DECLINE OF THE "LITTLE PARLIAMENT": JURIES AND JURY REFORM IN ENGLAND AND WALES

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I
INTRODUCTION

The English jury[1] evokes passionate and often extreme views. On the one hand, trial by jury is vigorously defended as an ancient right,[2] a bastion of liberty,[3] and a means whereby the ordinary person's common sense views can inform decisions and contain the powers of government.[4] On the other hand, the jury is regarded much more cynically as a costly, sometimes incompetent anachronism that merely creates opportunities for exploitation by "professional" criminals at great public expense.[5] This century in England, the second of these views appears to have gained ground. The scope and powers of the English jury have markedly declined, and jury trials are increasingly seen as excessively expensive and time consuming. Juries have all but disappeared in civil cases, and their use in criminal cases is continually threatened by sustained

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1. The United Kingdom embraces three separate legal systems (for England and Wales, Scotland, and Northern Ireland), each with different jury systems. This article is concerned with England and Wales, and for simplicity and following custom, will refer to "England" as including both England and Wales.

2. The right of a freeman to the "legal judgement of his peers" is mentioned in Clause 39 of Magna Carta (1215).

3. Lord Devlin writes:

> Each jury is a little parliament. . . . No tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.

SIR PATRICK DEVLIN, TRIAL BY JURY 164 (1956).

4. *See* M.D.A. Freeman, *The Jury on Trial*, 34 CURRENT LEGAL PROBS. 65, 88 (1981). Freeman writes: "Juries infuse 'non-legal' values into the trial process. They are the conscience of the community: they represent current ethical conventions. They are a constraint on legalism, arbitrariness and bureaucracy." *Id.* at 90.

5. The strength and range of views held by senior members of the legal profession were demonstrated by the papers presented at a seminar on December 10, 1997, at Gray's Inn, London, entitled *The Effectiveness of Juries and the Use of the Civil Courts in the Control of Crime* (papers on file with author). The seminar was chaired by the Lord Chief Justice Lord Bingham, and organised by the British Academy of Forensic Sciences and jointly sponsored by the Criminal Bar Association, the Administrative Law Bar Association, and the Law Society.

growth in the number of criminal trials and by growing government interest in efficiency and crime control.

This article begins with an historical look at the English jury, and then briefly places the jury and jury reform in the context of the English legal and political system. After outlining the limited role remaining for juries in civil cases, the remainder of the article focuses on juries in criminal cases, discussing the scope of the right to jury trial, and the rules governing jury trial, such as the selection of jurors, the conduct of the trial, and verdicts.[6] Recent changes or proposals for change have been made in all these areas. However, the impetus for change has come from immediate political concerns, high-profile cases, and anecdote as much as from systematic information or reliable research.

II

EVOLUTION OF THE ENGLISH JURY

The idea of an "ancient right" to jury trial is an attractive argument, and the present-day English jury does indeed have roots that can be traced back several centuries.[7] But the jury has continuously adapted and evolved, and its functions have changed fundamentally over the years. Besides changes in the jury itself, wider changes to the criminal justice system have transformed the nature of the right to a jury trial. In particular, the growth of legal aid in criminal cases this century[8] means that virtually all criminal defendants are represented by a trained lawyer, strengthening the defendant's position whilst placing an increasing burden on the public purse.

The original concept of the jury was probably imported into England after the Norman Conquest in 1066. The Normans had developed the practice of putting a group of local individuals under oath (hence the term "juror"[9]) to tell the truth. Early jurors in England acted as sources of information on local affairs—for instance gathering information for the Domesday Book—but they gradually came to be used as adjudicators in both civil and criminal disputes. By 1367, it had become established that a unanimous verdict was required. Initially jurors were selected for their prior knowledge of the matter in dispute. A judge summoned a group of worthy citizens to decide between rival claims

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6. The basic features of the jury in England and Wales are outlined in many textbooks. The outline in this paper draws in particular on S.H. BAILEY & M.J. GUNN, SMITH & BAILEY ON THE MODERN ENGLISH LEGAL SYSTEM (Sweet & Maxwell, 3d ed. 1996), CATHERINE ELLIOTT & FRANCES QUINN, ENGLISH LEGAL SYSTEM ch. 5 (2d ed. 1998), and A. SANDERS & R. YOUNG, CRIMINAL JUSTICE (1994).

