphere of experience. In other words, he may recognise the fallibility of his experience in light of the evidence presented and yet lack the ability to propose or develop a counter argument against himself.

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<sup>630</sup> Kuhn, Deana, *The Skills of Argument*, (1991) Cambridge University Press, pp. 266-267

When this ability is lacking in the juror, it is argued that the individual experiences what psychologists have called the theory of cognitive or pre-decisional dissonance as proposed by Leon Festinger<sup>631</sup> and further demonstrated by Festinger and Carlsmith in 1959.<sup>632</sup> These researchers proposed that dissonance can influence judgement and decision making. According to this theory, subjects or jurors in our case, try to reduce dissonance (defined as a negative drive state) whenever possible. In other words, people are motivated to reduce or avoid psychological inconsistencies. Thus, people experience cognitive dissonance when they simultaneously hold two thoughts that are psychologically inconsistent.

If a juror believes that women are invariably less likely to commit violent crimes and yet is confronted by evidence of such culpability, he would experience cognitive dissonance and would attempt to reduce the inconsistency perhaps by rationalising the phenomenon or attempting to shift his opinion. In such a case, the story model would seem to be in abeyance. Instead of constructing a story that best fits the evidence, the juror's dissonance would be mitigated by his attempt to construct a counter argument or alternative theory against his long held belief. However, an individual does not necessarily rely on primary evidence to argue against himself. In order to do that, he must be able to envision the possibility that his theory or story is incorrect and must also understand what evidence would show it not to be correct. He must then seek and confirm the absence of such evidence to sustain his opinion. In the process, he might develop alternative theories or persuade the others of its correctness. In any event, the pressure to feel consistent will lead him to bring his opinions and beliefs in line with his ultimate voting behaviour thus reducing his dissonance.

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<sup>631</sup> Festinger, L., (1957). A theory of social cognitive dissonance. Evanston, IL: Row, Peterson

<sup>632</sup> Festinger, L., & Carlsmith, J. M (1959), Cognitive consequences of forced compliance. *Journal of Abnormal and Social Psychology*, 58, 203-210

In the end, the extent to which jurors have employed competent decision-making strategies in approaching deliberations may affect their final verdict.<sup>633</sup>

The jury deliberation process, it is argued, provides an opportunity for jurors to trade experiences and concentrate their thoughts on trial evidence and less on extra-legal and possibly biasing information. This assertion is by no means conclusive of the process. This is because in order to reach a verdict, objective and subjective evaluations are manipulated. However, since we have no access to the jury room, we can merely speculate on the point.

Such a process, when subjected to judicial requirement for an explanation following a verdict, is more likely than not to produce an articulated response.

It is clear from these analyses that the process of jury deliberation is a critically important factor in the ultimate outcome of the trial. Certainly the deliberation practices, especially the timing of the first vote, are related to the likelihood of juror deadlock. Also important are the interpersonal dynamics of the jurors during deliberations. Juries that hung, according to Festinger, reported having more trouble remembering the evidence and law, having less thorough discussions of the evidence during deliberations, experiencing more conflict among the jurors and more domination by one or two jurors, and having a larger presence of unreasonable people on the jury. These findings suggest that jurors might benefit from guidance on how to conduct effective small group discussions.

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<sup>633</sup> McCoy et al. op.cit. at page 559.

## Chapter Fifteen – Juxtaposing Ambiguity With Clarity of The Law

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Archival research, studies using mock juries and shadow juries, post trial interviews (where they are allowed) and books by ex-jurors indicate a decision making process in criminal trials that is as complex as it is impregnable in many ways. Part of the mystique of the jury is the fact that it is made up of ordinary citizens who are not required to be formally trained in the art of decision making and even more compelling, they are required to take all their predispositions into the court and the jury rooms. It is not such a surprise that there appears to be a relationship between trial by jury and democracy amongst the nations employing the common law system. Trial by jury, it has been argued, gives the citizen a stake in the society of which he is a part.

Research indicates that, on balance, jurors do take their responsibility seriously and attempt conscientiously to achieve justice. This is not in dispute. Part of the requirement not to explain a verdict is shrouded in irrationality and the need to answer a question unequivocally. Devlin, celebrating and rationalising this concept, concluded:

‘It is the oracle deprived of the right to be ambiguous. The jury was in its origin, as oracular as the ordeal: neither was conceived in reason: the verdict, no more than the result of the ordeal, was open to rational criticism. The immunity has been largely retained and is still an essential characteristic of the system.’<sup>634</sup>

The eminence of the jurist almost intimidates. Yet, it is submitted that such sentiments, robust and colourful as they are, underline a modern challenge.

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<sup>634</sup> Devlin, P. ‘Trial by Jury’ (London) 1956, 14



Can we continue to suffer an ancient mechanism that appears ill at ease with modernity on the basis of fear of ambiguity? Ambiguity,<sup>635</sup> in this case, is supposedly nullified by the straight answer 'guilty or not guilty'. The matter rests. Yet, we know that the complexity of the case is almost left behind a locked door. In the Proof of Guilt, Glanville Williams<sup>636</sup> recounts an occasion when a defendant was charged with attempted suicide while being drunk. The verdict was an ambiguous one of 'guilty but of unconscious mind'. This verdict is similar to that delivered by Bushell and his men following the trial of William Penn. This was, clearly, a defective verdict as the accompanying words appeared to contradict the verdict. Apparently, in those days, the jury could give an explanation for its verdict because as Williams continues, in its accompanying note, the jury 'evidently intended it as an acquittal, the word 'guilty' meaning only that the accused had done the act charged'. The jury found however, that the mens rea for such a crime was absent. On a review of the evidence, the judge demonstrated that the defendant was cognizant of his action and the jury was then directed to reconsider its verdict. It returned a guilty verdict. Williams concludes that if the jury had expressed its opinion in the correct legal form of 'not guilty', the ambiguity would have disappeared and the defendant would have walked free.

An analysis of this account would tend to lend credence to the notion of the unexplained verdict given that such explanation may, as in this case, encumber justice. It however begs the question whether ambiguity is synonymous with clarity of the law and justice. If the jury found the defendant not guilty, it would make reason stare given that the evidence for culpability was clear and raise the spectre of a 'perverse' verdict.

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<sup>635</sup> A jury will be directed to reconsider its verdict only if it is ambiguous: Crisp (1912) 28 TLR 296, 76 JP 304, 7 Cr. App. R 173

<sup>636</sup> The Hamlyn Lectures, 3<sup>rd</sup> Edition, London, (1963) p.264

If the verdict was guilty, it negates whatever sympathies the jury might have had for the mitigating circumstances. Either way, ambiguity may have been removed but the law is made no clearer or more just. Of course, the issue is not about the justice of the law. Yet the jury's verdict touches on both its efficacy and justice. Given the difference in time and the complexity of modern society, the question of ambiguity must be answered in the negative. Indeed, this highlights the fact that trial by jury is neither a fine art nor an exact science. It could be argued that the verdict of a jury is, by definition, ambiguous. When the verdict is delivered, we can only speculate on what the reasons were for it. Thus, while the effect of the verdict is decisive, it is intellectually unhelpful and provides no understanding of the workings of the CJS. Responding 'yes' to the question 'have you eaten?' does not take into account what I ate and when I ate and is only useful if it is an end by itself. It might just have been a slice of bread which may not provide the nutrition needed for a sustained physically strenuous activity and yet would be factually correct. 'What did you eat and when did you eat?' might be a more helpful enquiry. The answer may determine whether or not I may be judged fit to undertake a particularly strenuous exercise especially if that is the reason behind the question.

'How do you find the defendant, guilty or not guilty?' The trial process of which a jury verdict provides a culmination suggests that the question and its answer are part of a process in an ill-structured drama. The response is generally an anticlimax because the process continues either to a discharge or committal. It also acts as a catalyst but into whose domain none can venture except the jurors. Its catalytic nature however, at best, may occasionally lead to an appeal and at worst, provides for speculation and to that extent, outside the ambit of black letter law, ultimately futile.

If the question was followed by the logical extension 'on what grounds'? progress, however haltingly, would be made.

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### Group Dynamics

What does a juror bring with him into the deliberations? What contributions does a juror make to the process? In order to understand how a jury works relative to decision making, we must address the issue of how a juror thinks. It is, of course, a minefield. Although we have previously articulated the factors that affect and influence a jury's verdicts, it is important to explore group dynamics by first exploring a juror's emotional and dry reasoning perspective and how he approaches the role he plays as part of a group charged with making a critical decision.

Sir Louis Blom-Cooper took the view that jurors should not import factors outside of the trial process in their assessment of the evidence and reaching a verdict. Presumably, this is on the grounds, as Elster<sup>637</sup> observed, that since emotions are irrational and dangerous forces, they should be excluded from public deliberations. However, it is submitted that since emotions are inherent in the human race and appear to be the basis of lay participation in criminal trials, the attempt to restrict juror deliberation to a reasonably objective dialogue is fraught with difficulties and ultimately, ineffective.

It is therefore important to recognise and appreciate that emotions will always and do play a big role in a jury's decision. The issue is how best to minimise its impact and ensure that it enhances rather than damages the decision-making process.

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<sup>637</sup> Elster, J. (1998), 'Introduction' in J. Elster, *Deliberative Democracy*, Cambridge: Cambridge University Press.

The writings of Wilfred Bion<sup>638</sup> described by Bleandonu<sup>639</sup> as one of the most influential figures in the post-war psychoanalytic movement, are instructive in understanding the impact of emotional forces within group deliberations and decision-making. The concept of Group Relations is ascribed to him and this uses psychoanalytical and systematic approaches to work with groups in various organisational settings. The theory informs a number of key aspects of political theory.<sup>640</sup> Bion argues for a more relational approach to deliberations and expresses concerned understanding for what he called our 'inalienable inheritance as a group animal'.<sup>641</sup> He places this theory in a primitive grammar of the emotional life of groups and analyses them in terms of three fundamental emotional configurations which he calls basic assumptions and which are, typically, invoked as a way of dealing with individual insecurities. Bion's three basic assumptions provide examples of certain kinds of group emotional culture. We shall explore these in turn as they relate to juries as a collective.

Basic assumption dependency corresponds to a culture of willed and willing subordination, a resource-less dependency on an accepted wisdom. Thus, any feelings apart from love, wisdom and adoration towards this figure-head are unacceptable and any one questioning the accepted wisdom will be shouted down. This can be seen in the received wisdom of a community whose sense of morality has been violated and finds itself falling back on dogma or prejudice as the basis for its allegiance.

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<sup>638</sup> Bion, W et al (1998)

<sup>639</sup> Bleandonu, G (1994), Wilfred Bion: His life and works 1897- 1979, London: Free Association Books

<sup>640</sup> Alford, C.F. (1994), Group Dynamics and Political Theory, Cambridge, MA: Harvard University Press.

<sup>641</sup> Bion, W.R. (1961) Experiences in groups and other papers, London: Tavistock Press at page 91

We only need to look at the Salem Witch hunts which began in 1692 in the USA for a historical perspective.<sup>642</sup>

In the context of the jury, the dependency centralises on the judge, the most charismatic and persuasive lawyer, the defendant or victim or the jury foreman.

Basic assumption fight-flight corresponds to a culture of paranoia and aggressive solidarity in which the basic group mobilises to defeat an imagined internal or external enemy. The only feelings entertained here are those of fear, suspicion and hatred of the object of the contention. Again, xenophobia and the witch-hunt of sex offenders are fine examples.

This sort of assumption will obtain where a jury feels that it must make an example of a particular situation to send a message to the wider community at large to desist from such actions even if the defendant in the case is innocent. The sense of outrage caused by the criminal act charged overrides the rational thinking of the deliberation.

Basic assumption pairing corresponds to a Salvationist culture. This is not directly applicable to our quest except to the extent that conviction would appeal to the sense of safety of the jurors thus making the state the saviour. It will not be considered further.

In considering the above scenario, one can see how the system can be held hostage to emotional tyranny. In other words, the prevailing assumption imposes a sort of group think and group feeling into a group thus ensuring that only certain ideas and beliefs are accepted. In jury trials, there is scant evidence of this especially because we simply do not know in England although jury researchers in the US and elsewhere are better informed. Nonetheless, it would be unfortunate to discount its presence completely especially as juries deliberations are sacrosanct.

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<sup>642</sup> See generally Dwyer, W. (2002), *In The Hands of The People*, Thomas Dunne Books, St. Marten's Press NY.

The point though is that such group-think, when it is biased and un-objective may have the effect of alienating dissenters or entrenching prejudice.

Earlier, we considered deliberation as a way of cancelling prejudices or in some cases, perpetuating them. Thompson and Hogget<sup>643</sup> argue that it is not that no one will listen to dissident voices: the point is that in all likelihood, they will be subject to attack.<sup>644</sup>

Hogget et al argue that the basic group can shift between these assumptions from moment to moment or in specific circumstances, one particular assumption may persist for a longer period.

Taking up the argument, Bion submits that alongside the basic group, there often exists the work group which operates scientifically. In other words, adapting the situation to a criminal jury, while some members of the jury may engage in emotionally driven arguments, others look to evidence analysis to reach a decision. This begs the question as to what specific skills and objectives the jury as a group must have to achieve its goal. This is, of course, complex. For one, it is argued that they must stay focused on the job at hand and direct their energy at the evidence tendered. The matter of staying focused is greatly assisted by good preparation by the court system in terms of the process and the procedure for articulating a reasoned verdict.

This however, does not take us very far and indeed, making the wrong decision could be the product of concentrated effort. Bion provides a more cogent position that is consistent with the thrust of this paper.

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<sup>643</sup> Thompson, S & Hogget, P, (2000), *The Emotional Dynamics of Deliberative Democracy*, Policy and Politics, vol., 29, no.3

<sup>644</sup> Hogget, P. (1998), 'The Internal Establishment' in P. Bion-Talamo, F. Borgogno and S. Merciai, *Bion's Legacy to groups*, London: Karnac Books.

He suggests the following:

1. The group must have a clear goal
2. The group must have a sense of direction
3. There should be clear boundaries between it and other groups
4. There should be no rigidly defined internal sub-groups – each person's contribution should be valued.

We shall consider these points in turn in the next chapter. For now however, we shall turn attention to the dynamics of these groups within a group.

Thompson et al argue that in contrast to the emotional tyranny of the basic group, the work group's approach mitigates the effects of the affective regime.

It is of great interest that given the fact that a jury must reach a decision or be declared hung and be discharged, these two groups learn to co-exist, albeit uneasily within the framework of the deliberation. Again, given the confidentiality of jury deliberations in the UK and given the fact that the majority verdict has been with us for some time, it is difficult to determine just what the splits might have been prior to the verdict unless, of course, the verdict is unanimous. Even then, we can never tell whose arm was twisted if any.

Insecurity is a basic but constant feature of every one's nature and to that extent, it is never feasible to demand that emotions be completely suppressed. This insecurity and their emotional inclinations are merely latent during deliberations and could be unmasked at any given moment. The work group, as identified by Bion, because it is sufficiently aligned to rationality, it is argued, should prevail and to that extent, may protect itself from emotional affectations. It may, in fact, be able to harness the emotional leanings of the basic group to drive the deliberation to a conclusion.

This point, of course, would assume that the work group is as vocal and authoritative as it is scientific. What that conclusion might be, may be dubious. However, such dispassion makes it easier for reason articulation to justify the verdict.

One must proceed with the recognition that a particular emotional culture of a group can create fertile ground for sentimental communication. Criminal juries generally elect authoritative males as foremen.<sup>645</sup> In addition, in her study of gender dynamics in juries, Ellsworth observed that men speak more often, at greater lengths and are more likely to interrupt other speakers than women.<sup>646</sup>

Thus, a jury with polarised emotional dynamics is more likely to look up to a juror or group of jurors who are authoritative and exude calm reasoning. In most cases, that figure head is a man with those characteristics. His election may have very little to do with leadership but more to do with brazen brashness communicated through the medium of emotions.

Emotion is not the only factor that exerts pressure on decision-making. However, with the singular exception of the strength of evidence, very little else comes close. In fact, even the strength of evidence can instigate its own emotional dynamics especially if opinions are split and a consensus is difficult to reach or the evidence is hotly contested. The sentimentality may manifest itself in various guises. While the single dominant figure may provide good leadership, those of shy demeanour may find it hard to get their views across and may end up ratifying the decision of the vocal majority.

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<sup>645</sup> Ellsworth, P.C. (1989). 'Are twelve heads better than one?', *Law and Contemporary Problems*, vol. 52, no. 4: 205-24

<sup>646</sup> Marder, N. S. (1987) 'Gender Dynamics and jury deliberations', *Yale Law Journal*, vol. 96: 593-612



There is a further point. Earlier, this paper adverted to the summing up by the trial judge. Group Relations theory describes cases where a group finds or creates allegiance to the authority of the judge and what he represents.

This becomes a reference point against which the jury measures its performance.

In some instances, juries find themselves unable to comply with some of the judge's instructions. Yet, in other instances, if the jury is held sufficiently hostage by a dependent culture, then a slavish adherence may skewer the democratic ideal and affect deliberation and verdict. Democracy itself, observe Thompson et al, may come to be regarded as a weakness that needs to be destroyed with the group deliberations. It therefore becomes necessary to guard against such mentality and ensure that democratic deliberation takes place and that the instructions of the judge do not stand in the way of this.

It has been observed that some criminal juries unduly restrict their deliberations on the basis of too slavish an interpretation of the judge's instructions. Ellsworth observed that procedural instructions are often used 'primarily as a weapon to close off lines of argument that a juror disagreed with' and generally, took the form of 'we can't speculate about that' or 'we're not allowed to consider that'.<sup>647</sup>

This highlights the absence of a system-driven trial. The argument of this paper is that the management of the jury should be a matter for a robust system enforced by the authority of the court and not driven by dependency on the judge. In other words, provide a system and a list of clear guides as to what is expected from the jury and let discipline and adherence prevail.

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<sup>647</sup> Ellsworth, *ibid*

As we make progress into the 21<sup>st</sup> Century, there is a strong argument that an informed jury system capable of delivering a reasoned verdict is as valuable to the CJS as it is to democratic growth. Understanding the dynamics of groups may assist us in devising the appropriate format for reason articulation.