7. There are numerous accounts of the early emergence of the English jury. This summary draws in particular on BAILEY & GUNN, *supra* note 6, at 888-89, ELLIOTT & QUINN, *supra* note 6, ch. 5, and GEOFFREY ROBERTSON QC, FREEDOM, THE INDIVIDUAL AND THE LAW 348-51 (7th ed. 1993).

8. The legal aid system provides government-funded legal assistance in both criminal and civil cases. A number of schemes run by the Bar and judiciary existed in the 19th century to provide free or cheap legal advice to some prisoners in criminal cases. However, it was the Poor Prisoners' Defence Act, 1903, § 1 (Eng.), that first introduced substantial provision for legal aid from public funds in cases heard by a judge and jury. *See* Tamara Goriely, *The Development of Criminal and Legal Aid in England and Wales*, *in* ACCESS TO CRIMINAL JUSTICE 26 (Richard Young & David Wall eds., 1996).

9. From the Latin *jurare*, to swear.

based on their local knowledge. However, the principle gradually emerged that jurors should be uninvolved in the case, and by the eighteenth century a juror with personal knowledge was required to excuse himself from serving on the jury. Until the mid-nineteenth century, jury trial was the only form of trial in the common law courts, and until the early twentieth century, it continued to predominate for civil as well as criminal cases.

Early jurors often faced physical ordeals in carrying out their duties. They could be starved into submission by being locked up without food or heat until they returned a guilty verdict. The Star Chamber was known to punish jurors who refused to convict by seizing their land and possessions. The 1670 *Bushell*[10] case marked a major turning point in such practices and is still remembered by an inscribed gold plaque hanging in the Old Bailey.[11] Twelve jurymen refused to convict the Quakers William Penn and William Mead of seditious assembly and were locked up for two nights without food, water, fire, tobacco, or chamber-pot.[12] When this failed to force them to retract their not guilty verdict, the jurors were sentenced to prison until they had paid a fine.[13] Four of the jurors, led by Bushell, refused to pay the fine and challenged their incarceration by a writ of habeas corpus.[14] The Lord Chief Justice released them in a landmark decision establishing the jury as the sole judge of fact.[15] The jury could give a verdict according to its conscience, and jurors could not be penalised for taking a view of the facts which was at odds with the judge. It is under the principles established in *Bushell* that the jury has been acclaimed as "the lamp that shows that freedom lives"[16] and "the bulwark of liberty."[17] The jury has complete power over the verdict and is not required to give any explanation or justification. A defendant may appeal against conviction, but an appeal cannot be made simply on the grounds that the jury's decision is unjustified or mistaken.

The right of a jury to exercise judgment according to conscience continued to generate controversy over the next three centuries as juries continued to acquit with impunity even though the law and the evidence clearly indicated the defendant's guilt. Juries' refusals to convict radicals charged with publishing seditious attacks on King George III and his government are among the best known exercises of these rights. In the late eighteenth and early nineteenth centuries, juries repeatedly undervalued stolen property in theft cases, evidently because theft of goods valued at more than forty shillings carried the

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10. Bushell's Case, 124 Eng. Rep. 1006 (C.P. 1670).
11. The Old Bailey is the famous Central Criminal Court in London.
12. *See* 124 Eng. Rep. at 1007.
13. *See id.* at 1006
14. *See id.* at 1012.
15. *See id.* at 1018.
16. DEVLIN, *supra* note 3, at 164.
17. Ford v. Blurton, 38 T.L.R. 801, 805 (1922) (Lord Atkin describing jury trial as "the bulwark of liberty, the shield of the poor from the oppression of the rich and powerful").

death penalty.[18] The acquittal of Clive Ponting in 1985 of offences under the Official Secrets Act stands out as a contemporary example of a jury verdict according to conscience and against the weight of the evidence.[19] Ponting, a senior Ministry of Defence official, was charged with violating Section 2 of the Official Secrets Act,[20] which prohibited government employees from revealing information obtained in the course of their job without the authorisation of a superior.[21] At his trial, Ponting admitted to passing to a Member of Parliament classified documents which indicated that government ministers had lied to Parliament about the sinking of the Argentine warship, the *General Belgrano*, during the Falklands War.[22] He argued that he owed a greater duty to make the information public than to observe the Official Secrets Act, and it appears the jury agreed with him.[23] The right of juries to decide in defiance of the law, or "jury nullification," is central to the jury's democratic function and is discussed further below. As the current Chairman of the Criminal Bar Association, Roy Amlot, writes, "Parliament enacts and a powerful Government with a strong whip may enact harsh laws. But no jury can be forced to implement what it considers to be a harsh law. In this way a jury plays a vital part in the democratic process."[24]