Building or creating a system based on clear expectations and guidelines will take the guess work out of the equation and ensure that accountability is ingrained in the system in the manner espoused here.

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### **The Jury As a Repository of Community Conscience**

The evidence from this literature review thus far, falls into three categories.

The first is that juries reach their verdicts on many extra-legal factors in combination with admissible evidence. This is against the grain of objectivity as argued by detractors of the system. These factors that impinge on the final verdict are inevitable components of humanity and human experiences. They are present in the system not as concessions to human frailty but as indispensable relics of our humanity. They are, invariably, based on value judgements which are products of our environment, our cultural and religious backgrounds, our social status and many more factors that are subtle and, in the main, emotional and unquantifiable.

The second is that the jury acts as the repository of the community's conscience and by implication, its prejudice. It could also act as the guardian of that conscience to the extent that community conscience is demonstrably present. This is difficult to gauge in a diverse, socially divergent and multi-cultural community.

Devlin said that the jury system was created by judges to 'help them reach the right decision'. It would appear that the extra purpose is to alleviate the judge of the difficulty associated with decision making.

Although it is not widely admitted, even judges may be prejudiced by personality, social status, culture and the tyranny of experience and dispassion. It is an unpleasant thing to have to pass judgement on another citizen.

The anonymity of the jurors makes it easier not only to deliberate on the state of the law, the moral approbation of the defendant's conduct and the relationship with society's level of tolerance but also to pass judgement in a seemingly detached fashion without having to live directly with the weight of that decision in the glare of publicity or the ignominy of personality.

The third point is that with the singular exception of the application of the rules of evidence and rules of procedure, there is virtually no other check, as such, on the jury. Thus, it reigns supreme within the mandate given to it. That it may ignore any instructions given to it or any evidence presented in court is undeniable.

That it may do so with impunity is established. What is more, the sanctity of the jury room and the inscrutability of the verdict make this a potent power. This is not to conclude that juries ignore relevant material. However, since there exists no criteria for measuring verdict accuracy and weight given to any piece of evidence by the jury, any commentary on the matter is purely speculative.

The underlying conclusion then is that the nuances of a trial are complex and prima facie, militate against an explained verdict. For that reason, the jury is not competent to articulate an explanation for its verdicts in a way that would prove beneficial to the CJS. This is not to conclude that the jury ultimately cannot. It merely recognises the fact that given the way criminal trials are conducted and the rules that apply and given the indifference with which jurors are treated, juries will continue to be incompetent at articulating reasons for their verdicts. It is argued that nothing in the reviewed literature indicates an incompetent jury system.

Indeed, no system would entrust the freedom of another citizen to the hands of a body that was manifestly incompetent to evaluate the evidence. That would not only be a mis-judgment but also a mis-reading of the commentary. However, here lies the truth of the matter.

The jury is seen as competent and on balance, proves itself to be so. A jury trial is an appeal to innate human sense of duty and those who sit as jurors do all they can to come to what they deem to be a just verdict. The jury is not, as it stands, equipped by training, education or trial procedure to articulate a reason for its verdicts.

It is also worthy of observation that there is no judicial requirement or attempts to instruct the jury to be ready to explain itself. It remains to be seen what effect such a requirement would have on the deliberation process and the subsequent verdict.

However, when the demands of a modern democracy are juxtaposed with the efficacy of an explained verdict and when evidence shows that decision-making bodies can explain a verdict provided strict guidelines are set, it becomes manifest that a place for the explained verdict in the English CJS is one that is both desirable and possible.

This leads fluidly into an exploration of the relationship between our system of adversarial trials and the search for truth.

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### **The Adversarial Inheritance**

The ordeal of fact finding in the adversarial system appears to treat truth as a function of the leverage of combative weakness of one side or the other. The nature of the system demonstrates that there is 'more to engaging in arguments successfully than mastery of the skills...' <sup>648</sup> There must be a point to the argument which is clearly understood by the contestants.

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<sup>648</sup> Kuhn, D. *The Skills of Argument*, Cambridge University Press (1991).

In every system of law, there are a series of goals to be achieved by the justice system. Some of these goals are explicitly stated. Others are implicit in the system. Either way, the nature of the objectives, as an accretion of the community's values, would militate against personal or emotional antagonism.

Yet, the adversarial system of trial, while acknowledging the transitory nature of the quest, is fraught with the infusion of extra-legal factors into the system.

Nothing energises the judiciary as much as the high drama of a criminal trial or a high profile civil matter involving a celebrity or vastly substantial sum of money. The actors do not disappoint either. Those who find themselves pawns in this high drama often watch with bemused expressions and intimidated anxiety as the theatre unfolds before them. Jurors, the most innocent actors also happen to be the main catalysts. They, after all, make the final decision. The judge, the umpire ensuring fair play, remains aloof. The key protagonists are the opposing counsels. The prosecution must prove its case beyond a reasonable doubt in criminal cases or a balance of probability in a civil case.

Trial by jury and by definition, the adversarial system, is largely a clash of wits between opposing counsels. As EP Thomson observed in his *Writing by Candle Light*, the jury, the passive arbiter of the facts, watches back from the box. But this is just one of its characteristics. The striking point however, is that the contest, in this case, is between the ideological sentiment entrenched in the system – that truth can be determined by oracular combat - and the reality of the outcome – a compromise of personal opinions sifted in the heat of deliberation. This outcome exposes the adversarial system not as an exercise in arriving at the certainty of a case by determining what really happened but one of what can be believed to have happened

based on an evaluation of available and admissible evidence. Proof, in this case, is more illusory than tangible or what Isaacs calls 'constructive truth'.<sup>649</sup>

The curious thing is that in an age of high technology, the judicial system is yet to develop a more effective way of recording, presenting and evaluating evidence beyond the cobbled adversarial system. Constructive truth therefore is permanent.

But the matter is more serious than that and underlines our attachment to the system.

Despite the noted and notable aloofness of both judge and counsel in the English courts and the grandiose atmosphere that prevails during a trial, a criminal case is a deeply personal event. With the possible singular exception of the jury, the main actors in the drama have a legal axe to grind. From the prosecution employed to ensure the interests of justice, gather and present evidence persuasively enough to obtain a conviction to the judge whose role as umpire is also to ensure that justice is both fair and seen to be fair through to the defence counsel who is motivated by his allegiance to the courts, duty to his client and self preservation in the form of a victory against the prosecution. But the jury is not entirely passive.

As members of the community in which the crime has been committed, each juror has a constructive and indirect stake in the outcome of the trial – a factor that gives the jury a unique position in the CJS. It is also a factor that affects the confidence of the citizen in the criminal justice system.

Zuckerman wrote that:

'In the criminal field, there are two central concerns in relation to which the jury can reflect public sentiment: the need to protect innocent people from conviction and punishment and the need to protect the community from crime'.<sup>650</sup>

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<sup>649</sup> N. Isaacs, 'The Law and the facts', 22 Col L Rev 1,6 (1922) quoted in AA Zuckerman's 'Principles of Criminal Evidence, Clarendon Press (1989) p34

<sup>650</sup> Zuckerman, op. cited at page 38

Yet, it is submitted that the jury does not apply the same standards of judgement in both instances. The standards of 'honest reasonable' men is a transitory one in any society and more so in a non homogenous one.

After all, a jury of a particular racial composition may vote to convict a perceived outsider or stranger on the basis of his alien heritage in defiance of the evidence. Posner makes a cogent submission in writing that 'these two social concerns are not necessarily complementary. They (jury) may argue for different standards of fact-finding because the more we protect innocence by increasing the standard of proof of guilt, the fewer guilty people we are likely to convict and the weaker will the protection from crime be'.<sup>651</sup> The matter then rests on utilitarian principles as sustained by the community's prevailing prejudice at the time. It used to be quite natural to enslave people. That was the prevailing culture. Truth, in that case, would be consistent with the prevailing culture and all court cases were decided accordingly. These utilitarian principles are best reposed in the jury due to the nature of the adversarial system and because the dynamism of community sentiments is best reflected by the jury as opposed to institutionalised dictates. The argument is not altogether persuasive.

Auld LJ observed that many of the far reaching and revolutionary judgments on liberty were not made by juries but by judges sitting in appellate positions who could foresee the legal future.

In contrast, Buxton observed that, '...shared values and assumptions about the implications of actions and the circumstances in which those actions occur may be a safer guide to culpability than analytical deductions from generalised verbal definitions'.<sup>652</sup>

<sup>651</sup> Posner, 'An economic approach to legal procedure and judicial administration', 2 *Journal of Legal Studies* 399 (1973).

<sup>652</sup> 'Some simple thoughts on intention', (1988) *Crim. L. Rev.* 485. See Zuckerman at page 36.

This is a clear reference to the ordinary members of the society being better placed to articulate the values of their society than a detached judge could be whose 'world' is necessarily protected from the reality of common living.

That being the case, perhaps this lends credence to the involvement of the ordinary man in the affairs of judging guilt or innocence.

The jury's role is stated objectively. It is simply to faithfully try the defendant and return a verdict according to the evidence. The jury's actual work and subsequent verdict is a mixture of opinions and hard evidence.

Its tools include the drama of the trial, the eloquence of the counsels, the instructions and admonitions of the judge, the evidence tendered, the personal experiences, moral judgements and prejudices accumulated and the liberty afforded by the system.

The nature of the adversarial system allows the public, through the jury, to ensure that the CJS 'does not become detached from popular perceptions of right and wrong and does not thereby lose the public support which is so important to its effective operation'.<sup>653</sup> The judicial system and legislative body recognise this. They, quite rightly, leave the question of moral judgement,<sup>654</sup> in some cases, to the opinion or prejudice of the jury.

This opinion, by definition, is not intellectualised but constructed from common sense and common standards of behaviour. Above all, it is a nod to prevailing and accepted standards of behaviour of a community. For this reason, Lord Mansfield declared that: '...by means of a general verdict, they (jury) are entrusted with the power of blending law and fact and following the prejudices of their affections or passions'.<sup>655</sup>

<sup>653</sup> Zuckerman op. cit. at page 35

<sup>654</sup> Such judgments include dishonesty in the crime of theft where the jury's decision must be made according to the 'ordinary standards of reasonable and honest people'. See Ghosh (1982) 2 All ER 689, 696.

<sup>655</sup> Shipley (1780) 4 Douglas 73, 163. See Zuckerman cited above.



To crown it all, Cornish observed that 'a provision of which juries will not approve is unlikely to be regularly enforced'.<sup>656</sup> There is, of course, no indication that the jury is aware of the impact of its decisions on the state of the law.

They are, after all, men of ignorance and the selection process is so random as to render the 'conspiracy' of knowledge immaterial.

The trial process requires that the jury undertake a considerable number of decision-making tasks. Each piece of evidence presented must be evaluated for relevance and weight, each witness must be assessed and reassessed with various criteria and the veracity of statements tested against the facts presented either in relation to contested physical evidence or by way of observed nuances which are in turn interpreted against personal prejudice. Then the integrity of each witness must be juxtaposed with society's accepted norms.

At the end of the trial, the jury retires with its ears buzzing with the testimony heard and the judge's instructions on the law, its mind bedevilled by a riot of emotions generated by the trial and its intellect challenged by the decisions that lie ahead.

The cognitive processes involved in such high drama combined with the expected verdict deserve an investigation.

Two questions are raised. First, is the jury equipped to explain and secondly, can the jury be made to explain?

To answer these two questions, one must start by comparing why a jury may not be able to explain and evaluating why it may be required to do so and how it may achieve this.

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<sup>656</sup> Cornish, *The Jury* (1968)

## Chapter Sixteen: The Place of The Explained Verdict:

### Why The Jury Is Not Competent To Explain

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A criminal trial is largely seen as a process whose function is to resolve a public dispute and dispense corrective justice by passing sentence or ordering an acquittal.

However, the system is perhaps somewhat more complex than that. A criminal trial grapples with such difficult issues as morality and the rule of law. It represents a dramatic event where the performance of the players can quite easily become the key to the jury's understanding of and judgement of the matter at hand. It is by exploring the verdict that the true significance of a trial and its impact can be understood.

The modern trial with its inherent tensions and high drama is an antidote to the potential paralysis of legal conventions. Through self criticism which can only be made following an explained verdict thus providing the forum for renewal, the CJS can make itself more relevant to the society. In the process, the jury will achieve a moral elevation by resolving multiple conflicts in the trial.

Given that trial by jury invites the ordinary man into the judicial arena, we can comfortably assume that jurors are normal humans who come into the system with their experiences intact. A trial is also supposed to be a process of arbitration devised to discover what can be proved rather than the pursuit of truth or certainty of a contested set of facts. It is a mechanism that pretends and attempts to find accurate facts through the application of generalised law and to dispense justice.

In the process, any identifiable norms that are not shared by the rational thinking commune is removed from the system.

It must be noted that anomalies in the trial process are not simply failings in need of reform but are significant in that they identify a need for better interpretation.

Thus, when the system identifies challenges to its received wisdom, it must be willing not only to confront such anomalies honestly, but also to see them as opportunities to advance the cause of the system and make it more relevant. The lack of an explained verdict, however well protected, is such an anomaly. Its survival may be excused on the grounds of ambiguity as articulated by Devlin. Its continued practice only serves to disrobe the benign view of the judiciary and by implication, the legislature, of the ordinary citizen. When the entire process is stripped of its rhetoric, one thing is clear, the matter is that of prejudice masked as un-ambiguity.

In *R v Connor*, Lord Rodger of Earlsferry observed that ‘in the pool of people summoned to jury service, there is, potentially, a plethora of prejudices and pre-dispositional beliefs’. He further observed that:

‘Except to the extent that the law forbids it, people are free to hold and to run their lives by such prejudices – however irrational, unattractive or downright pernicious’.

One can hardly argue with this point as a correct evaluation of human nature in a free society. Lord Rodger continued in a vein that is not difficult to reconcile with reality.

‘Not so, however, when the same people deliberate as jurors since, if given free rein, any of these prejudices might make for a partial verdict. The point goes deeper. Even jurors who harbour no such particular antecedent prejudices will usually identify more readily with people whose way of life is similar to their own and correspondingly, look askance at those with very different and apparently inferior lifestyles. Yet more often than not, jurors from ordinary respectable backgrounds have to judge those who the evidence of the trial shows, lead very different lives – not working, ruthlessly exploiting the social security system, taking drugs, regularly drinking to gross excess and generally acting in an anti-social fashion.

There is an obvious risk that hearing this kind of evidence, jurors may be biased against such a defendant. What matters therefore, is not the particular type or source of prejudice but the risk that it may result in a partial verdict'.<sup>657</sup>

Within this snippet of the judgment, we can detect some of the reasons behind the common law prohibition and statutory declaration of the sanctity of the deliberation. This would also explain, perhaps more forcefully, why the jury does not have to explain. We have been told that the deliberation is confidential in order to promote candour and spirited exchange of opinion during deliberation and so as to protect the jurors from ridicule or pressure to explain themselves. That is a cogent argument. However, can it be successfully argued that one of the main points is not prejudice – a concession to human frailty? Does confidentiality not excuse or justify too much? With the exception of a blatant declaration of prejudice, is it possible for one who appears to straddle the middle position but is secretly prejudiced to openly declare his hands in a transparent fashion? Possibly not. Certainly not in a society that has declared itself committed to fairness and justice. Deliberations may be stormy, requiring the reconciliation of strongly held views. With the prevailing condition, can a betrayal of the encouraged secrecy be justified by demanding an explained verdict? The answer must be a resounding no. Lord Rodger acknowledges the risk that those chosen as jurors may be prejudiced in various ways.

He also notes that this is and always has been inherent in trial by jury and that only the most foolish would deny that judges too may be prejudiced, whether, for example, in favour of a pretty woman or an handsome man, or against one whose dress, general demeanour or lifestyle offends.

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<sup>657</sup> R v Connor et al [2004]HL

The legal system thus operates on the premise that the legally trained professional judges are able to set aside their prejudices in judging a case. Alas, there is no redeeming quality for the jurors beyond their humanity – a factor which underlies the requirement not to explain. Implicitly, Lord Rodger acknowledges that there is more than a hint of prejudice in the deliberation and an explanation of the verdict would expose it. Thus, it would appear that the confidentiality of jury deliberation is a euphemism for silencing the jury relative to an explanation and by extension, masking prejudice that we dare not confront.

There is a further point about the rule on secrecy and this is attributed to finality.

Atkins LJ, giving his opinion in the Court of Appeal case of *Ellis v Diheer* [1922] 2 KB 113, said that the rule on finality prohibits the leading of evidence as to what took place in the jury room by way of explanation of the grounds upon which the verdict was given or by way of a statement as to what the juror believed its effect to be. His rationale was:

‘The statement why that evidence is not admitted is twofold, on the one hand, it is in order to secure the finality of decisions arrived at by the jury and on the other, to protect the jurymen themselves and prevent their being exposed to pressure to explain the reasons which actuated them in arriving at their verdict. To my mind, it is a principle which it is of the highest importance in the interest of justice to maintain and an infringement of the rule appears to me a very serious interference with the administration of justice’.

This view was adopted by Lord Denning MR in *Boston v W S Bagshaw*.<sup>658</sup>

‘But the law also recognises that confidentiality is essential to the proper functioning of the jury process, that there is merit in finality and that jurors must be protected from harassment.’

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<sup>658</sup> (1966) 1 WLR 1135, 1136

These requirements too are directed to the essential object of maintaining public confidence in this mode of trial. So the general rule is that, after the verdict has been returned, evidence as to things said by juries during deliberations in private is inadmissible. The question which these cases have raised is whether this rule is incompatible with the right to a fair trial and if so, to what extent it can and should be modified.<sup>659</sup>

This chapter is concerned not with the confidentiality of jury deliberations but with the connected point of the unreasoned verdict. While the argument for keeping the deliberations are fairly cogent in the most, the law lords might be forgiven for taking a certain path that is altogether not too helpful when it comes to the reasoned verdict. They have devoted much legal energy and reasoning defending the secrecy and relegating the jury's intelligence that it would be intellectually challenging not to defend the unreasoned verdict. But broadly speaking, they have confused the issue of confidentiality of deliberations with the vexed question of a reasoned verdict, finality and fair trials.

Deliberation engenders, we might expect, strong feelings. These feelings need the space for expression. Exposing the process to the public gaze is not necessarily a great idea. However, the reason is not restricted to the protection of the juror from public ridicule.

One suspects that the real motive is, in addition to prejudice, the lack of confidence in the ability of the ordinary man to compose himself or as Damaska put it, his ignorance with the convention of decision-making. The jury's exposition might then shine a bright light on the judiciary – a situation it may not be able to withstand.

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<sup>659</sup> R v Connor, *ibid* per Lord Hope of Craighead.

The intention is not so much to protect the jury as it is to protect the judiciary. How does the judiciary control a jury of twelve ordinary people who, supposedly, lack the training for evidence sifting? Throw the jury into a room and let them divine a verdict but do not ask how. Like the Oracle at Delphi, we will accept their verdict however vague. Ours is not to reason how.

Exposing the decision-maker, however untrained, has its challenges. However, as observed in Australia, this should not be exaggerated.<sup>660</sup> Exposure may also concentrate the mind to perform better its task of evidence evaluation.

This goes for the need to explain. This paper argues that explaining a decision would make the juror a better contributor to the debate. Thus, any decision emanating from a jury is more likely than not to be based, in sound logic and rational justification but more importantly, on the evidence.

The argument goes to the heart of what social scientists call Social Facilitation.

It has been argued that the ability of decision makers to influence how people behave is one of the oldest findings in experimental social psychology. According to Tetlock,<sup>661</sup> 'decision makers should be regarded as politicians who are accountable to their 'constituents' (friends, family members and professional colleagues)' and who are constantly concerned with questions such as 'How will others react if I do this?' and 'How can I justify my views if challenged?'.

In a wider writing on the history of social psychology, Allport<sup>662</sup> argued that:

'The first experimental problem and indeed the only problem for the first three decades of experimental research was formulated as follows: What change in an individual's normal solitary performance occurs when other people are present?'

<sup>660</sup> New South Wales Law Reform Commission, *The Jury in a Criminal Trial* (DP 12, 1985)

<sup>661</sup> Tetlock, P. E. (1985). *Accountability: The neglected social context of judgment and choice*. *Research in Organisational Behaviour*, 7, 297-332

<sup>662</sup> Allport, G. W. (1954). *The Historical background of modern social psychology*. In G. Lindzey (ed). *The Handbook of Social Psychology* (Vol. 1). Reading, MA: Addison-Wesley.

Robert Zajonic<sup>663</sup> answered the question in 1965 strengthening the case for the confidentiality of the jury room and the exclusion of 'intruders' into this process. He argued that the performance of simple well-learned responses is usually enhanced by the presence of on-lookers but the performance of complex, un-mastered skills tends to be impaired by the presence of others. He speculated that this effect, known as social facilitation was, in part, attributable to the arousal caused by the physical presence of other people. Later research indicated however, that the physical presence of an audience need not be part of the equation to produce the same result.<sup>664</sup> Given that members of the jury are, supposedly, ignorant of the decision-making convention and untrained in their role, it could be argued that the process of deliberation can be classified as an un-mastered complex exercise.

The point was proved in experiments using a college pool hall.<sup>665</sup> The study used unobtrusive observers to classify pool players and record the percentage of successful shots made by these players in the presence or absence of onlookers. They found that the presence of an audience improved the performance of above-average players and hurt the performance of below-average players.

The apotheosis of this is the concept of social loafing which argues that people work less hard in a group than they do as individuals. According to Walter Moede,<sup>666</sup> in an experiment, people were found to pull harder on a rope when tugging alone than in groups. On the average, individual subjects performing in twosomes pulled 93% as hard, subjects in groups of three pulled only 85% as hard and those in groups of eight pulled 49% as hard.

<sup>663</sup> Zajonic, R. B. (1965). Social Facilitation. *Science*, 149, 269-274

<sup>664</sup> Henchy, T., & Glass, D. C. (1968). Evaluation apprehension and the social facilitation of dominant and subordinate responses. *Journal of Personality and Social Psychology*, 10, 446-454

<sup>665</sup> Michaels, J. W., Blommel, J. M., Brocato, R. M., Linkous, R.A., & Rowe, J. S., (1982). Social Facilitation and inhibition in a natural setting. *Replications in Social Psychology*, 2, 21-24.



Translated into the legal arena, it is of course, imperative that all jurors in a jury participate in the deliberation process. Whether or not they do, is quite another matter. However, assuming they all did with an eye to explaining the verdict, social loafing, it can be argued, would be reduced considerably.

Social loafing has been explained as a phenomenon that obtains because people do not feel the link between their effort and the final outcome as directly as people working alone. Thus, responsibility for the final outcome is diffused amongst members of the group as opposed to the sense of responsibility that obtains when one works alone.<sup>667</sup> This diffusion of responsibility is at home in a general verdict. It may do very little to re-assure the jurors of the verdict and the role they have played. However, the articulation of an explanation for the verdict ensures that each juror plays a role as it necessarily galvanises the panel. It is argued that it provides the mentioned catharsis to the jurors and allows them not only to play a full role but also justify themselves to each other and to the public in the court.

Judicial pronouncements mask a latent reluctance on the part of the authorities to make robust demands of the tribunal of facts.

While these sentiments may be forgiven of earlier generations, in a modern society that is exposed to the cyberspace culture, such judicial sentimentalities leave much to be desired. The jury is incompetent to explain because of the tyranny of ideology.

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<sup>666</sup> Moede, W. (1927). Die Richtlinien der Leistungs-Psychologie. Industrielle Psychotechnik, 4, 193-207.

<sup>667</sup> Latane, B., Williams, K., & Harkins, S. (1979). Many hands make light the work: The causes and consequences of social loafing. Journal of Personality and Social Psychology, 37, 822-832.

## Chapter Seventeen – Reasoned Verdict As a Legitimate Expectation

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### A Comparative Analysis

One of the quests of this paper is to determine the hypothesis whether an explained verdict is a legitimate expectation of a modern democracy especially in light of Human Right Conventions. To answer the question, the paper explores International Conventions and the legal system in the USA, South Africa, France, Belgium and Scotland and compares these to that of England. In the next chapter, both Spain and Russia are briefly explored and attention focuses on an English translation of the Spanish Constitution.

Andrews, in the Introduction to his book *Human Rights*, observes:

‘Perhaps, one of the most fundamental of all human rights should be the entitlement of the defendant to be told the reasons for his conviction and subsequent sentence.’<sup>668</sup>

In this comparative study, Andrews went on to observe that in most of the jurisdictions which were the subject of his comparative analysis, this right is denied to defendants. Although much has happened in international law since the publication of that book, studies indicate that fact-finders in a number of jurisdictions are increasingly required to provide reasons or explanations for their decisions. The discussion that follows is organized according to the general rule of each jurisdiction explored.

The USA and Canada generally do not require an explained verdict. On the other hand, Israel, South Africa and Belgium do. France is in a state of transition and England, together with Scotland is yet to settle their positions.

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<sup>668</sup> Andrews, John. *Introduction to Human Rights in Criminal Procedure: A Comparative Study* 10-11 (John A. Andrews ed. 1982)

The position has been greatly affected by the incorporation of European Convention on Human Rights, which may require an explained verdict in all criminal trials, into English domestic law.

In many jurisdictions, neither the judge nor the jury is generally required to provide explanations or reasons for a decision. Even so, some jurisdictions provide that the judge must or should give reasons in some instances such as at the request of a party or where the evidence is complex.

In order to gain deeper insight into the discussion, let us consider these jurisdictions in turn but in brief.

I consider it prudent to offer a word of caution. The following part of the research undertakes a brief but scholarly comparative analysis of the jurisdictions studied. This study has been affected by language barriers in some instances and by access to an articulate body of law, constitution or rules of evidence or criminal procedure.

### **The USA**

The US has no national code of criminal procedure.<sup>669</sup> Instead, it has a two tier system with state laws and federal laws being used in each state. The country maintains a rigid enforcement of the principle that judges need not provide reasons for their decisions or opinions. The majority of criminal trials take place in state courts and a state can grant a defendant more but not less rights than the Supreme Court but often has little incentive to do so.<sup>670</sup> Laws on criminal procedure with reference to defendant's right are comprised of the rulings and interpretations of the US Constitution by the Supreme Court.<sup>671</sup>

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<sup>669</sup> Bradley, Craig. M. United States, in *Criminal Procedure: A worldwide Study* 414 (Craig M. Bradley ed 1999)

<sup>670</sup> *Ibid*, at 396

<sup>671</sup> *Ibid*, at 395. The Court's interpretation of the Fourth, Fifth and Sixth Amendments. While these amendments facially apply only to the Federal Government, the Supreme Court has interpreted the Fourteenth Amendment as extending the other amendments to states in the 1960s

The Sixth Amendment to the Constitution provides that:

‘In all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed’. A jury trial is a matter of right in all but ‘petty’ offences.<sup>672</sup> A jury typically returns, in open court, a general verdict of guilty or not guilty, it does not provide reasons and may not be asked to do so.<sup>673</sup>

The Supreme Court has not determined the question of Special Verdicts (where the judge formulates succinct questions of fact necessary to the resolution of the matter). No federal statute authorises the use of special verdict and most courts find that such a practice infringes on the defendant’s right to trial by jury.

In the 1969 case of *Spock*,<sup>674</sup> a Federal Appeals Court found error in the trial court’s use of the special verdict procedure because of its potential to manipulate the jury’s decision. It went on to observe:

‘There is no easier way to reach and perhaps force a verdict of guilty than to approach it step by step...by progression of questions each of which seems to require an answer unfavourable to the defendant, a reluctant juror may be led to vote for a conviction which, in the large, he would have resisted.’

<sup>672</sup> *Ibid*, at 418 (citing *Baldwin v New York*, 399 US 66 (1970)). Here, the Supreme Court defined as presumptively ‘petty’, a crime for which a sentence of no more than six months is authorized by statute regardless of whether the defendant is actually imprisoned or not. The defendant cannot waive this right without the prosecutor’s consent but a prosecutor usually prefers a bench trial.

<sup>673</sup> See Federal Regulations on Evidence 606(b). Judges are prohibited from inquiring into the reasons behind a jury’s verdict. See also *Gray v US* 174F. 2d 919, 924 reversing a conviction in which the jury ‘was erroneously required to render verdicts in the nature of special verdicts in answer to particulars of the information. The jury was provided with one verdict form for each criminal count but each form had several paraphrases, each with a corresponding blank line on which the jury was to indicate a finding of guilty or not guilty’.

<sup>674</sup> *US v Spock*, 416 F. 2d 165, 182 (1<sup>st</sup> Cir.1969). The Court distinguishes cases in which the use of a special verdict in a criminal case has been upheld as cases where the procedure benefited the defendant and the defendant did not object. It observed that ‘it is elementary that defendant, properly advised, may waive even fundamental rights’.

Presumably, when juries discuss the case, they often go through the elements of the crime one at a time in just the same manner to narrow down areas of disagreement and come to the required unanimous verdict. The court noted that it was the judge's participation in the forcing of a decision by use of the special verdict that was objectionable.

Equally, judges do not, generally, give reasons or explanations for their decisions in bench trials where they serve as fact finders.<sup>675</sup> The Federal Rule of Criminal Procedure 23(c) provides that:

'If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in written decision or opinion'

This contrasts sharply with the Federal Rule of Civil Procedure which at page 52 states that:

'A trial court, in all actions tried without a jury must find the facts specifically and state separately its conclusions of law thereon'.

The rule that a judge need not provide an explanation or reason unless specifically asked to do so by a party to the case is given a strict interpretation. In *Bolles*<sup>676</sup> for instance, it was held that no findings were needed in the absence of a request even though the court had admitted evidence subject to a condition and never ruled on whether that condition was ever satisfied. In another case, the court indicated that where no request is made, on appeal, findings will be implied in support of the judgment if the evidence, viewed in the light most favourable to the government warrants them.<sup>677</sup>

<sup>675</sup> See Sean Doran et al., *Rethinking Adversariness in non-jury Criminal trials*, 23 AM. J. CRIM. L. 1, 44 (1995). ('reasoned judgments in criminal bench trials appear to be an exception rather than the rule in the US')

<sup>676</sup> *US v Bolles*, 528 F.2d 1190, 1191 (4<sup>th</sup> Cir. 1975)

<sup>677</sup> *US v Ochoa*, 526 F.2d 1278, 1282 n.6 (5<sup>th</sup> Cir. 1976).

The above cases highlight the fact that in federal non-jury cases, reasons are only required if requested before the verdict is delivered. When a request for findings is made, 'the court's reasoning, finding and conclusions must be adequate to enable intelligent appellate review of the basis for the decision'.<sup>678</sup>

Many states go further than federal jurisdiction in that they do not require that judges give reasons for their opinions in non-jury criminal trials at all.<sup>679</sup>

For instance, the Ohio state Rules of Criminal Procedure at p.23 provides that:

'in a case tried without a jury, the court shall make a general finding'. An Ohio appeals court held that a trial court is not required to state specific findings in its verdict.<sup>680</sup>

An appeal court held that The Texas Code of Criminal Procedure does not provide for a judge to give reasons for his opinions and added that it was not in error for a trial court to ignore the defendant's request to make factual findings.<sup>681</sup> A study of the bench trials in Philadelphia indicated that judges sometimes give reasons for their decisions.<sup>682</sup>

In many jurisdictions, a written opinion is considered a prerequisite to a defendant's ability to appeal but this is not so in the US where as a general rule, questions of fact are not reviewable on appeal.<sup>683</sup>

<sup>678</sup> US v Silberman, 464 F. Supp.866, 869 (MD) Fla. 1979)

<sup>679</sup> Gordon van Kessel, Hearsay hazards in the American Criminal Trial: An Adversary-Oriented Approach, 49 Hastings L. J. 477, 518 n.172 (1998) rebutting an argument that hearsay evidence need not be excluded in bench trials because 'judges are required to write opinions which prevents them from improperly using evidence in reaching decisions.'

<sup>680</sup> State v D'Ambrosio, No. 57448, 1990 Ohio App. Lexis 3781 at \*42 (Ohio Ct. App. Aug. 30, 1990). The court held that the trial record and transcripts are insufficient for an effective appeal.

<sup>681</sup> Hernandez v Texas, 420 S.W. 2d 949, 952 (Tex. Crim. App. 1967). The Appeals Court did not discuss the issue but cleverly rejected the allegation of error only in two sentences: 'The failure of the trial court to make findings of fact and conclusions of law as the appellants requested was not in error. Such procedure is not provided for in the Texas Code of Criminal Procedure'.

<sup>682</sup> Stephen J Scholhofer, Is Plea-bargaining Inevitable? 97 HARV. L. REV. 1037, 1065 (1984)

<sup>683</sup> Osakwe, C. (1982). The Bill of Rights for the Criminal Defendant in American Law: A Case Study of Judicial Law-Making in the United States', in Andrews, J.A. (ed.) 1982, 381-387.

The appellate courts may, however, reverse convictions for lack of evidence which implies a finding that the facts were not correctly decided.<sup>684</sup>

What emerges from a review of this jurisdiction is that in the US, neither the judge nor the jury gives or is required to give reasons for their opinions. However, a judge must do so at the request of a defendant. On appeal, the findings of fact, like other jurisdictions, are not reviewable but a reversal for lack of evidence implies a reversal of factual findings.

There is no evidence yet that defendants are exercising their rights to demand reasons for verdicts. One of the reasons is that they are not even sure they can.

### Canada

The Canadian system is somewhat at odds with that of the US to the extent that a failure to give reasons is likely to lead to a reversal on appeal. However, Canada has no statutory requirement that judges ought to provide reasons for their decisions. Criminal trials are, in the main, before a judge sitting without a jury although a defendant can generally elect to have a jury trial.<sup>685</sup> Criminal procedure is governed by the Canadian Criminal Code<sup>686</sup> which is not a comprehensive document but is supplemented by judicial decisions interpreting the Canadian Charter of Rights and Freedoms and the common law.<sup>687</sup> Although the Code does not require the fact finder in a criminal case to provide a reasoned opinion in support of his decision, case law<sup>688</sup> indicates that judges must provide reasoned opinions in certain circumstances.

<sup>684</sup> Bradley, *op. cit.* at p. 422.

<sup>685</sup> Kent, W. Roach, *Canada In Criminal procedure: A Worldwide Study*

<sup>686</sup> Canadian Criminal Code, R.S.C. 1985, c. C-46, ss. 686(1)(a)(i) [am. 1991, c. 43, s. 9.

<sup>687</sup> Part 1 of the Constitution Act. 1982

<sup>688</sup> *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27, where Binney, J referred with approval to *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, 'The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large'.

The Code says nothing about whether or not trial judges must give reasons in writing for their opinions. Such a requirement however, may be implicit in the defendant's right to appeal. The Supreme Court of Canada held in *McMaster* that:

'It would be wise for trial judges to write reasons setting out the legal principles upon which the conviction is imposed so that an error may more easily be identified if there be an error.'<sup>689</sup> Appeals are allowed on the grounds that the conviction is unreasonable or not supported by the evidence, entails a miscarriage of justice or is based on an error of law.<sup>690</sup> However, the court took a more definitive position in 1994 when it held, unanimously, that a judge need not provide reasons for his decision.<sup>691</sup> Burns was convicted of sexual assault in a trial in which conflicting evidence was presented. The trial judge gave brief oral reasons for the conviction stating that he believed the complainant.<sup>692</sup> When the matter came to appeal, the court, not persuaded by the statement of the reason 'to determine whether the learned trial judge properly directed himself to all the evidence', set aside the conviction and directed a new trial.

However, the Supreme Court of Canada restored the convictions citing a 'general rule that a trial judge does not err merely because he does not give reasons for deciding one way or another on problematic points'.<sup>693</sup> It appears this rule was endorsed on public policy grounds.