III

LEGAL AND POLITICAL CONTEXT OF THE ENGLISH JURY

Amlot writes that the spirit of trial by jury "is burnt into the consciousness of every Englishman—to such an extent that the jury's detractors might as well attempt to do away with Parliamentary democracy as trial by jury."[25] While it is certainly true that any perceived attack on the jury can expect to be met with vociferous resistance, the constitutional position of the English jury leaves it more vulnerable than the jury in the United States. In England, the right to trial by jury is not enshrined in an entrenched constitution.[26] The nature and

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18. *See* ROBERTSON, *supra* note 7, at 350-51. For a history of the role of juries deciding according to conscience, see T.A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL 1200-1800 (1985).

19. *See* J.C. Smith & D.J. Birch, *Case and Comment*—R. v. Ponting, 1985 CRIM. L. REV. 318, 320.

20. A new Official Secrets Act was passed in 1989, and while Section 2 was abolished, the new restrictions relating to disclosure of government information are considerable. *See* ROBERTSON, *supra* note 7, at 167-73.

21. *See* Smith & Birch, *supra* note 19, at 320.

22. *See id.* at 319.

23. *See id.* at 320.

24. Roy Amlot, Leave the Jury Alone, *in* The Effectiveness of Juries and the Use of the Civil Courts in the Control of Crime, *supra* note 5, at 42.

25. *Id.*

26. 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. For a detailed discussion of the constitu-

extent of the right to trial by jury are governed by ordinary parliamentary statute, which can be altered by a simple act of Parliament. To the extent it controls Parliament, the government of the day could, in principle, radically change or even abolish the right to jury trial. However, the political barriers to attacking the jury are considerable, and governments generally tread cautiously. Changes to the jury system have tended to be piecemeal and incremental rather than sweeping.

The main statute governing the present day jury is the Juries Act.[27] The same rules generally apply to both civil and criminal juries. Many other statutes contain important provisions relating to the jury, including the Criminal Justice and Public Order Act[28] and the Contempt of Court Act.[29] The government departments most likely to be concerned with jury reform are the Lord Chancellor's Department and the Home Office.[30] Several *ad hoc* Departmental Committees of Inquiry and Royal Commissions[31] have made recommendations concerning aspects of the jury and will be referred to throughout this article. These include the Royal Commission on Criminal Justice under the chairmanship of Viscount Runciman ("Runciman Commission"), which was set up in response to concern over miscarriages of justice and reported in 1993,[32] the Fraud Trials Committee chaired by Lord Roskill ("Roskill Committee"), which reported in 1986,[33] the Royal Commission on Criminal Procedure, which reported in 1981,[34] the Morris Departmental Committee on Jury Service ("Morris Committee"), which reported in 1965,[35] and the James Committee on the Distribution of Criminal Business between the Crown Court and the Magistrates Court, which addressed the right to elect trial by jury and which reported in 1975.[36]

One of the most controversial statutory provisions regarding juries has been Section 8 of the Contempt of Court Act, which prevents any research or other enquiry into jury deliberations. This section was inserted after the former Liberal Party Leader Jeremy Thorpe was acquitted of conspiracy to murder in a

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tional 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).

27. Juries Act, 1974 (Eng.).

28. *See* Criminal Justice and Public Order Act, 1994, § 31 (Eng.).

29. *See* Contempt of Court Act, 1981, § 8 (Eng.).

30. The Lord Chancellor (a cabinet minister as well as head of the judiciary and an active legislative member of the House of Lords) has broad responsibility for the administration of justice, although responsibility for the penal system lies with the Home Secretary.

31. Royal Commissions, usually well funded, are established to inquire into and recommend changes in specified areas of the law or governmental or legal institutions.

32. *See* ROYAL COMM'N ON CRIM. JUST., REPORT, 1993, Cmnd. 2263 [hereinafter RUNCIMAN COMMISSION].

33. *See* FRAUD TRIAL COMM., REPORT, 1986 [hereinafter ROSKILL REPORT].

34. *See* ROYAL COMM'N ON CRIM. PROC., REPORT, 1981, Cmnd. 8092.