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See also *R. v. R. (D.)*, [1996] 2 S.C.R. 291; *R. v. Burke*, [1996] 1 S.C.R. 474; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Biniaris*, [2000] 1 S.C.R. 381, 2000 SCC 15.

<sup>689</sup> *R v McMaster*, 1 SCR. 740 (1996)

<sup>690</sup> S. 686(1)(a) of the Criminal Code, RSC., c. C-46 91985) provides for an appeal where the court of appeal finds that: '(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence, (ii) the judgment of the trial court should be set aside on the ground of wrong decision on a question of law or (iii) on any ground there was a miscarriage of justice'.

<sup>691</sup> *R v Burns*. (1994)1 S.C.R. 656.

<sup>692</sup> The judge made it quite clear that having 'observed the minor complainant and her demeanor', he was 'persuaded beyond a reasonable doubt about the veracity of her evidence and that the defendant was guilty on the counts'.



The court noted that the appellate court focused neither on a lack of evidence to support the verdicts of guilty nor on a finding that those verdicts were unreasonable but on the trial judge's failure to 'indicate that he considered certain frailties in the complainant's evidence'. The court went on to hold that:

'a judge is not required to demonstrate that he knows the law and has considered all aspects of the evidence. Nor is the judge required to explain why he does not entertain a reasonable doubt as to the guilt of the accused'.

On further analysis, the court sought to distinguish insufficient reason from bad reason. Relying on a statement from the earlier decision in Harper,<sup>694</sup> the court held that 'an appeal must be allowed where the record, including the reasons for judgment, disclose a lack of appreciation of relevant and more particularly, the complete disregard of such evidence.'

That statement referred to cases where the trial judge's reasons showed a failure to grasp an important point or a choice to disregard it such that the verdict was unreasonable.

The matter was reconsidered in R v R (D)<sup>695</sup> and here, the Supreme Court held that 'where there is confused and contradictory evidence, the trial judge should give reasons for his conclusions'.<sup>696</sup> Burns was re-affirmed maintaining that the appellate court will not intervene 'where the reasons demonstrate that the trial judge has considered the important issues in a case or where the record clearly reveals the trial judge's reasons or where the evidence is such that no reasons are necessary'.

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<sup>693</sup> R v Burns, (1994) 1 S.C.R. 656 (citing Harper v Queen, (1982) 1 SCR 2

<sup>694</sup> *ibid*

<sup>695</sup> 2 Supreme Court Rules (SCR) 291 (1996)

<sup>696</sup> The Supreme Court, using this case, offered the following example of confused and convoluted evidence: 'when the victim testified that her father had cut her on her back, she claimed first that she had to get stitches and stay overnight in a hospital. Then she testified that her hospital stay lasted three weeks. However, there were no records of any such hospital stay'.

In a dissenting opinion, one justice argued that the case fell squarely within *Burns* such that no reasons were required and that the trial judge did give reason albeit orally.

The thrust of the Canadian position is that a judge that provides reasons for his opinion can ensure that that opinion or verdict will not be overturned on appeal as unreasonable especially where the evidence is controversial or contested. The reasons, however, must be thorough and succinct or the decision is likely to be set aside as unreasonable or unsupported by the evidence.

In sharp contrast to judges, juries do not give reasons or explanations for their verdict<sup>697</sup> under any circumstance and there are no rules that make such a requirement. Where they are used, juries deliberate in secret and much like in England, the courts are prohibited from speculating on the reasoning process behind a verdict.

The Canadian system, in some ways, mirrors the system in England and Wales. Judges need not and juries may not give reasons for their decisions in all cases. A logical decision that can be supported by the evidence is required by both, however, because the decisions of either can be set aside if unreasonable. There is, yet, no test for that reasonableness or logic. The integrity of the trial court is the best guaranty for such logic.

### **South Africa**

This country inherited the jury system from England in 1928. Today, however, it does not have juries but uses assessors. These are similar to juries in that they are called for specific cases and decide questions of fact. However, unlike jurors, assessors give reasons for their decisions.<sup>698</sup>

<sup>697</sup> *R v Noble*, 1 SCR. 874 (1997)

<sup>698</sup> Neil Vidmar, *the Jury Elsewhere in the World in World Jury Systems*, 425 (Neil Vidmar ed. 2000)

The use of assessors developed as the use of juries declined from 1920 to 1969 when the jury system was finally abolished.<sup>699</sup> Modern South Africa considers the jury system as wholly impractical as a result of its apartheid heritage and the rendering of unjust verdicts by whites against non white defendants coupled with the problems of devising a jury system for a complex multi-racial society.<sup>700</sup>

The system works with the judge or magistrate being the only fact finder or co-finder of fact.<sup>701</sup> Magistrates preside in District and Regional magistrate's Courts which are collectively referred to as 'lower courts' and have limited powers based on the seriousness of the offence charged.<sup>702</sup> The High Court is presided over by a judge and he has jurisdiction over all cases but deals in practice with the most serious cases only.

Both the judge in the High Court<sup>703</sup> and the magistrate in the lower court<sup>704</sup> have discretion whether to appoint assessors to assist with fact finding.<sup>705</sup>

Assessors, (two per case), deliberate with the judge or magistrate in chambers deciding only factual questions. They must give reasons for their decisions which become part of the record and are available to any appeals court.

<sup>699</sup> P.R Spiller, *The Jury System in early Natal*, 8 J LEGAL HISTORY. 129 (1987).

<sup>700</sup> Neil Vidmar, *op. cit.* at 425

<sup>701</sup> P. J. Schwikkard & S. E. van der Merwe, South Africa, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* (1987) at page 172

<sup>702</sup> The jurisdiction of the District Magistrates Court is limited to twelve months imprisonment and fines not exceeding R20,000.00. They have no jurisdiction over cases of murder, rape or high treason. The jurisdiction of Regional magistrates Courts is limited to ten years imprisonment and fines not exceeding R200,000.00. They are competent to try all cases except cases of high treason.

<sup>703</sup> The South Africa Criminal Procedure Act of 1977, s145 states that 'Persons appointed as assessors in the High Court must be experienced in the administration of justice (such as legal practitioners or law lecturers) or must have skill in any matter which may be considered at the trial (such as accountants or pathologists).' Schwikkard & van der Merwe at 351

<sup>704</sup> The South Africa Magistrates' Court Act 32 of 1944, s. 93(1). The experience requirements in the High Court do not apply here although such experience may be considered. The appointment of assessors by magistrates in the lower courts is unlike the appointment of assessors in the high courts – essentially aimed at promoting the notion of lay participation in the adjudication of facts in a criminal trial.

<sup>705</sup> The discretion of the judge may be challenged by the defendant. One exception is murder in which a judge must appoint two assessors unless the defendant requests against it. Even then, the judge still has discretion to appoint or not to appoint them.

Judges and magistrates also give reasons for their decisions including factual decisions. Where assessors are used, the decision of the majority, not necessarily that of the judge is the verdict of the court<sup>706</sup>

### **Belgium**

This European nation provides jury trial for all criminal cases but the jury is only really used for the most serious crimes such as murder.<sup>707</sup> The jury, composed of twelve members, answers its question in the form of a special verdict that includes questions about the elements charged in the crime and where appropriate, about the aggravating and mitigating factors relative to sentencing. Voting is by secret ballot and eight out of twelve votes are needed for a conviction.<sup>708</sup> Should the jury decide seven to five in favour of a guilty verdict on a material fact, the panel of judges who preside over the trial expresses its opinion on the question of guilt. Curiously, failure to agree with the majority results in an acquittal.<sup>709</sup>

Belgium has different courts for different offences but all have similar procedures with regards to the delivery of the verdict. It must be given with reasons and must be delivered in public.<sup>710</sup>

### **France**

Issues of procedure in France come under the detailed provisions in the Code of Criminal Procedure.<sup>711</sup> The Constitution of France has very few rules of criminal procedure.

<sup>706</sup> Neil Vidmar, op. cit.

<sup>707</sup> Neil Vidmar, op. cit at 445.

<sup>708</sup> Neil Vidmar, op. cit.

<sup>709</sup> Marc Chatel, Human Rights and Belgian Criminal Procedure at the Pre-Trial and Trial level, in HUMAN RIGHTS IN CRIMINAL PROCEDURE, at 190.

<sup>710</sup> Belgian Constitution, Articles 96-97. this is available at <http://www.oefre.unibe.ch/law/icl/be0000.html>

<sup>711</sup> Richard S. Frase, France, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY, at page 147. It is observed that case law is not a significant source of French law. This is because procedural law is heavily codified and the decisions that exist are not considered binding but are seen as illustrations of the principles found in the text rather than the prior decisions.

However, France is a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms. As such, the Convention has an incremental effect on French procedural law. The procedural rules depend on the nature of the offence. Trials for more serious crimes are generally subject to more elaborate regulations and safeguards.

The Assize court which has jurisdiction over major felonies consists of three professional judges and nine lay jurors who decide both guilt and sentencing.<sup>712</sup> This is the only time lay adjudicators are still used. France abolished the jury system in 1942 preferring instead, the mixed tribunal of lay persons and judges working together to decide the facts.<sup>713</sup> The most minor offences are tried in the Police Court before a single professional judge. Offences that fall in between are tried in Correctional Court before one or three professional judges.

All three courts adopt a similar procedure with respect to the delivery of judgements. After closing arguments, the court deliberates on issues of both guilt and sentence. In the Correctional and Police Courts, judgment must be written citing the reasons for the decision including the principal facts supporting guilt as well as the law violated. In the Assize Court, the judgment order is simply the mixed court's verdict of guilty or not guilty as to each offence charged, findings of aggravating or mitigating circumstances and the sentence imposed.<sup>714</sup>

<sup>712</sup> Gerald, S. Frase, Introduction, in THE AMERICAN SERIES OF FOREIGN PENAL CODES No. 29, FRANCE 23-25 (1988) (Edward M. Wise ed., Gerald L. Kock & Richard S. Frase trans. 1988).

<sup>713</sup> Neil Vidmar, op. cit at page 429.

<sup>714</sup> The French Code of Criminal Procedure does not exist in an English translation. Recourse is made to the 1987 translation 'THE FRENCH CODE OF CRIMINAL PROCEDURE' (rev.Ed., Gerald L. Kock & Richard S. Frase, Trans. 1987

## Scotland

The Lord Advocate is ultimately responsible in most cases for deciding whether or not to prosecute, in what court and under which procedure.<sup>715</sup> There are two types of jurisdiction – solemn and summary which are available. The choice of the two depends on the seriousness of the crime in question. Scotland is peculiar in that the accused has no say whether or not he is sent before a jury.<sup>716</sup> The procedure depends largely on the jurisdiction. Trial for a solemn offence, which is a more serious crime, is set before a jury of 15 lay people and either a judge of the High Court of Justiciary or a Sheriff. Summary procedure consists of trial on complaint without a jury before a sheriff, magistrate or one or more justices of the peace. Reason is not generally required of any of these courts in criminal trials.

In solemn trials, at the close of evidence, the judge charges the jury, instructing it on the law and the points in issue.<sup>717</sup> Unlike in English courts, the judge does not summarise the evidence and the jury may deliver its verdict immediately or retire for deliberations. When it has a verdict, the jury states only the verdict and whether it was unanimous.

In the event of non-unanimity, the jury does not state the number in the majority.<sup>718</sup> In the event that the prosecution fails to prove its case beyond a reasonable doubt but the jury is not persuaded of innocence, a verdict of not proven<sup>719</sup> is returned. Reasons are neither required nor given.

<sup>715</sup> Walker, David, M. *The Scottish Legal System* 531 (6<sup>th</sup> ed., 1992)

<sup>716</sup> Duff, Peter, *The Scottish Criminal Jury: A very Peculiar Institution*, 62 *LAW & CONTEMP PROB.* 173 (1999)

<sup>717</sup> See *Hamilton v H.M.A.*, (1938) JC.134; *Rubin v H.M.A.*, (1984) SCCR. 96; *King v H.M.A.*, (1985) SCCR 322

<sup>718</sup> *Criminal Procedure (Scotland) Act 1995 c. 46 s.100 (1)*. The Thompson Committee, *Criminal Procedure in Scotland*, Second Report, Cmnd. 6218 para.51.51-56 (1975) considered the possibility that the number of the majority be announced in open court to prevent mistakes but this was rejected in the interests of preserving the privacy of jury deliberations.

<sup>719</sup> Stoddart, Charles, N. *Human Rights in Criminal Procedure: The Scottish Experience*, in *Human Rights In Criminal Procedure: A Comparative Study*, at 137-138

## The Criteria

The studies indicate that most jurisdictions that use trial by jury require only the return of a general verdict of guilty or not guilty with no explanations or reasons. In cases where the trial is before a judge sitting alone, reasons may be given but are not required and where given must be succinct and precise.

One justification for the jury is that it is better at fact finding than a sole judge and consequently, it is difficult to justify any judicial interference with the verdict of the jury. Indeed, as this paper has uncovered, the appellate courts have shown themselves to be less eager to scrutinise the decision of a jury than they are that of a judge. The general rule that the judiciary cannot inquire into the reasons of a jury's decision also allows for the possibility of jury nullification, acquitting a factually guilty defendant.<sup>720</sup> This power to nullify a law, it has been argued by eminent legal scholars, enhances the jury's role as a check on the powers of the state.<sup>721</sup>

To the extent that judicial inquiry is likely to undermine the jury's power to find according to its conscience, it would not be helpful to allow it if we desire to maintain trial by jury with all its implications.

A requirement that the fact finder should explain or provide reasons for a given decision is more common with professional judges than lay juries. As we have articulated, judges are expected in all cases, to apply the law to the facts accurately and fairly. As such, requirement for reason or explanation could be viewed as a means to ensure judicial accountability. Its presence even in judge only trials indicates that it represents a legitimate expectation which should be available to the society if and when required. This expectation is also reflected in International law which we shall consider next.

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<sup>720</sup> Duff, Peter. *Op. cit.*

There is however, a difference with judicial interference with a jury's verdict and a jury's self assessment as epitomised by an articulated reason for its verdict. One is voluntary and independent. The other is simply an interference.

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### **International Law**

According to Paust et al,<sup>722</sup> there are two types of International Criminal Law – International Agreements and Customary International Law. They argue that a principle that reasoned judgments are required of the fact finder in criminal trials is found in both sources of law. Let us pursue this argument.

### **Express Statutory Provision**

International agreements are technically binding only upon the parties to such an agreement and their nationals. These may be a source of international law although some would limit the authority of treaties to filling gaps where international law is unclear. A duty to provide reasoned judgment is expressly created by the governing documents of most international criminal law tribunals. This suggests that such a requirement is a standard procedure of international law.

In 1973, the Bangladeshi International Crimes Tribunal Act, for instance, provided that 'the judgment of a Tribunal as to the guilt or innocence of any accused person shall give reasons on which it is based...'<sup>723</sup> A similar requirement obtains in the statute governing the International Criminal Tribunals for the former Yugoslavia and Rwanda which provide for 'a reasoned opinion in writing to which separate or dissenting opinions may be appended'.<sup>724</sup>

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<sup>721</sup> Devlin, Patrick. (1956) Trial by Jury. See also Rules of Civil Procedure and the proposed Amendment, 31 FRD. 617, 618-19 (1963) per Mr. Justice Black & Mr. Justice Douglas

<sup>722</sup> Paust, Jordan et al., (2000) International Criminal Law: Cases & Materials 4

<sup>723</sup> Bangladesh International Crimes Tribunals Act of July 19, 1973, Art. 20 (1) (July 20, 1973)

<sup>724</sup> Statue of the International Criminal Tribunal for the Former Yugoslavia, UN Sec. res. 827, art. 23 (1993). Statue of the International Tribunal Rwanda, UN. Sec. Res. 955., art. 22 (Nov. 8. 1994)



The Rome Statute of the International Criminal Court<sup>725</sup> also includes a requirement to explain although with a significant difference. It does not seem to provide for separate opinions. These statutes clearly demonstrate a healthy requirement of judges of fact to accompany their decisions with written reasons. The implication is that a reasoned judgement is a legitimate expectation of a modern democracy as evidenced in International law. This could be attributed to increased needs of such tribunals to demonstrate legitimacy and independence. This point was alluded to by Damaska who also observed that when judges must explain the grounds upon which they based their decision, it makes the decision less likely to be criticised on the grounds that the outcome was predetermined and the trial was just a show.

### Customary Law

International criminal law is not limited to express provisions in sources of international law but also in customary international law. According to Paust, customary international law is of a universally obligatory nature.

In order to prove that a certain rule is customary, one has to show that it is reflected in state practice and that there exists a conviction in the international community that such practice is required as a matter of law.<sup>726</sup>

That the modern society is entitled to a reasoned or explained decision in criminal trials is a principle that this paper has demonstrated of international law deriving its legitimacy from national customary laws.

<sup>725</sup> Rome Statute of the International Criminal Court, adopted by the UN Diplomatic Conference, zrt. 74 July 17, 1998

<sup>726</sup> International Committee of the Red Cross, ICRC Study on Customary Rules of International Humanitarian Law: <http://www.icrc.org/providing> an overview of International Committee of the Red Cross, Customary International Humanitarian Law (2003). 'In this context, 'practice' relates to official state practice and therefore, includes formal statements by states. A contrary practice by some states is possible because if this contrary practice is condemned by other states or denied by the government itself, the original rule is actually confirmed. State practice in this context, does not mean age-old

This view is supported by reference to the inclusion of such a requirement in the statutes of international law and the widespread state practice of requiring reasoned judgments from decision makers. This requirement, though not an absolute one, is grounded, it is argued, in human rights principles relative to defendants.

### **Implications of Human Rights Law**

This paper has established that modern citizenship is entitled to explained verdicts in its criminal trials and that this right is grounded in human rights principles which, incidentally, also limit the scope of that right in relation to other protections provided by human rights law. Two such protections relevant to criminal defendants are the right to a fair trial and the right to an appeal following a conviction.

We shall explore these in turn.

### **The Right To A Fair Trial**

This right is enshrined in nearly all international documents.<sup>727</sup> Some common concepts are that decisions should not be arbitrary,<sup>728</sup> that defendants should not be

practice. In general, we have focused on state practice during the last twenty years. Customary international law can emerge in an even shorter period of time'.

<sup>727</sup> See M. Cherif Bassiouni, *The protection of human rights in the administration of criminal justice: a compendium of United Nations norms and standards 132-90 (1994)* compiling UN documents asserting the importance of the right to a fair trial: Universal Declaration of Human rights, art. 10. UNGA res.217A, 3UNGAOR, UN Doc.A/810 at 71 (1948) which states that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him': European Convention for the Protection of Human Rights & Fundamental Freedoms, art. 6, 213 UNTS221, Eur. T.S No. 5 (1950) 'In the determination...of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. It is noted that Israel's Bill of Rights does not include the right to a fair trial, however, the Bill also states that the list of rights it contains is not by any means, exhaustive.

<sup>728</sup> Universal Declaration of Human Rights, art. 9. 'no one shall be subjected to arbitrary arrest, detention or exile'.

convicted under retrospective legislation<sup>729</sup> and that trials shall not be subject to unreasonable delay.<sup>730</sup>

It is submitted that a professional judge who must provide the basis for his decision is more likely than not to be more logical with respect to the rules than a jury which does not have such a burden would. Furthermore and by extrapolation, if the argument for a reasoned requirement is valid, it follows that such a requirement acts as a de facto protection against arbitrary decisions.

One possible fall out from this requirement would be an increased work load of appeals. But then, the right to an effective appeal is one of the principles of international criminal law.

### **The Right to an Effective Appeal**

‘The more clearly articulated the grounds for a decision, the greater the opportunity to challenge that decision by reference to the record on appeal’.<sup>731</sup> The right to an effective appeal is widely recognised in international criminal law. The International Covenant on Civil and Political Rights provides that ‘everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law’.<sup>732</sup>

One of the observations made of this requirement is that it will result in disproportionate number of appeals. This argument has been debunked on two fronts.

1. Findings of fact are still relatively final even in bench trials where reasons are given, due to the general reluctance of the appellate courts to overturn

<sup>729</sup> Art. 15, International Covenant on Civil and Political Rights, 999 UNTS 171) Dec. 9, 1966) ‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed.’

<sup>730</sup> Art. 14 (3)( c) mandates a minimum guarantee for criminal defendants to be tried without undue delay.

findings made by a trial judge who witnessed first hand the nuances of the trial and saw all the documents and all the evidence and is better placed to judge credibility.<sup>733</sup>

2. A reasons requirement may streamline the appeal system as a party can better assess his chances of success when an explanation for a decision is clearly stated.<sup>734</sup>

Finally, Doran makes a cogent point when he observed that 'the requirement that a judge give a reasoned verdict is an implicit recognition that the sense of finality that attaches to the jury's verdict is of less force in the non jury contest. Thus, the trade off for increased appealability is a decrease in finality of judgments'.

This is an indictment of such policy concerns as efficiency of the court system and validity. Finality of judgment, it is argued, loses its meaning in conviction cases due to the mandate for appeals. If that is the case, there is very little reason not to extend the requirement for a reasoned verdict to jury trials.

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<sup>731</sup> Sean Doran et al., Rethinking Adversariness in Non jury Criminal Trials, 23 AM. J. CRIM.L.1,44 (1995).

<sup>732</sup> Art.14 (5), 999 UNTS 171 (Dec.9, 1996)

<sup>733</sup> Richard Nobles et al., The Inevitability of Crisis in Criminal Appeals, 21 Intn'l J. Soc. L. 1,2 (1993)

<sup>734</sup> Michael Asimow, Toward a South African Administrative Justice Act, 3 Mich. J. Race & L. 1,11 (1997)

## Chapter Eighteen – In The Interests of Justice

The judge asked, perhaps in frustration: ‘Am I not to hear the truth’? To which the objecting Counsel responded: ‘No, Your Lordship is to hear the evidence’.<sup>735</sup>

In a trial by jury, each party will present their case as being the truest account of the disputed facts. It is the jury’s duty to decide where it believes the truth lies – with the defendant, the prosecution or somewhere in-between.

Let us explore the trial process in a way that readily identifies with the issue of a jury’s verdict.

Burns submits that a criminal trial is defined by two significant elements: its narrative structure and its multiple and dynamic tensions.<sup>736</sup>

At the narrative structure level, the process operates on the level of story telling. This is both historical (touching on past events), contemporaneous (exploring their place in the drama being played out) and futuristic (exploring how a narrative of those events are being presented and what should happen as a result of the trial).<sup>737</sup>

A story is fairly easy to follow and people can generally find a good story persuasive and understandable.

A legal argument of the kind played out in the appellate courts is not designed to tell a story. The trial is the opposite of a formal legal argument because it employs ordinary language set in the everyday realities of the people. The witnesses are a part of the intricacies of this story.

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<sup>735</sup> John Mortimer QC, Creator of ‘Rumpole of the Old Bailey’ in *Clinging to the Wreckage*, pp. 233-34

<sup>736</sup> Burns, Robert. (1999). ‘A Theory of the Trial’. Princeton University Press, pp. 280

<sup>737</sup> Thomas Green writes that the early juries were involved in an assessment of personal worth. Was the suspect the sort of person likely to have committed a certain act with malice? And almost inevitably, trial verdicts came to be judgments about who ought to live and who ought to die, not merely determinations regarding who did what to whom and with what intent. Green, Thomas H. (1985), *Verdict according to Conscience*, Chicago & London at page. 98

The story format and hence the human aspect of the trial speak to the ordinary people who serve as jurors. In this way, the story provides the mechanism by which the common-sense morality and the community's sense of values inform the verdict.

The jury uses this morality to explain the human behaviour revealed in the story in the form of evidence at trial.

The second element is conflict and tension – the hallmarks of the adversarial system. The trial offers each side of the argument the opportunity to produce competing narratives. We thus find that the trial is not just the telling of one story. There are many stories involved and each must be sifted through and held up against the prejudice of the fact finder.

The jury is tasked with the ultimate decision as to which of the two narratives proves superior when set against their concept of what happened and their own experiences.

Therefore, in order for the jury to reach a decision, Burns suggests that it must decide five questions:

1. Which of these two accounts is more probable than the other?
2. Which understanding of these two stories inspires a more powerful norm that we should identify with?
3. Which understanding of those events or evidence leading to the trial is more consistent with our public identity or prejudice?
4. Which witnesses appear more credible?
5. Does the action which is the subject of the prosecution deserve public approbation or disapproval?

It is argued that the story that wins the argument would be the superior one if it offers the best responses to these questions. These questions, in turn, should inform the deliberation process and consequently, the explanation of the verdict.

However, it is argued that choosing one of the two general verdicts in favour of a particular story on the basis of its superior appeal does not resolve the tension.

In other words, the trial does not end with the verdict. With the admission of evidence, it is contended, further conflict arises not only between the competing stories but between each story and the reality of the evidence. It could be argued that tendered evidence does not always fit or support a particular story and that witnesses do not always meet the expectations or stay consistent with a given story. The nuances of a trial and the reality of the facts are invariably bound to upset well crafted and seemingly credible stories. Furthermore, as Burns argues, certain facts or items of evidence will be resistant to manipulation on the grounds that they are true. The pervasive nature of the structure of the trial narrative is not necessarily introduced as a possibility. There is, after all, a tension between the public meaning as pronounced by counsel during trial and factual accuracy as a given primary in the testimony phase. Accuracy in this case, is relevant to a verdict. Given the nature of our adversarial trials, accuracy can neither be guaranteed nor can it, avowedly, be the subject of unrelenting objective pursuit. The closest we can get to it is in the explaining of a verdict as this allows the observer to evaluate the drama that has just been played out in court in the context of the reasoned verdict.

The tensions and conflicts can only be resolved if one is permitted to cast an inquiring glance into the reasons underpinning a verdict.

But the deliberation process is sacrosanct. The verdict makes no compelling argument against scrutiny of the deliberation process.

Transposing this argument, therefore, it is submitted that accuracy has a primary purpose. That purpose is to approximate the truth of the matter in question. Since the trial is part of the constructed continuum, an artificial setting that seeks to process

certain disputed matters (even a confession cannot be accepted without the court process), accuracy seeks to provide a justification for the sanctions of the legal process and assuage the thirst for public justice. In this context, accuracy, although an elusive factor, can be demonstrated by an explained verdict. This forces the jury and the system to understand and connect with real people, real values and the real consequence of a case rather than simply treating it as a symbol,<sup>738</sup> an anticlimactic event or a means for dispensing justice however arbitrary and seemingly fair. A criminal trial, after all, is not a neutral institution and juries are no less partial when a verdict has been chosen just because they do not explain. Thus, there should be a strong commitment to the idea that fact finding, as determined by a jury must be conducted in a coherent and rational manner in order that the epistemic process meets the normative requirements of a contemporary and relevant CJS.

Such process and requirements must, in turn, be crafted in a way that enables the fact finder to return an informed decision that can be explained.

Before proceeding on a brief exploration of how this could be made possible, it is necessary to explain a point.

The giving of an explanation for a verdict does not demand from or command infallibility of the tribunal of fact.

Contrary to the revelations of the Oracle<sup>739</sup> of old, the jury is composed of fallible men and women who must do their best to second-guess the events in a given trial. Their verdict is, at best, the product of a careful exercise that investigated most of all the nuances of a trial. It is also, as far as we know, and will continue to be, a mixture of evidence and sometimes unsustainable emotions. However, the impact of the latter can be minimised. The giving of reason, as has been articulated, ensures that logic and

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<sup>738</sup> Burns. *ibid*

<sup>739</sup> Whose infallibility was underpinned by a collective acquiescence on the part of the people



a proper consideration of all the relevant facts of a case inform a verdict and that the public and the system see this to be the case.

The critical question remains however. How do we make the jury accountable?

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## **Chapter Nineteen -A look at Continental Europe:**

### **Why the jury is competent to explain**

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The Civil law jurisdictions of Continental European countries employ the inquisitorial<sup>740</sup> method of trials which is largely seen as an exercise in truth-seeking. Most European countries abandoned the adversarial system from 1198 following the decrees of Pope Innocent III in his reformation of the ecclesiastical courts.

It is a matter of some interest then that Europe is now experiencing something of a revival in trial by jury which was long abandoned.

The Russian Federation introduced trial by jury in 1993 and following Post-Franco Spanish Constitution of 1978, Spain adopted this mode of trial in 1995.

This development is instructive in a number of ways.

As Thaman<sup>741</sup> observed:

‘First, it is a surprising reversal in the long-term trend toward the elimination of the classic jury in favour either of courts in which professional judges and lay assessors collegially decide all questions of fact, law and sentence. Secondly, it raises the question whether the jury can act as a catalyst in the reform of Continental European criminal procedure as it did during the 19<sup>th</sup> Century in the wake of the French Revolution’.

There is, of course, a further point. Wholesale reform is possible even in the shadow of uncertainties. To move from a mixed panel of assessors to one where the jury in the form of ordinary citizens plays a decisive role is a tribute to mental evolution and the

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<sup>740</sup> In an inquisitorial system, the court is actively involved in determining the facts in issue and the rules system applies to questions of procedure.

needs of an ever changing society. This, though, has more to do with the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the shadow of which the Spanish constitution was drafted. In the light of Human Right Conventions, the rules of a criminal trial should not stagnate.

As long ago as 1776, Bentham, writing anonymously, in his tirade against the scholarly writing of Blackstone, observed that:

'The age we live in is a busy age in which knowledge is rapidly advancing towards perfection. In the natural world, in particular, everything teems with discovery and with improvement...'<sup>742</sup>

Bentham's observation is true of any period but is especially apt of the modern society even if we are unable to articulate the concept of perfection. Advancement, in a free society, cannot and should not be checked by the sort of conservative thinking that stifles it. Trial by jury is no exception.

Thaman observes that the modern notions of procedural fairness in criminal procedure which have gained general international recognition in national constitutions and international human rights convention have their origins in the core values of the Anglo-American concepts which developed in the context of an adversarial trial by jury. These include:

The presumption of innocence, the privilege against self-incrimination, the equality of arms, the right to a public and oral trial, the accusatory principle and the judge's independence from the executive or investigative agency. The present Human Rights Conventions, it would appear, were drafted based on the above.

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<sup>741</sup> Thaman, S. C (2000) *Europe's New Jury Systems: The Cases of Spain and Russia*, ed. World Jury Systems by Neil Vidmar, Oxford University Press.

It is worthy of note that both the Kingdom of Spain since the Franco dictatorship and the Russian Federation, had to start afresh to draw up a constitutional framework under which the nation could unite. Both countries experienced upheavals in their history that required a fresh beginning and a rethink of the values that ought to prevail in a civilised society.<sup>743</sup>

The United Kingdom, with its long history of democratic stability and parliamentary supremacy, has no 'written' constitution and has never had a revolution of a significantly violent nature that would have necessitated a fresh beginning. This is not to say that there have not been dissents.

Indeed, UK has known internal and international wars to rival any other. However, there has always been the effective principle of compromise which has helped to avert violent revolutions within. Nonetheless, there have been intellectual and legal revolutions involving some eminent heavyweights.

It is interesting that the UK parliament enacted the HRA 1998 which introduced the ECHR into domestic law.

Thus, the principles underpinning the cultural legal heritage of most modern European legal systems with regards to civil liberties have become somewhat indistinguishable from the English law. Furthermore, the ever closer union with European States also

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<sup>742</sup> Jeremy Bentham, *A Fragment on Government*, ed, W. Harrison (Oxford, 1948), p.28.

<sup>743</sup> The Spanish Constitutions of 1812, 1837 and 1869 provided for some kind of trial by jury but the system found legislative form in the Code of Criminal Procedure of 1872 and finally in the Law on the jury of 1888.. Only the latter was implemented for any length of time between 1888 and 1923. It was then suspended by the Primo de Rivera Dictatorship. It was revived again between 1931 and 1936. For a history of jury trial legislation in 19<sup>th</sup> Century Spain, see Thaman, *Spain Returns*. Russia, on the other hand, introduced trial by jury under the leadership of Alexander II's judicial reforms of 1864. It survived, despite subsequent legislation removing political and press crimes from its jurisdiction until it was abolished in 1917 by the Bolsheviks. See Thaman, *Resurrection of Trials by Jury in Russia*, 31 *Stan. J. International L.* 61 (1995)

The movement that re-introduced trial by jury into the Russian Federation began with the old Soviet Union under Mikhail Gorbachev's perestroika. It culminated in the Russian Jury Law. The reform was aimed at replacing the traditional Soviet 'mixed court' which had been quite ineffective.

means that we now have shared values and common legal grounds with our continental neighbours.

It would not, of course, be correct to argue that the jury has been introduced in all European States. Indeed, where a form of lay participation is used, the role of the lay assessors is strictly restricted and often seen as little more than a token gesture.

Indeed, in some of these countries, the jury system has been rejected as being alien to certain principles such as the necessity for the reviewability of verdicts in the form of the requirement to provide a reason for a verdict.<sup>744</sup> There are significant lessons, nonetheless, to be learnt from the experience of the infant jury in Spain in particular.

By virtue of article 125 of the Spanish Constitution of 1978, public participation in the administration of justice in the form of trial by jury was enshrined. At the time, this was seen as a necessary ingredient to the democratic reform of the criminal justice system following the Franco Dictatorship. According to Thaman, the legislature noted that the suspension, abolition or limitation of the jury trial in the period between 1820 and 1939 always coincided with the limitation of civil rights in periods of monarchic reaction or dictatorship. He further argues that in nearly all Continental European countries, the introduction of trial by jury coincided with liberal reforms and its abolition with the installation of dictatorial or totalitarian regimes.<sup>745</sup>

These are lessons that might inform the debate in the English parliament regarding the institution. They also echo the sentiments expressed by Devlin when he referred to the jury as a 'little parliament' and that he could not envisage a dictator allowing the

<sup>744</sup> Article 111(1) of the Italian Constitution makes the re-introduction of the classic jury impossible because it requires the production of reason for all judicial decisions. See Ennio Amodo, *Guistiza popolare, garantismo e partecipazione*, in *I Giudici penali* 1, 13, n .30 in Thaman's *Europe's New Jury Systems*.

<sup>745</sup> These include Bolshevism in Russia (1917), Fascism in Italy (1931) and the Vichy Regime in France (1941). The exception was in Germany in which the democratic Weimar Government abolished the classic jury albeit in an undemocratic manner by the Emminger Decree of 1924. See Ellison Kahn, 'Restore the Jury? Or Reform? Reform? Reform? Aren't things Bad Enough?' (1991) 108 *S. Afr. L. J.* 672, 678

retention of trial by jury because it would affect his authority. In other words, this peoples' parliament is the closest approximation of a free society to the collective rule of law that embodies the citizen's participation.

The argument however, goes further. The Spanish legislature, much like its Russian counterpart, has rejected the Anglo-American general verdict of guilty or not guilty. They have both adopted, instead, the French model whereby the jury is presented with a list of questions or propositions. Auld LJ found this idea rather engaging in his report and recommended a list of questions which should be presented to the jury. The answers to these questions, he argues, should provide the judge with the means to divine the reasons behind a jury's verdict. This paper attacks that proposal as undermining the independence of the jury. Although it provides a platform for the argument presented here, there is a significant point of departure which maintains the jury's independence but makes a robust demand for the explanation of a verdict post pronouncement.

However, the Spanish system is of more interest to us as it requires that the jury give a succinct rationale for their verdict, indicating the evidence upon which the verdict was based and all the reasons for finding a particular proposition proved or not proved.<sup>746</sup>

Under article 120 (3) of the Spanish Constitution, 'judgement shall always contain the grounds therefore and they shall be delivered in a public hearing'.