35. *See* DEPARTMENTAL COMM. ON JURY SERVICE, REPORT, 1965, Cmnd. 2627. Some of its recommendations were implemented by the Criminal Justice Act, 1972 (Eng.).

36. *See* INTERDEPARTMENTAL COMM. ON THE DISTRIBUTION OF CRIM. BUS. BETWEEN THE CROWN COURT AND MAGISTRATES' COURTS, REPORT, 1975, Cmnd. 6323 [hereinafter JAMES COMMITTEE].

highly publicised jury trial.[37] One of the jurors gave an interview to the *New Statesman* magazine explaining how the jury had reached its decision.[38] The magazine was prosecuted, but the High Court refused to find that it had committed contempt of court in publishing the story.[39] The government moved immediately to insert a new clause into the Contempt of Court Act making it a criminal offence to "obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced, or votes cast by members of a jury in the course of their deliberations."[40]

There have been increasing calls for a relaxation of this ban for the purposes of academic research. Although not all jury research requires the questioning of actual jurors, the Contempt of Court Act has been a major inhibition to jury research in England.[41] In 1986, Roskill expressed frustration at being unable to question jurors in his investigation of the future of fraud trials.[42] Lack of research on juries also meant that the Runciman Commission felt unable to make recommendations on whether there is a case for raising the age limit for jury service or whether there should be literacy or comprehension requirements for jurors.[43] The Commission recommended that the Contempt of Court Act be amended "so that informed debate can take place rather than argument based only on surmise and anecdote."[44] Following the *Maxwell* fraud case, discussed below, support for lifting the Contempt of Court Act prohibition on questioning jurors came from the Bar, the Law Society, senior members of the judiciary, and the Serious Fraud Office.[45] Some commentators have suggested that the jury would not survive close scrutiny and that secrecy must surround the jury room if the jury is to be workable.[46] But the jury has survived extensive research in the United States. As Robertson argues, the ban "has not worked as its advocates predicted to protect the jury system from attack: on the contrary, it has imposed yet another layer of secrecy which handicaps those who would wish to defend the system with more than anecdotal evidence."[47]

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37. *See* Attorney General v. New Statesman & Nation Publ'g Co., 1981 Q.B. 1, 5 (Eng. C.A.).

38. *See id.* at 6.

39. *See id.*

40. Contempt of Court Act, 1981, § 8 (Eng.).

41. Sarah McCabe, for example, laments the paucity of research on the English jury. *See* Sarah McCabe, *Is Jury Research Dead?*, *in* THE JURY UNDER ATTACK 27 (Mark Findlay & Peter Duff eds., 1988).

42. *See* ROSKILL REPORT, *supra* note 33, ¶¶ 8.10-.11, app. A ¶ 7.

43. *See* RUNCIMAN COMMISSION, *supra* note 32, at 2.

44. *Id.*

45. *See* Francis Gibb, *The Result of the Maxwell Brothers' Case Has Put the System Under the Spotlight*, TIMES (London), Jan. 30, 1996, at 31.

46. *See, e.g.*, Ely Devons, *Serving as a Juryman in Britain*, 28 MOD. L. REV. 561 (1965).

47. ROBERTSON, *supra* note 7, at 361.

IV

THE SCOPE OF JURY TRIAL

The role of the English jury today is almost entirely confined to the more serious criminal cases. Juries occasionally sit in civil trials, and even less frequently in the Coroner's Court (as a result of the Coroners Amendment Act,[48] which enabled the coroner to sit without a jury in almost all cases).[49]

A. The Jury in Civil Cases

The frequency of civil jury trials steadily declined in England and Wales from the middle of the nineteenth century, when judges were given the right to refuse trial by jury. Today, less than one percent of civil trials are jury trials.[50] The Supreme Court Act[51] gives a qualified right to trial by jury in only four types of civil case: libel and slander, fraud, malicious prosecution, and false imprisonment.[52] Even in these cases, the right can be denied where the court is of the opinion that the trial requires "prolonged examination of documents or accounts, or any scientific or local investigation which cannot be conveniently made with a jury."[53] A large proportion of civil actions in England and Wales are personal injury cases, where jury trial is no longer a right, although it may still be granted at the discretion of the court. *Ward v. James*, decided in 1965, is often considered to be the death blow to civil juries in personal injury cases: The Court of Appeal held that personal injury litigation should be heard by a single judge unless there were special considerations.[54] However, by then it was already rare for the parties to ask for juries in personal injury cases, most parties preferring the predictability of a judge.[55]

Currently, civil juries are used most often in defamation cases. A major cause for concern has been the usually large size of jury awards in such cases. In 1975, the Faulks Committee on Defamation recommended that the function of the jury in defamation cases be limited to deciding issues of liability, leaving the assessment of damages to the judge.[56] The recommendation was not implemented, however, and in 1995 the Court of Appeal in *John v. MGN Ltd.*[57]

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48. *See* Coroners Amendment Act, 1926, § 13 (Eng.).