During the drafting of the Constitution, the view that reason ought to accompany a verdict was considered necessary in conformity to the mentioned article 123 of the Spanish Constitution.<sup>747</sup> As far as research shows, Thaman observes, with the exception of a non-binding statement by the jury provided for in the Austrian Code of

<sup>746</sup> See Law of the Judiciary (LOTJ) art. 6 (1)

<sup>747</sup> It was also deemed necessary to comply with the presumption of innocence guaranteed by art. 24(2) of the Spanish Constitution and art. 6(2) of the ECHR. See Thaman, 'Spain Returns' at 364 (citing

Criminal Procedure,<sup>748</sup> this is the clearest attempt yet by a legislature to require that juries justify their verdicts.<sup>749</sup>

In the Spanish context, the jury's role in determining guilt in a criminal trial is restricted to finding that the defendant committed a certain act rather than a finding that a crime was committed in the legal sense. According to Thaman, art. 60 (1) originally called for a finding of guilt or lack thereof as to each charged crime.<sup>750</sup> This situation is similar to that obtaining in the English courts where the available verdicts are guilty or not guilty of the offence charged.

Prior to the end of the trial the Spanish judge prepares a verdict form or a list of questions some of which are designed to be favourable to the prosecution and others not so. The jury must then decide whether the questions were proved or not.

These questions only address the facts as presented during trial, conditions which exclude or modify guilt and statutory factors that aggravate or mitigate the defendant's criminal responsibility. Finally, the jury is asked to affirm or deny the proof of the defendant's guilt of the criminal acts contained in the parties' case.<sup>751</sup>

The Spanish legislature chose the question-list verdict as a way of giving the professional judge a factual foundation for the articulation of a reasoned judgment, this being a statutory requirement.

The essence of this is that a reasoned judgment is a legitimate expectation of the public in criminal trials both in the Russian Federation and in Spain. It is also a recognised part of the ECHR per art.6 (2).

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Gimeno Sendra, *Ley Organica Del Tribunal Del Jurado. Comentarios Practicos al Nuevo Proceso Penal ante al, Trbunal Del Jurado* 165-6 (1996).

<sup>748</sup> See art. 331(e) StPO. Thaman suggests that it is a contested point whether the reasons stated in the 'Niederschrift' may be used as a basis for attacking the factual findings of the jury. See Thaman, *ibid.*

<sup>749</sup> Thaman, *ibid.*

<sup>750</sup> In November 1995, the language was changed to 'charged criminal act' to effect a clean separation of questions of law from questions of fact. As one critic noted, 'it is no longer a guilt-finding in the strict sense, it is actually superfluous in the technical sense'. See Thaman, 'Spain Returns' at 378, citing Gomez Colomer, *El Proceso Penal Especial Ante el Tribunal Del Jurado* 33-4 (1996)

The latter is contested and dubiously so in the case of the United Kingdom. It is argued that this is more out of political expediency than any real argument. The courts have, so far, not ruled that the English courts violate article 6 (2) ECHR. That matter may yet change.

A further observation is that is it not the jury that articulates and delivers the reason in the Spanish case. It merely provides answers to the list of questions provided by the judge who will then interpret the jury's decision. Indeed, or in order to avoid the deficiencies of the verdict, the jury in Spain may request that the secretary of the court assist them in drafting the verdict.<sup>752</sup> If this was introduced into the UK courts, it violates the sanctity of jury deliberations by allowing a 13<sup>th</sup> juror or worse still allowing an eaves-dropper into the deliberations chamber. He would have to be under oath. But the practicalities only need to be stated to be appreciated. The court clerk is a professional. Does this compromise random selection and fairness?

How far can he interpret or explain the law without prejudicing the jury and given the sanctity of the jury room, how can we know that a distance is established and maintained? Furthermore, as a professional member of the court system, does he become a permanent juror and if so, should he not be subject to exemption and if he is, then what?

In England, the final word in a jury trial belongs to the judge who must make a summary of the evidence to the jury, explain the legal position of the case to them, instruct them on the law and explain the roles played by the judge and the jury.

<sup>751</sup> See Thaman, *World Jury Systems*, *ibid.*

<sup>752</sup> See *Ley Organica del Tribunal del Jurado*, B. O. E., 1995, 122. Some commentators have seen this as the first step toward, or a subliminal recognition of what is, in their opinion, the superiority of the mixed court with lay assessors.

The Spanish judge plays a similar role following the preparation of the verdict form, the arguments of the parties and the defendant's last word. The judge goes on to instruct the jury, in a restrained manner and in a form the jury can understand on the following:

1. The jury's function
2. The content of the verdict form
3. The nature of the facts under consideration – those that determine the circumstances constituting the crimes charged and those that refer to allegations of exclusion and modifications of guilt
4. The rules of deliberation and voting
5. The form of their final verdict.<sup>753</sup>

One might observe that the Spanish judge goes beyond the position of the English judge in explaining the rules of deliberation. The judge's ruling, following a guilty verdict, must be based on the facts the jury found to be proved.

This raises a conflict between the judge and the jury. Indeed, it is not a peculiar one since all judges, in all jurisdictions that employ lay participation in the form of trial by jury, must grapple with it. However, it is made more pronounced in the Spanish case. The judge must pass judgement even when he disagrees with the jury's verdict. This is fine. But then, he has to provide a rationale for that verdict.

This is altogether, an unhappy situation. In a case where the jury acquitted a defendant who had stabbed his victim in the areas of her vital organs on the grounds that he did not intend to kill, the judge lamented that:

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<sup>753</sup> See *LOTJ art 54*



'...in the mind of the jurist, a certain pain emerges from the point of view of judicial technique when one must justify a judgement when the facts collide with the interpretative criteria which jurisprudence utilizes to determine the intentionality of an agent'.<sup>754</sup>

The Spanish experience may not be a perfect one not least because there is a distinct lack of enthusiasm for uninformed lay participation in the trial process. But there is more.

Earlier on, this paper had contested the recommendations of Auld LJ on the grounds that the list of questions given to the jury would do very little to dispel the impression that the jury is being funnelled into a particular point of view by the judges and the parties to the case. This, this paper argues, casts a shadow on the independence of the jury. The Spanish experience, however, is instructive in one sense. The judge's summation articulates exactly what is expected of the jury including the requirement to pay attention to the list of questions and articulate a response to each.

Herein lies the gem.

The jury's attention is drawn, prior to retirement, to the list of questions it must answer in order that the judge may articulate a reasoned judgment. It is argued that this works to concentrate the mind of the jurors on the evidence and less on extra-legal concerns. The point however is not judicial interference in the mode of deliberation but the expected articulation of the reasons behind a verdict.

This paper recognises that in spite of this requirement, the Spanish jury has neither consistently delivered verdicts with which the judges agree nor have they eschewed sentimentality in their verdicts.

Indeed, a judge is required to review a verdict from a jury for defects and ask them to take corrective measures. If a judge returns a verdict to the jury on three occasions to make amends and it fails to do so, the jury may be dismissed and the case will go for a

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<sup>754</sup> Thaman, *ibid*, citing Fransesco Peiron El Pais (1997) – a Spanish case

new trial. If the new jury also fails to reach a verdict, the judge may enter a verdict of acquittal.<sup>755</sup>

The other interesting point of the Spanish position is that an acquittal<sup>756</sup> may be reversed by the superior courts. It did just that in June 27, 1997 when the Superior Court of Justice of the Basque County reversed the Otegi acquittal.

It ruled that the acquittal was based on the insufficiency of the rationale given by the jury, believing that the jury had basically made just bald assertions of reasonable doubt. Neither the Spanish legislature nor the courts define what the sufficiency of reasoning is and it is observed that the Spanish juries do not always provide elaborate explanations as to why they were persuaded by some facts and not others or why a case was proven.

In fact, some have adopted the de minimis principle and have confined their response to just 'witnesses.'<sup>757</sup> The efficacy of the Spanish experience is in its application in the English courts but with significant variations.

The integrity of the jury's independence must be protected but the jury must be told what is expected of it and given clear guidelines on how to deliver.

### **Bion Revisited**

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Earlier on, I had adverted to the suggestions made by Bion as the four necessary features of a decision-making group:

1. It must have a clear goal or sense of common purpose
2. There must be the absence of a rigidly defined internal sub group
3. The contribution of every member must be valued

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<sup>755</sup> *art. 65 LOTJ, ibid.*

<sup>756</sup> *This is markedly different with the English Courts where an acquittal is final.*

4. Members must have clearly defined and fully accepted roles.

Bion's suggestions, in the context of this research paper, can be adjusted to four requirements:

1. A jury must have a common sense of purpose
2. A jury must have clearly defined parameters for decision-making
3. A jury must be specifically instructed as to what it is required to do
4. There must be a robust process or environment within which the decision maker can comply.

Ellsworth argued that the lack of attention paid to the evaluation of juror competency may be due to the fact that competent decision-making is not clearly or operationally defined. As mentioned in Chapter 8, a study by McCoy et al suggested that when given specific instructions, it is possible that jurors can articulate an explanation for their verdict. The matter certainly is supported by the Spanish experience.

Let us consider the suggestions in detail.

1. Having a clear goal or common sense of purpose.

In a criminal trial involving judge and jury, the role played by each participant in the process is clearly defined. The judge instructs the jury of its duties in his summing up. But first, he identifies the parties to the case once the jury has been sworn in and empanelled.

The importance of this cannot be overemphasised and its place in our criminal trials is not contested. The jury's role is to determine the facts. It is the judge's role to determine the law.

'Our functions in this trial have been and remain quite different. Throughout this trial, the law has been my area of responsibility and I must give you directions as to the law which applies in this case. When

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<sup>757</sup> The Court in the Basque County has studied reasons given in 139 verdicts returned up to March 31, 1998 and has found reasons sufficient in 70 cases and clearly insufficient or non-existent in 51 cases.

I do so, you must accept those directions and follow them. I must also remind you of the prominent features of the evidence. However, it has always been your responsibility to judge the evidence and decide all the relevant facts of this case and when you come to consider your verdict, you and you alone must do that'.<sup>758</sup>

So here we have a classic separation of powers made quite clear to the tribunal of fact. The matter begins to get a little blurred once we get down to what the jury may or may not take into consideration.

'The facts of this case are your responsibility. You will wish to take account of the arguments in the speeches you have heard but you are not bound to accept them. Equally, if in the course of my review of the evidence, I appear to express any views concerning the facts or emphasise a particular aspect of the evidence, do not adopt those views unless you agree with them and if I do not mention something which you think is important, you should have regard to it and give it such weight as you think fit. When it comes to the facts of this case, it is your judgment alone that counts.'

This is the extent of the direction except with particular relevance to the burden and standard of proof and other matters. At the end of the summation, the jury retires to consider its verdict.

What should they make of the separation of powers? Should they consider all the tendered evidence, consider the judge's comments or decide according to their consciences? The matter is not straight forward.

As concise as the direction is, it leaves the juror with the distinct feeling that he must apply his own judgment and what is more, there is no requirement to articulate an explanation. How does the system ensure that the jury actually considers the evidence?

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CGPJ Informe, pp. 74, CGPJ Anexo I at 33-4

If they just come out and declare a verdict, how do we know they even considered anything presented in the trial or that their verdict was not entirely based on the inscrutable conscience?

A proposed specimen direction would add the following:

'...when it comes to the facts of this case, it is your judgement alone that counts. In reaching that judgment, please be prepared to articulate the basis for your verdict.

You must give careful consideration to all the evidence and be prepared to inform the court which evidence you found persuasive as well as which ones you rejected. You must also give brief but succinct explanations as to why you found any evidence persuasive or otherwise taking care to explain whether your reasoning relates to the strength of the evidence, the way it was collected or simply the veracity of the witnesses'.

There is a further point. It is submitted that unanimity decision-making should be restored as a way of ensuring a common objective. It could be argued that when jurors know that a majority verdict is acceptable, there is the possibility that the common purpose idea does not operate as robustly as it should.

A jury that must reach unanimity has two common objectives: to reach a decision and to agree altogether with that decision. The third element of anticipated explanation will add to the coherence of the deliberations.

2. A jury must have clearly defined parameters for decision-making

This is a difficult area as there is a plethora of evidence that the jury must grapple with. However, the soft instruction the jury receives as to what evidence it may or not consider needs to be revised.

A robust direction to consider all the evidence but to decide the weight to be given to each piece of evidence may be more useful.

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<sup>758</sup> Crown Court Bench Book Specimen Directions: May 2004 update

Such instruction may include the words 'consider all admissible evidence objectively, debate all issues raised, reach a decision, evaluate that decision in light of your debate and articulate your reasoning'.

3. A jury must be given clear instructions.

The rules of evidence are such that occasionally, evidence may be introduced in the course of a trial which is not admissible or admitted for other purposes. The jury will be directed as to what to do with that evidence.

Earlier, we had considered the fact that asking jurors to ignore certain evidence during deliberations sometimes produced a reactance that made it impossible for them to comply.

It is argued that the requirement not to explain a verdict may indeed foster this reactance. There is no way of telling whether or not the jury complied and speculating on it is futile. It is argued that specific instructions as to what evidence to ignore would be better adhered to by the jury if there is a corresponding instruction that the verdict must be explained. All these instructions must be in written form together with the transcript of the issues before the tribunal of fact.

The matter is really quite simple. The Spanish manage to obtain answers, in the main, to a list of questions posed to the jury. This forms the basis for a reasoned judgment.

How should we do it? The next chapter deals with this quest but before that, the fourth element:

4. There must be a robust process or environment within which the decision maker can comply.

Without a strict and structured process which is unremitting in its requirements, the jury will continue to operate according to the dictates of its conscience.

Quite apart from judicial instructions as to court etiquette designed to avoid being found in contempt of court and the rules of evidence, the jury has no strict guidelines to help it arrive at a decision. In other words, the environment of a trial does not allow for fundamental jury accountability. This paper argues that the shift in emphasis should not be in changing the juror but to create an environment in which the jury, as a body, can perform as required of it by the court system. It is one thing to demand accountability, it is quite another to make its delivery a successful and possible one. Creating such an environment as part of the judicial process does not infringe on the jury's independence.

On the contrary, its absence greatly affects what the jury can do because in such an ordered environment, in the absence of a system-driven process, the liberation theory operates on the other end of the spectrum which is to wallow in the ignominy of unaccountability. The environment, ordered by a process, would discipline the trial of fact and make it easier for him to deliver that which is expected of him. Let us look at the process.

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## Chapter Twenty - The Thirteenth Juror

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'Many rules of evidence can be understood only in terms of the judge's need to rigidly control a group of ignorant illiterates – the jury. But change is...apparent here. The present day juror is much more sophisticated and educated than was the juror sitting when the rules of evidence solidified in the last century'.<sup>759</sup>

This statement reflects the reality of its time but it is true today as it was in 1966.

Weinstein could have been addressing the 21<sup>st</sup> Century.

In order to facilitate juror comprehension and explanation for a verdict, better management of the criminal trials is advocated and it may be necessary to adopt the following into the English courts.

1. Jurors should be required and allowed to take notes during the trial – a situation that has been tried and tested in many courts in the US starting with the Wisconsin experiment and attested to by the Arizona Jury Discussion Project. The notes should be left behind at the end of the trial in the jury room to be destroyed by court officials, shredded by the jurors as they leave the deliberation chambers or kept as part of the court records if there is enough room for them.
2. The judge should provide the jury with a summary of the case at hand and his pre-trial instructions so that they can get acquainted with their roles at the outset. They should be allowed sometime to read and understand the summary and if possible, the judge may explain it to them briefly. One of these instructions should be the requirement to produce the reasoning for the chosen verdict – this has the effect of bringing the jury's attention to what the system expects of them from the outset.

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<sup>759</sup> JB Weinstein, 'Some Difficulties in Devising Rules For Determining Truth in Judicial Trials' (1966) 66 Columbia Law Review 223, 225.



3. The trial should be recorded and played back to the jury during deliberation should they wish to see and hear it for clarification. This tape should be destroyed once the trial is over or after a prescribed period to allow for possible appeal if a conviction results. It should also be given protection by the Contempt of Court Act 1981.
  4. The jury should be required to produce the basis for its verdict. This articulated rationale should be produced in a written form and read out to the open court by the foreman following the rendering of the verdict. Guidelines should be provided as to what the court seeks but the exact remit and wordings would be those of the jurors. This will protect the independence of the jury.
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#### **The Jury in Action - The Arizona Jury Discussions Project.**

Neil Vidmar et al conducted the Arizona Jury Discussion Project using a number of civil trials. The study was based on the Arizona Rule of Civil Procedure 39(f) which instructs jurors that they are permitted to discuss trial evidence among themselves in the jury room during trial recesses as long as all jurors are present; the jurors are admonished to reserve judgment about the outcome of the case until they begin deliberations. Other states, by contrast, typically instruct jurors that they must not discuss the evidence, even among themselves, until they are instructed on the law and deliberations commence. Rule 39(f) has been controversial.

The rationale behind Rule 39(f) includes the following empirical assertions:

- (a) juror comprehension of evidence is enhanced
- (b) jurors can share impressions and raise questions on a timely basis rather than waiting until deliberations when the impression or question may be forgotten

(c) a juror's tentative judgments that surface during discussions can be tested by the other jurors' knowledge and

(d) divisive "fugitive" conversations and cliques among jurors will be reduced because of the opportunities for "venting" in the presence of the other jurors.

### **Opposing Views**

Opponents of juror discussion have offered counter-arguments that include the following:

(a) The rule may encourage the formation of premature judgments about ultimate issues in the case;

(b) the rule advantages the plaintiff through a primacy effect, since the plaintiff presents first

(c) jurors who openly express their views in the presence of other jurors will be more inclined to be fixed in those views

(d) an aggressive juror may dominate discussions and unduly influence others before deliberations begin; and

(e) permission to discuss may open the gate to discussions when not all jurors are present and reduce inhibitions against talking with non-jurors during trial.

### **The Research**

The Arizona Jury Discussions Research Project empirically tested the opposing views of proponents and opponents of Rule 39(f). All juror discussions during trial, jury deliberations and the trial itself were videotaped in a sample of 50 Arizona civil juries that included motor vehicle, medical malpractice, other torts and contract cases. In addition to the videotapes, the data included trial exhibits, judicial instructions, verdict sheets, and questionnaires administered to the trial judge, the jurors and the attorneys.

Additionally, a sub-set of the cases were randomly assigned to a control condition in which jurors were instructed that they could not discuss the evidence.

The researchers discovered the following:

1. Nearly all juries instructed that they were permitted to talk about the trial did so on at least one occasion, but juries varied in the extent to which they took advantage of the opportunity. Despite their instruction under Rule 39(f) to limit discussion to occasions when all jurors were present, jurors often discussed the case when some jurors were not in the jury room.
2. Discussions were significantly more likely to occur in the second half of the trial than in the first half. Only a minority of juries instructed not to discuss the case had multiple conversations about the case.
3. A small minority of jurors reported discussing the case outside the jury room, whether with other jurors or with family and friends;
4. Jurors in the Discuss and No Discuss cases did not differ in the frequency of these outside discussions.
5. During discussions, jurors sought information about the testimony from one another to assist them in recalling testimony, obtain needed clarification, or provide meaning to facts. They also discussed questions that they had submitted to the court or that they planned to submit, and they talked about evidence that had not yet been presented that they would like to have.
6. Case studies in the complex cases examining the correspondence between the trial evidence and the answers that jurors gave when their fellow jurors sought information during discussions revealed that discussion did result in more accurate understandings of trial evidence.

7. In the majority of Discuss cases, one or more jurors expressed verdict preferences during discussions. Typically, the statements concerned liability, favoured the defence, and occurred after a defence witness had testified. These statements infrequently provoked reminders from other jurors about the judge's instructions to not make up their minds. No jury arrived at a group decision on a verdict in the course of their discussions.
8. Although the Discuss juries were somewhat more likely to take their first vote in the initial 10 minutes of deliberations, average time to first vote did not differ between Discuss and No Discuss juries. Discuss juries tended to have shorter deliberations than No Discuss juries; however, the difference was not statistically significant. The average number of questions submitted during trial and during deliberations did not differ between Discuss and No Discuss juries.
9. The verdict statements expressed during discussions sometimes, but not always, predicted individual juror positions during deliberations.
10. Plaintiff win rates and damage awards were not different for Discuss and No Discuss juries.
11. Unanimous verdicts occurred more often on Discuss juries, and Discuss jurors tended to see their juries as more open-minded and thorough; these differences, however, were not statistically significant.
12. The overall impact of juror discussions was modest, revealing both benefits and a few shortcomings. Several changes in procedures may maximize the benefits and minimize or eliminate the weaknesses in the way that Rule 39(f) is currently implemented.

These changes include posting the instructions relating to Rule 39(f) in the jury room, providing each juror with a written copy, and reinforcing the instructions in the course of the trial. It may also be advisable to encourage jurors to select an interim presiding juror who holds that position during discussions. <sup>760</sup>

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### **The point**

Although this study is based on civil trials, it illustrates the point made by this paper in relation to jury involvement and can be instructive in the debate for criminal jury reformation.

### **Reason Format**

Cornish adverted to the consistency of a jury's verdict where it is required to produce one and this paper has contested this suggestion on the grounds that the explanation need not be consistent with each jury but the format must be.

The jury should restrict itself to the facts and present a short and concise explanation.

The above study indicates that where jurors are allowed to make notes, they generally do and find these helpful during deliberations. From an informed and intellectual perspective, this should be a requirement in the English courts.

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<sup>760</sup> Vidmar, N et al (2002) Arizona Jury Discussions at <http://www.law.duke.edu/pub/Vidmar/arizonacivildiscussions.pdf>

## **The Reason Curve**

The Spanish provision for a legally trained court clerk to assist in the drafting of the opinion of the jury is problematic. This, I have argued, will undermine the independence of the jury and lead to the establishment of a college of expert jurors.

The reason curve however, provides a different dimension of clarity to a jury trial.

It is a mental seclusion into which jurors can retire prior to delivering their verdict to ensure that they are in compliance with the conventions of objective decision-making.

It forces them to examine their verdict in the light of reason, filters out prejudice and ensures that a balanced view of the entire evidence is taken. This curve is not necessarily an isolated event. For this reason, it is argued that the requirement should be part of the judge's pre-trial instruction to the jury.

The impact of this is to ensure that the jurors enter this sphere as early in the drama as possible because only then will they be able to integrate the court requirement into the process. This curve represents the thirteenth juror.

The thirteenth juror should be nothing more or less than the requirement to develop and enter this curve combined with the template of instructions given to the jury with the judge's leave in order to make the decision-making process a more informed and less arduous one for the jury and the community. The thirteenth juror, in addition to being the reason curve, also constitutes a robust and structured trial system that has clear and unambiguous instructions.

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## Conclusion

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This thesis has attempted an exploration of the place of the explained verdict in the ECJS through an analysis of existing legal literature and research papers of the social sciences. It has articulated the argument in three essential areas with the following submissions:

First: it submits that research indicates, overwhelmingly, that the giving of reason is a legitimate expectation both of the establishment and of the public in almost all socio-political public activities, including most international tribunals, international law and most legal jurisdictions in our modern society. It finds unpersuasive the arguments advanced for its absence in criminal trials in most domestic courts.

It makes this submission by reference to our judicial heritage and appeal to accepted International Conventions.

Second: it submits that the present jury, constrained by the lack of a fully structured trial system designed to assist a sound logical decision-making, is incompetent to explain its verdict. It does so by highlighting the rules governing criminal trials including common law principles, the nature of the adversarial system, the inherent collective thinking on the appropriate method to obtain honest and unfettered deliberation amongst jurors leading to subjectively and objectively evaluated just verdict and by exploring some of the factors that influence a jury's verdict. It observes that the process is not assisted by the fact that some judicial instructions concentrate on requirements that pose tremendous mental and practical challenges to the jury at the expense of deliverable requirements.

Third: it submits that as a collegiate, the jury is competent to provide an articulated explanation of its verdict with the very important proviso that it receives a clear requirement and instruction to do so from the moment it is empanelled and that the right environment and process are installed to enable such a delivery.

In other words, better management and clear unambiguous requirement to explain ought to be a standard requisite of trial by jury. But of course, in order to achieve this, a number of changes would, of necessity, be made to the criminal trial process. This paper does make a brief articulation of some of these changes and submits that these be matters for further academic research.

These submissions turn on the further observation that there ought to be a political dialogue aimed at developing activities that inform the citizen at large of his duties and prepare him not only to discharge those duties but also to do so in an informed and result oriented manner. Furthermore, the court system should invest in the necessary strategy to maximise jury participation and trial efficacy by creating environments for and pursuing the explanations of a verdict with the view to learning lessons from them and delivering a fair trial. Interest restricted to the general verdict is not enough. Such pursuit not only invests the entire process with further legitimacy (if some was required) but also gives the trial process the real aura and satisfaction of fairness. This develops the judicial system in ways that assist and sustain connectivity with the public.

The paper makes a single conclusion that there is a historical and a post-modern place for the explained verdict in the ECJS that precedes the human rights movement but made especially necessary in the advent of human right conventions and articles.



It finds however, that in light of modern criminal trials, such a place is latent and must be discovered or constructed – in other words, the place has always existed but has lacked visibility due to the exigencies of criminal trials and the reluctance of the system for reformation. It submits that juries are capable of delivering an explained verdict, as they have done at various times in the past, provided that they are required, expected to and provided with the aids to do so. To put it another way, in spite of their seemingly divine powers that apparently render their verdicts not only inscrutable but also nonsensical at times, juries are capable of being accountable provided they are given the guidelines to do so and an appropriate environment and process are put in place. Accountability must follow responsibility. Accountability is thus a natural progression of an informed and better managed system of trials.

This is not necessarily at odds with the principle of jury independence but its absence may indeed challenge that independence and as Damaska argued, cause its verdict to suffer the ignominy of legitimacy deficit.

This paper further argues that in the light of the demands of a complex society and the need for fairness and accountability, an explained verdict emerges as a legitimate expectation of a modern democracy in the 21<sup>st</sup> Century in both international and domestic courts. What is required is that nations adopt the same sense of maturity in domestic courts as they seem to exhibit in the international arena by extending the frontiers of trial by jury. In a global world, 'representativeness' is more of a global phenomenon than a local one and the variables abound. The paper thus finds that although the place of the explained verdict, given the present legal climate, is untenable not least because we are still held hostage by the subservient mentality that considers juror intelligence at the expense of a process, explanation is not as far fetched a notion as it might appear.

Benjamin Barber claimed that effective dictatorships require great leaders. Effective democracies need great citizens.<sup>761</sup> This thesis agrees and submits that effective criminal trials need, in addition to great jurors, a great and informed system the elements of which must include the requirements for a reasoned verdict.

This paper alluded to the statement from the American writer, John Steinbeck who opined that 'it is the nature of man to rise to greatness if greatness is expected of him.' Steinbeck's point is a self-evident truism. We only have to look at evolution to validate the statement. We only have to look at business empires to learn some valuable lessons on people management and accountability.

We have established that a reasoned verdict is a legitimate expectation of a modern democracy. What is required is to help the jury deliver that expectation.

Requiring the fact finder to state the criteria for his finding will require not just the asking but the measures necessary to accomplish the task as articulated here. We may find that the juror is actually equal to the task in spite of our misgivings.

This paper supports the view that trial by jury has served this country for many generations. While it has its challenges, it is an institution that approximates our democratic ideal. Indeed, it does show that freedom lives – at least in the lives of those on trial where the evidence is hotly contested. However, it is an institution that must evolve as it has done over the years.

Modern democracy demands accountability from all public judgements. The jury should not be an exception. In order to maintain its role in CJS, the system must be brought forward. The reforms proposed by this thesis are not revolutionary – they merely identify the requirements of a modern democracy.

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<sup>761</sup> Barber, B. (1984) *Strong Democracy: Participatory politics for a new age*. Politics For A New Age. Berkeley, CA: University of California Press

However, these measures introduce a unique element into the debate that challenges the thinking and argues for clarity and maturity in the system. The argument for the status quo has run its course. It is imperative that we find a new way to make the system more reflective of our needs.

Tetlock et al found that having to justify one's position to others with unknown or differing views increases accountability. Accountability should not be an option for the judicial system much less the jury. Anonymity is a poor substitute for it and should not serve as an excuse for not requiring it. This accountability is crucial given the wave of Human Right Conventions and its boundaries must be extended to include the wider public as represented in the court room. There is, by definition, a requirement that any changes to the way jury trials are conducted are made after exhaustive study and investigation so as not to do a violent and irreparable damage to the institution.

The ECJS stands in need of reform in many ways and some of those are more deserving than others. In every human system, mistakes and errors are bound to occur from time to time. Echoing those sentiments, Lord Hoffman<sup>762</sup> quoting Immanuel Kant noted that 'from the crooked timber of humanity, nothing completely straight can ever be made.'

It is argued that our system of trial by jury is not a perfect institution and for as long as our humanity persists, the inherent challenges will remain. However, it behoves every system to evolve and develop in ways that support its integrity or as Rawls argues, bring it to an end.

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<sup>762</sup> R v Smith, HL, (2000) *ibid.* per Lord Hoffman.

There are those who will argue that the jury is not up to the task assigned to it. In the words of Mark Twain: 'The jury system puts a ban on intelligence and honesty and a premium on ignorance, stupidity and perjury. It is a shame that we must continue to use a worthless system because it was good a thousand years ago...'<sup>763</sup>

Adopting the modest measures highlighted in this paper will nullify the charges of Mr. Twain not least because a reasoned verdict would force the decision maker to ensure that his judgment is based on rational grounds that can be defended.

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### The Implications

This paper has concentrated on decision-making and reason articulation post verdict by juries. In spite of the usefulness of the research examined here, the conclusions of this paper suffer from a number of limitations. Some of those could be attributed to research restrictions and access to real jurors. The studies examined here, thus, do not represent an exhaustive survey of all decision research or the factors that affect juries' verdicts. The topics are discussed very briefly in order to investigate the issue of jury accountability.

### Accountability

Decision making is strongly linked to accountability. Decision makers who are made to feel accountable for their decisions show less overconfidence than those who do not,<sup>764</sup> display less social loafing<sup>765</sup> and exhibit greater analytic complexity.<sup>766</sup>

In the end, it is argued that how people think depends in part on why they think.<sup>767</sup>

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<sup>763</sup> Mark Twain in *Roughing It* (1872). Hartford, Conn: American Publishing Co.

<sup>764</sup> Tetlock, P. E. & Kim, J. I. (1987). Accountability and judgment process in a personality prediction task. *Journal of Personality and Social Psychology*, 52, 700-709.

<sup>765</sup> Weldon, E. L. & Gargano, G. M (1988). Cognitive loafing. The effects of accountability and shared responsibility on cognitive effort. *Personality and Social Psychology Bulletin*, 14, 159-171.

<sup>766</sup> Hagafors, R. & Brehmer, B. (1983). Does having to justify one's judgments change the nature of the judgment process? *Organizational Behaviour and Human Performance*, 31, 223-232.

<sup>767</sup> Tetlock, P. E et al (1989). Social and cognitive strategies for coping with accountability: Conformity, complexity and bolstering. *Journal of Personality and Social Psychology*, 63, 53-63.

Furthermore, decision making depends largely on situational factors such as time, mood and some of the factors explored in chapter eleven of this paper. One of those factors is time. Although the court system allows, in theory, a considerable length of time to juries to deliberate on their verdicts, evidence pointing to the requirement for non-unanimous verdicts and juror's own time constraints suggest that time can be a crucial factor in jury decision-making. When there is pressure of time, decision-makers use simplifying strategies, attend to a small number of cues and choose relatively low-risk alternatives.<sup>768</sup>

Then there is the factor of the decision-maker's mood and disposition. Research indicates that the setting of the trial and its nature combined with the type of evidence tendered can significantly affect the mood of the decision-maker. Thus decision-makers who are in a 'good mood' tend to be more creative,<sup>769</sup> perceive negative events as relatively infrequent and improbable<sup>770</sup> and are more circumspect when in relation to risk taking.<sup>771</sup>

These studies highlight the care that should be exercised when drawing conclusions from decision research and care should be taken to avoid generalisations. It must be borne in mind that a research is subject to the biases and dispositions of the researcher. As such, this paper does not claim fallibility but identifies with the challenges facing the study.

<sup>768</sup> Ben Zur, H., & Breznitz, S. J. (1981). The effects of time pressure on risky choice behaviour. *Acta Psychologica*, 47, 89-104.

<sup>769</sup> Isen, A. M., Daubman, K. A. & Nowicki, G. P. (1987). Positive affect facilitates creative problem solving. *Journal of Personality and Social Psychology*, 52, 1122-1131

<sup>770</sup> Johnson, E. J., & Tversky, A. (1983). Affect, generalization and the perception of risk. *Journal of Personality and Social Psychology*, 45, 20-31. See also Salovey, P. & Birnbaum, D. (1989). Influence of mood on health-relevant cognitions. *Journal of Personality and Social Psychology*, 57, 539-551.

<sup>771</sup> Isen, A. M., & Geva, N. (1987). The Influence of positive affect on acceptable level of risk: The person with a large canoe has a large worry. *Organisation Behaviour and Human Performance*, 31, 194-202..

In spite of these challenges, scholars in the English Criminal Jurisdiction suffer a distinct disadvantage due to the limitations of the Contempt of Court Act making it impossible to undertake any useful research involving real jurors.

It is submitted that in its proposals on trial by jury, the government put the cart before the horse by attempting to curtail the rights to trial by jury. The important requirement would have been for a reasoned verdict in the first instance. The delivery of it, it is argued, would have generated a robust political debate reflecting the independence of the jury and energising the debate in an informed manner. Out of this, a clear path would have emerged as to how best to evolve the system to reflect the community it serves.

These research findings and suggestions have implications for lay participation in the CJS. It is submitted that it is both practical and useful, notwithstanding the potential political fall-out (the evidence of which remains, in the most, anecdotal), that a jury be required to explain its verdict.

The reasons are manifold:

Provided the safeguards and instructions entertained here are installed prior to the commencement of a trial, such a requirement may serve as a filter of prejudice during deliberations and a catalyst for ensuring that jurors balance their subjective assessment of the evidence with real evidence tendered in court. In other words, a modern criminal justice system should employ the combined merits of dry logic and emotional dynamics in determining the threshold for criminal responsibility and such should be evidenced in the process. This position presupposes that useable fact is buried somewhere amongst the volume of evidence but the truth of the matter remains within the competence of interpretation following real evaluation. An explanation thus enhances the understanding of that interpretation and energises that evaluation.

It may also assist higher level juror reasoning and the quality of the debate during the deliberation process. This may be directly more relevant to the perception of fair trials than other attempts at tinkering with the system.

As a corollary to this, the opportunity to explain a verdict may be catharsis for the jurors assisting them to come to terms with their verdict while constraining the jury to useful relevant evidence.

There is also, at once, a utilitarian value to this. A society responds largely to what is expected of it. As Steinbeck observes, if greatness is expected of a man, he is more likely to attain it. Adding to this, 'treat people as if they were what they ought to be and you help them to become what they are capable of being'.<sup>772</sup>

The current climate discourages juror reasoning on the unproven ground of juror mental deficiency. In other words, expectation of greatness is not enough. Provision must be made to give birth to and nurture the attainment of that expectation. A post-modernist legal system that adopts an intellectual approach to jury trials may find that the lay participants are far more capable than it had presumed. In other words, the legal system should provide better management of the jury system in order to assist it to deliver the sort of verdict on a prescriptive platform as it desires.

Shari Diamond,<sup>773</sup> professor of law and senior fellow at the American Bar Foundation, in her take on the research with Vidmar, tempers all the heated rhetoric about jury decision making by showing how jurors actually behave.

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<sup>772</sup> Johann W. von Goethe, cited in Peter, L. J. (1977). *Peter's Quotations. Ideas for our time.* New York: Bantam Books.

<sup>773</sup> Diamond, Shari, (2005) *Revisiting the Unanimity Requirement: 'The Behavior of the Non-Unanimous Civil Jury'* (Northwestern University Law Review, vol. 100, no. 1, 2005).

With an unprecedented access to actual jury decision-making, Diamond has widely recognized expertise on the subject. Despite popular notions, Diamond's research indicates that jurors, when given proper instructions and respect for their intelligence, are relatively good decision makers.

“The emphasis should be on giving jurors enough clear information about what they need to solve problems...but the legal system often treats the jury as a radioactive isotope, a valuable but unstable element whose power is so great and whose behavior is so unpredictable that the only reasonable response is an elaborate system of control.”