49. Coroner's juries are still usually required where the death occurred in custody or involves the conduct of the police.

50. *See* ELLIOTT & QUINN, *supra* note 6, at 123.

51. Supreme Court Act, 1981, § 69 (Eng.).

52. *See* BAILEY & GUNN, *supra* note 6, at 790; ELLIOTT & QUINN, *supra* note 6, at 123.

53. ELLIOTT & QUINN, *supra* note 6, at 123-24.

54. *See* Ward v. James, 1966 Q.B. 273 (Eng. C.A.).

55. In 1990, a personal injury claim related to the underground fire at Kings Cross was refused a jury trial because, in the court's view, the case involved technical and far-reaching issues which were not suitable for a jury. *See* ELLIOTT & QUINN, *supra* note 6, at 138 (citing *Singh v. London Underground*).

56. *See* COMMITTEE ON DEFAMATION, REPORT, 1975, Cmnd. 5909, at 141-43, 180 (known as the Faulks Committee).

57. 2 All E.R. 35 (1996).

acted to curb excessive awards through the instructions given to juries.[58] In a libel suit against the *Sunday Mirror* newspaper, the jury awarded singer Elton John £350,000 (£75,000 compensatory damages and £275,000 exemplary damages). The Court of Appeal set aside the jury's award and awarded John a total of £75,000 (£25,000 compensatory and £50,000 exemplary damages).[59] In doing so, the Court of Appeal held that future guidance could be provided for libel juries in assessing compensatory damages, including reference to appropriate awards and brackets of awards.[60] Reference could also be made to conventional personal injury awards to check the reasonableness of proposed jury awards.[61] Since the *Elton John* case, the Defamation Act of 1996 has further curtailed the role of juries in libel cases, establishing a summary procedure whereby judges, not juries, can dispose of libel claims up to £10,000.[62] Judges now have the power to dismiss weak claims and to make awards of up to £10,000 for strong claims.[63]

Following its actions in defamation cases, the Court of Appeal also has recently issued guidelines on the directions to be given to juries assessing damages in cases of false imprisonment and malicious prosecution brought against the police.[64] These guidelines, which relate in particular to exemplary damages, came in response to a request from Sir Paul Condon, Metropolitan Police Commissioner, who claimed that jurors were being influenced by previous cases in which big sums had been awarded.[65] Fifty thousand pounds was held to be the maximum appropriate award for exemplary damages in such cases; and exemplary damages were held to be appropriate only when very senior officers were involved.[66] The jury could also be instructed that exemplary damages represented a windfall to the plaintiff who would have already been awarded compensatory damages, and that, in the case of the Metropolitan Police, the award was payable out of police funds which consequently would reduce money available for other purposes.

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58. *See Libel Juries Can Hear Submissions on Amount of Damages*, TIMES (London), Jan. 14, 1995, at 42.

59. *See* 2 All E.R. at 64.

60. *See id.* at 55.

61. *See id.* at 56.

62. *See* Defamation Act, 1996, ch. 31, § 8 (Eng.).

63. *See id.*

64. *See* Thompson v. Commissioner of Police of the Metropolis, 2 All E.R. 762 (1997) (consolidated with Hsu v. Commissioner of Police of the Metropolis). Thompson sued the police for false imprisonment, and the case included a claim for damages for personal injury. Hsu's case was for malicious prosecution.

65. *See* Stewart Tendler, *Yard Wants Court to Set Limits on Damages Payouts*, TIMES (London), May 7, 1996, at 3.

66. *See Thompson*, 2 All E.R. at 776.