Diamond's recent work on the American Jury Project, an ABA task force charged with designing standards for juries and jury trials, was greatly informed by her research, some of which came out of the one-of-a-kind Arizona Project.

One of her Arizona project studies, for example, concluded that judges should permit jurors to submit questions to witnesses during the course of a trial. Judges often don't exercise that option because they worry that when jurors are told that they can't answer a particular question, they will become upset, jump to wrong conclusions or somehow skew their decision-making. Diamond's research was rather revealing:

“But our research shows that when judges tell jurors that they can't answer a question, jurors understand, for example, that the rules of evidence and other legalities might preclude certain questions and easily move on...the need to leave some juror questions unanswered offers no justification for missing the opportunity to assist jurors in reaching well-grounded decisions.”



Accordingly, the recently revised ABA jury standards that she worked on recommend that judges allow jurors to ask questions, suggesting that judges be as forthright as possible about why certain questions will not be allowed.

Through the Arizona Jury Project, Diamond and Vidmar received unprecedented access to what goes on behind the closed doors of jury rooms.

Because of the adoption in that state of Rule of Civil Procedure 39 (f), a controversial innovation in the civil court system as mentioned above, jurors in Arizona are allowed to discuss cases during trial breaks rather than only in final deliberations. Interested in how the rule would impact jury behavior, Arizona lawmakers allowed unobtrusive video cameras in jury rooms, giving researchers a highly valued peek at how jurors deal with instructions and evidence.

As mentioned earlier, researchers usually rely on simulated trials to study jury decision-making, however, through the Arizona project, they observed real jurors to analyze various aspects of how juries behave and, thanks to the Arizona innovation, have access to their thinking throughout the trial. Diamond et al continues to publish studies from her analyses of the Arizona project data collected from the videotapes of 50 civil cases as well as post-trial questionnaires from jurors.

In the first part of the project, Diamond and Vidmar addressed arguments against allowing jurors to discuss a case throughout the trial, as the Arizona reform allowed, rather than only in the final deliberations. According to one argument, such trial-long discussions of the cases would lead to premature verdicts. However, the research discovered that some individual jurors did offer positions on verdicts before official final deliberations began but what they said did not necessarily match their final verdicts and no jury arrived at a group verdict before final deliberations.

Most strikingly, jurors corrected misunderstandings during those trial-long discussions and solidified some of the memories that in a complex case are important for them to understand.

Diamond et al observed that 'much of what they did was exactly what one would hope they would do.'

'The Arizona deliberations reveal that some of the claims made in favor of dispensing with unanimity are unfounded.' 'Advocates argue that the non-unanimous verdict protects the jury from the obstinacy of the erratic or otherwise unreasonable holdout juror. Critics of the non-unanimous decision rule claim that it weakens the ability of jurors holding plausible minority viewpoints to be heard, undermines robust debate and threatens the legitimacy of jury verdicts'.

'The image of eccentric holdout jurors outvoted by sensible majorities in non-unanimous trials receives no support,' Diamond says. 'Instead the deliberations demonstrate that thoughtful minorities are sometimes marginalized when the majority has the power to ignore them in reaching a verdict.'

Diamond et al's research supports the position of this paper that better management coupled with clear and unambiguous instructions to the jury not only enhance the decision making process but make it easier for the jury to articulate a rationale for its verdict. Where the communication and interactivity are lacking with jurors, the problem is exacerbated and the cryptic verdict will persist because that political fear will remain unaddressed.

John Steinbeck may yet be proved correct. The converse is also possible but less probable in an advanced literate society.

The emphasis, though, is not so much in changing the juror as in creating the environment in which the juror can deliver accountability. It is submitted however, that the more accountability is demanded as part of the functions of decision makers, the more likely they are to deliver it. The process may be difficult at first but evolution in this area may be an excellent servant. Society will, in the long run, be the beneficiary by having an open and informed system. The justice system will have advanced in its appreciation of lay participants and evolving a more informed approach to criminal trials. Notwithstanding most of the phoney wars and wrangling on the subject, the jury system has evolved. In one sense, it has slowly evolved into gradual irrelevance and the light of its lamp only showing the path to a time when it stood as a custodian of freedom. In another sense, it has evolved into a quivering replica of its former glory maintained by those who owe a special allegiance to the empire's past. The death knell may yet be struck not by outlandish commentary but by the court system's refusal to acknowledge the research into jury reasoning and the demands of the public that it serves as reflected not just in international criminal laws but also social behavioural research. It would be reassuring to think that the future which promises to reveal even more startling evidence of cognitive and behavioural coherence will change this state of affairs. But if the past is any guide, many more premature arguments and controversies and conclusions will abound. Equally, if the past is any guide, the jury will continue to survive albeit with limited and even muted evolutions if only to appease those with orthodox inclinations.

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### Further research

A research on a subject of this nature cannot be completely based on literature review if it is to extensively impact the administration of criminal justice. The difficulties associated with an informed field research on the subject articulated in this paper make it necessary to extend this area of work.

This paper has been hampered by the provisions of the Contempt of Court Act 1981 in terms of interviewing the public and participants in the criminal justice system.

The area broached here must, of necessity, involve the opinions of those engaged in the CJS particularly jurors and ex jurors, legal practitioners, judges and the news media. Studies such as those conducted in New Zealand and Australia as well as that by Professor Zander must be commissioned in order to unearth informed opinion. Perhaps the Law Commission can commission a project on the explained verdict and its implications for the outcome of the trial and public entitlement.

Future research is required to determine whether or not a real juror would be capable of delivering a reasoned verdict. This paper already claims that he can. Perhaps the research should concentrate on the guidelines, instructions and the environment or process to be given to a jury and test its ability to conform.

Another area of research would be to determine the practical implications of a reasoned verdict relative to appeals and the potential for political fall-outs. So far, appeals mounted on the grounds of jury malpractice have been largely thwarted by the confidentiality of deliberations and the cryptic verdict.

Perhaps more engaging would be research into juridical notice and the explained verdict. Should a jury declare the expert composition of its membership when matters requiring specific juridical notice are in issue? Should this be necessary or would it give rise to political fall-outs that may be difficult to manage?

Research on the jury is restricted by statutory provision. As a result, the UK lacks an articulated scholarship on the subject. While it is true that we can learn from research carried out in other jurisdictions, we must accept that we have a distinct legal system and cultural values that are not always approximated by others. Thus, our understanding of our legal system, while at times borrowing from others, must be fundamentally based on our own legal experience and cultural heritage.

In the light of this observation, it becomes crucial that the provisions of s. (8.1) Contempt of Court Act 1981 be revisited so as to allow academic research into the decision-making process of the jury. Then, perhaps, we would be able to address, with a higher degree of certainty, the place of the explained verdict in the English Criminal Justice System.

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## Further Reading

Abramson, Jeffrey (1994/2000). *We the Jury: The Jury System and the Ideal of Democracy*. Cambridge, MA: Harvard University Press [2000 reissue, with new preface of book originally published in 1994 by Basic Books]. Presents a strong defence of the jury system while noting problems of community representativeness, exclusion of knowledgeable jurors and bias in capital sentencing. Vigorously defends the requirement that juries be unanimous and that peremptory challenges be eliminated.

*American University Law Review* (Winter 1991). Symposium Issue on the Selection and Function of the Modern Jury. Volume 40, Whole No. 2. Articles focus on topics of jury selection, particularly in media-saturated cases, and present empirical research on jury competence and jury prejudice.

Baldwin, John, & McConville, Michael (1979). *Jury Trials*. Oxford: Clarendon Press. An important study of the British jury. Analyzes jury trials from Birmingham and London in the mid-70s, comparing the verdicts of the jury with opinions of other parties in the case such as judges, lawyers, and police officers. Finds a number of questionable acquittals and a smaller number of questionable convictions.

*Chicago-Kent Law Review* (2003 Symposium Issue). *The Jury at a Crossroad: The American Experience*. Volume 78, Number 3.

Nancy S. Marder edited this special issue of the CKLR, which includes articles on a range of topics on the American jury, including jury sentencing, voir dire and jury selection, jury nullification, and race and the jury, along with essays on reinvigorating the jury.

Constable, Marianne (1994). *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge*. Chicago: University of Chicago Press. An intriguing account of the rise and fall of the mixed or half-alien jury to decide early English disputes. Mixed juries decided cases in which members of two different communities clashed. Half the jury came from one community, the rest from the other community. Provides an

alternative vision to the contemporary jury, because unlike the contemporary jury, the mixed jury purposefully incorporated diverse segments of society.

Choo, Andrew, L-T (2006) *Evidence*. Oxford University Press. A text book on evidence which presents the arguments on the law of evidence in a helpful and readable fashion taking care to provide insights.

Choo, Andrew, L-T (1993) *Abuse of Process and Judicial Stays of Criminal Proceedings*. This is a scholarly Oxford Monograph on the subject that highlights amongst many subjects, the dynamics of the principle as it relates to trial by jury.

Damaska, Mirjan. R. (1997) *Evidence Law Adrift*. Yale University Press. This high academic book explores evidence as an integral part of the criminal law and engages in highly critical but equally forensic analysis of the role played by the subject and the legal system.

Daniels, Stephen & Martin, Joanne (1995). *Civil Juries and the Politics of Reform*. Chicago: Northwestern University Press. Discusses the political motivations that are behind U.S. civil justice reform, particularly with respect to the civil jury. Their empirical work analyzing jury verdict data from a number of jurisdictions shows that there is a good deal of variation in jury outcomes across jurisdictions, but little support for the most extreme claims that the system is out of control.

DePaul Law Review (Winter 1998 issue). Symposium: *The American Civil Jury: Illusion and Reality*. Volume 48, No. 2. Excellent collection of articles reporting recent research on the civil jury, with commentary by noted scholars. Contrasts public and media perceptions of the jury with research evidence. Assembled and with an introduction by Stephan Landsman.

Dwyer, William L. (2002). *In the Hands of the People: The Trial Jury's Origins, Triumphs, Troubles, and Future in American Democracy*. A United States District judge makes the case for the preservation of the jury system.

Feigenson, Neal. (2000). *Legal Blame: How Jurors Think and Talk about Accidents*. Washington, DC: American Psychological Association. Integrates psychological theory and legal issues relevant to accident cases. Demonstrates how commonsense thinking about accidents draws attention away from situational causes. A good source for psychological research citations on decision making.

Findlay, Mark, & Duff, Peter (1988). *The Jury Under Attack*. London: Butterworths. This edited collection details the contemporary attack on the jury in both the U.K. and Australia. Pieces critically analyze the reasons why some politicians and others are working to undermine the jury system.

Chapters include discussions of the jury in complex cases, in political trials, and the removal of the jury in terrorist trials in Northern Ireland.

Finkel, Norman J. (1995). *Commonsense Justice: Jurors' Notions of the Law*. Cambridge, MA: Harvard University Press. Describes how jurors' "commonsense justice" often diverges from the law. Provides examples of the areas in which divergence is common.

Fukurai, Hiroshi, Butler, Edgar W., & Krooth, R. (1993). *Race and the Jury: Racial Disenfranchisement and the Search for Justice*. NY: Plenum. Analyzes racial inequality and the jury in the U.S., focusing particularly on racial representativeness in jury selection. Presents empirical studies of economic excuses, voir dire, sampling methods, and jury selection in high-profile cases.

Green, Thomas Andrew (1985). *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800*. Chicago and London: University of Chicago Press. Provides a historical account of the early development of the criminal trial jury in England, and how it was transformed over time. There is a particular emphasis on jury nullification, in which jurors used their own ideas of justice to decide disputes.



Greene, Edie and Bornstein, Brian H. (2003). *Determining Damages: The Psychology of Jury Awards*. Washington, DC: American Psychological Association. A comprehensive summary of the empirical work on jury decision making about civil damages. Reflecting the authors' own work, there is an emphasis on the mock jury research literature.

Grove, Trevor (1998), *The Juryman's Tale*. Bloomsbury Publishing PLC. This is a journalist's account as a juror which sheds light on the workings of a jury from a participant's perspective. It was very helpful without approximating the boundaries of legal prohibitions.

Hannaford-Agor, P. L., Hans, V. P., Mott, N. L., & Munsterman, G. T. (2002). *Are Hung Juries a Problem?* NCJ 201096, Washington, DC: United States Department of Justice, National Institute of Justice. [Report from the National Center for State Courts]. This report summarizes a national research study of the frequency and causes of hung juries. The project included jury trials from four U.S. jurisdictions. Comparing trials that hung with those in which juries reached verdicts, the report found differences in evidentiary characteristics (especially the ambiguity of the evidence), the perceived fairness of the law, and the interactions among jurors. The report is available online at [www.ncsconline.org/WC/Publications/Res\\_Juries\\_HungJuriesPub.pdf](http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesPub.pdf). The data are archived at [ICPSR](http://icpsr.umich.edu) at the University of Michigan..

Hans, Valerie P., & Vidmar, Neil (1986). *Judging the Jury*. NY: Plenum. An overview of the jury system, that briefly describes the historical origins of the jury system in the U.K. and the U.S., and then presents empirical research on jury selection, jury decision making, and juries in controversial cases. Discusses some of the problems with the jury system but on balance is quite favourable to the institution.

Hans, Valerie P. (2000). *Business on Trial: The Civil Jury and Corporate Responsibility*. New Haven: Yale University Press.

Assesses charges that juries in business cases are pro-plaintiff, anti-business, and operate with a deep pockets mentality. Reports original research, including juror interviews, experiments, and surveys.

Hastie, Reid, Penrod, S., & Pennington, N. (1983). *Inside the Jury*. Cambridge, MA: Harvard University Press. Reports a well-done jury simulation that tests the effects of requiring that juries be unanimous.

Hastie, R. (1993), Cambridge University Press. Cambridge Series of judgement and decision making. This book provides a comprehensive summary of the major theories of juror decision making and the research that has been conducted to evaluate their validity.

Indiana Law Journal (1995). Symposium: The Capital Jury Project. Volume 70, whole No. 4. Includes early research reports and analysis from the Capital Jury Project, a national post-trial interview study with jurors across the U.S.A. who have decided capital cases. Shows some serious problems with the guided discretion approach to determining who should receive capital punishment.

Judges' Journal. (1997, Fall). Special issue: Jury Reform: Reshaping the Bedrock of Democracy. Volume 36, No. 4. Excellent set of articles that describe recent jury reform efforts. A good survey of the range of reforms that are now being considered by the courts, and reflections on jury reform from a variety of perspectives, including court administrators, judges, researchers, and even a television producer.

Kalven, Harry, Jr. & Zeisel, Hans (1966). *The American Jury*. Boston: Little, Brown.

The classic work on the American jury, and the first systematic national study of jury decision making. Reports a study based on judicial questionnaires, in which judges who presided over jury trials were asked to give hypothetical decisions. Cases in which judges disagreed with juries were then analyzed to discover the unique contribution of the jury.

King, Nancy J. (Ed.). (1996, March/April). Symposium Issue: The Jury: Research and Reform. *Judicature*, 79, Whole No. 5. Excellent compilation of contemporary empirical research on jury decision-making, including articles on capital juries, civil juries in business cases, and pre-trial publicity. Several articles also address and evaluate jury reform efforts.

Kuhn, Deana. (1991), *The Skills Of Argument*, Cambridge University Press. This book presents a comprehensive empirical study of informal reasoning as argument involving subjects across the life span. The findings of its research address issues of concern to cognitive and developmental psychologists as well as educators concerned with improving the quality of people's thinking

Langbein, John. H. (2003) *The Origins of Adversary Criminal Trial*. Oxford Clarendon Press. This highly academic writing traces the genesis of adversarial criminal trials and compares it with the inquisitorial system of Continental Europe. It also considers the other nuances of a criminal trial.

Litan, Robert E. (1993). *Verdict: Assessing the Civil Jury System*. Washington, D.C.: The Brookings Institution. A wonderful collection of thoughtful essays on the civil jury system, including descriptions of empirical work and evaluations of civil justice reforms.

Munsterman, G. Thomas, Hannaford, Paula L., & Whitehead, G. Marc (Eds.) (1997). *Jury Trial Innovations*. Williamsburg, VA: National Center for State Courts. A comprehensive and extremely valuable resource for people interested in jury reform. The editors describe a variety of techniques that may be used in jury trials. For each one, they provide a description of the technique, the issues raised by use of the technique, procedures used by the states, advantages, disadvantages, and relevant legal and research references. There is also a useful introductory chapter by psychologist Vicky Smith that provides a theoretical overview of how jurors make decisions and the resulting implications for jury innovations.

Obilo, E. E. (2005) *Socialisation, Citizenship and Education*. Haron U Publishers. This is an exceptional précis of citizenship and the idea of participatory democracy in Nigeria written by a respected academic and Justice of the Peace.

Sward, Ellen E. (2001). *The Decline of the Civil Jury*. Durham, NC: Carolina Academic Press. I found this book's detailed summary of the many legal issues and legal reforms relating to the civil jury trial very helpful. Sward argues that although some changes have made the civil jury more accessible, it is also subject to greater control by judges.

Thane, Rosenbaum (2004) *The Myth of Moral Justice*. This is a fairly hard hitting indictment of the American Legal System seen from the writer's perspective as denying the spirit of the law and thus denying justice to its citizens. Quite a cynical monograph but equally celebrates the justice of law.

Vidmar, Neil (1995). *Medical Malpractice and the American Jury: Confronting the Myths about Jury Incompetence, Deep Pockets, and Outrageous Damage Awards*. Ann Arbor, MI: University of Michigan Press. The title says it all. This book defends the jury in medical malpractice cases against its critics. It presents data from a thorough study of medical malpractice litigation in North Carolina. The book examines different aspects of the litigation, including case selection, jury performance, liability decisions, and damage awards. Vidmar also compared how lay jurors' assessments compared to the professional judgments of doctors and claims adjusters.

Vidmar, Neil (Ed.) (2000). *World Jury Systems*. Oxford: Oxford University Press. An excellent collection of historical and comparative chapters that provides a comprehensive look at the use of juries worldwide.