B. The Jury in Criminal Cases

Even in criminal cases, only one or two percent of all trials are heard by a jury.[67] Instead, the vast majority of criminal cases are tried in the magistrates' courts by a bench of two or three magistrates.[68] A small proportion are tried by legally trained stipendiary magistrates, but most magistrates have no legal qualifications and receive no remuneration. The English criminal justice system is probably unique in the extent to which it relies on the services of lay magistrates (or justices of the peace).[69] A jury will try a case only when it goes to the Crown Court and the defendant pleads not guilty.

Criminal offences are grouped into three classes. "Summary" offences are the least serious and are triable only in the magistrates' courts. Examples of summary offences include minor traffic offences, avoiding payment of a train fare, and solicitation. The most serious offences are classified as "indictable only" and must be tried in the Crown Court, the lowest tier of the Supreme Court of England and Wales that exercises criminal jurisdiction. Between these extremes are offences classified as "triable either way."[70] Such cases can be tried either in the magistrates' courts or the Crown Court, and either the magistrates or the defendant can opt for trial in the Crown Court. If the accused pleads not guilty and the trial proceeds,[71] he or she will be tried before a jury.

Home Office statistics give an indication of the division of criminal business between the magistrates' courts and the Crown Court. An estimated 1,940,000 defendants were proceeded against in the magistrates' courts in 1995, while the total for trial in the Crown Court was 86,000.[72] Crown prosecution data show that forty percent of contested trials before a jury resulted in acquittal.[73] Fifty-two percent of cases in the Crown Court are there at the direction of the magistrates, and thirty percent are there because the defendant has elected trial in the Crown Court even though the magistrates are prepared to try the case in

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67. Estimates vary around one to two percent, depending on exactly how "cases" are counted and the year taken. *See, e.g.*, ELLIOTT & QUINN, *supra* note 6, at 123.

68. There are 30,374 lay magistrates as well as 90 full-time stipendiaries and 83 acting stipendiaries. *See* LORD CHANCELLOR'S DEPARTMENT, JUDICIAL STATISTICS ANNUAL REPORT, 1996, Cmnd. 3716, at 90-91.

69. For comparison with a number of continental European countries, see CHERYL THOMAS, JUDICIAL APPOINTMENTS IN CONTINENTAL EUROPE (Lord Chancellor's Department Research Series No. 6/7, Dec. 1997).

70. Magistrates Court Act, 1980, § 17 (Eng.).

71. The case may be discharged or otherwise disposed of before a jury is sworn into service.

72. *See* 1 GOVERNMENT STATISTICAL SERVICE, HOME OFFICE STATISTICAL BULLETIN ISSUE 16/96 supp. tbl. (1996). This report shows that in 1995 in the magistrates' courts approximately 464,000 defendants were proceeded against for indictable offences, 617,000 defendants were proceeded against for summary nonmotoring offences, and 858,000 defendants were proceeded against for summary motoring offences.

73. *See id.* at 4.

the magistrates' court.[74] The remaining eighteen percent are "indictable only" and therefore can be tried only in the Crown Court.[75]

Research suggests that defendants opt for jury trial primarily because both they and their solicitors believe that chances of acquittal are higher and that magistrates favour the police.[76] Some evidence exists to support this belief. Julie Vennard, for example, found that in a sample of offences triable either way, the chances of acquittal were significantly higher in the Crown Court than in the magistrates' court.[77] However, the allocation of either way offences to the Crown Court or magistrates' court is obviously not random, so comparisons in rates of acquittal in the two courts may not be comparing like-with-like. Whether the chances of conviction are higher, the magistrates' courts are undeniably quicker and cheaper. It has been estimated that while a contested case in a magistrates' court costs around £1,500 and an uncontested case costs around £500, the equivalent figures for the Crown Court are £13,500 and £2,500.[78]

A substantial proportion of potential jury trials become what are known as "cracked trials," where preparations are made for a jury trial that does not take place because the defendant eventually pleads guilty.[79] According to Hedderman and Moxon's research, seventy percent of those who elected trial in the Crown Court had pleaded guilty to all charges by the day of the trial.[80] They were not therefore tried before a jury and had foregone any perceived increase in likelihood of acquittal. Considerable concern has been expressed over the expense to the public purse that cracked trials represent, and their frequency has fuelled arguments for limiting or abolishing the ability of defendants to elect for jury trial.

Adjustments to the borderlines between the different categories of criminal offences have produced progressive erosion of the right to jury trial over the past twenty years, and the trend seems likely to continue. The Criminal Law Act of 1977 removed the defendant's right to choose a jury trial in cases of criminal damage below £200.[81] The Criminal Justice Act of 1988 further extended the powers of magistrates' courts by expanding summary offences to include, for example, taking and driving away a car without the owner's consent and common assault and battery.[82] Pressure continues to further limit the right

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74. *See* RUNCIMAN COMMISSION, *supra* note 32, at 85.

75. *See id.*

76. *See* C. HEDDERMAN & D. MOXON, MAGISTRATES COURT OR CROWN COURT? MODE OF TRIAL DECISIONS AND SENTENCING (1992).

77. *See* Julie Vennard, *The Outcome of Contested Trials*, *in* MANAGING CRIMINAL JUSTICE 126, 129-31 (David Moxon ed., 1985).

78. *See* ELLIOTT & QUINN, *supra* note 6, at 137.

79. *See, e.g.*, REVIEW OF DELAY IN THE CRIMINAL JUSTICE SYSTEM, REPORT, 1997 [hereinafter NAREY REPORT]; M. ZANDER & P. HENDERSON, CROWN COURT STUDY, RESEARCH STUDY NO. 19 FOR THE ROYAL COMMISSION ON CRIMINAL JUSTICE (1993).

80. *See* HEDDERMAN & MOXON, *supra* note 76.

81. *See* Criminal Law Act, 1977, § 22, sched. 4 (Eng.).

82. Criminal Justice Act, 1988, §§ 37-39 (Eng.).

to jury trial. In July 1998, the government published a consultation document, including proposals to remove the right to jury trial for additional offences, such as some categories of theft.[83]

There are also continuing moves to remove the right of a defendant to elect jury trial in either way offences. In 1993, the Runciman Commission recommended that once the magistrates have decided that the case is suitable for a summary hearing in the magistrates' court, the defendant should no longer be able to insist on trial in the Crown Court.[84] The Commission pointed out that defendants insist on a Crown Court hearing contrary to the views of the magistrates in more than 35,000 cases each year, and anticipated that the proposed change would result in fewer cases being sent to the Crown Court for trial.[85] A 1997 Home Office report by Narey agreed that defendants should no longer be able to veto the decision of magistrates to retain jurisdiction of cases.[86] The government revived discussion of these proposals in July 1998.[87]

The main justification put forward for limiting the right to jury trial is that jury trials are expensive and time consuming. The language of the debate is revealing. Proponents of limiting jury trials dismiss arguments in terms of "rights" and "justice" and focus rather on "abuse" of the justice system. For example,

> these recommendations would . . . stop improper manipulation of the justice system. Magistrates would be well able to distinguish those defendants who . . . were justified in seeking a Crown Court hearing. . . . One senior and distinguished magistrate succinctly summarised the current scope for abuse: . . . Inevitably, the ones who elect are experienced defendants, the ones who know how to play the system.[88]

Narey recounts the 1975 James Committee's[89] hesitation to remove the right of election from the defendant, recognising that it was necessary to take into account the substantial body of opinion opposed to such a step.[90] But he points out that few jurisdictions regard it as necessary or even desirable to allow the defendant any choice as to the court in which he or she will be tried.[91] Narey also suggests that the right to insist on a jury trial is not as ancient as is sometimes thought because there was no right to claim jury trial until 1855.[92] However, this glosses over the difference between the right to a jury trial and the right to *elect for* a jury trial. As Narey himself points out, until that date felonies were always tried on indictment in the Crown Court, as distinct from mis-

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83. *See* HOME OFFICE, DETERMINING MODE OF TRIAL IN EITHER WAY CASES (1998).

84. This is already the position in Scotland. *See* Peter Duff, *The Scottish Criminal Jury: A Very Peculiar Institution*, 62 LAW & CONTEMP. PROBS. 173, 177-78 (Spring 1999).

85. *See* RUNCIMAN COMMISSION, *supra* note 32, at 87.

86. *See* NAREY REPORT, *supra* note 79, at 35.

87. *See* HOME OFFICE, *supra* note 83.

88. NAREY REPORT, *supra* note 79, at 35.

89. *See* JAMES COMMITTEE, *supra* note 36.

90. *See* NAREY REPORT, *supra* note 79, at 31-32.

91. *See id.* at 32.

92. *See id.* at 31.

demeanours which were tried summarily in the magistrates' court.[93] Defendant election became relevant only when it became possible for an increasing range of indictable offences to be tried summarily *with the defendant's consent*. The proposed change would, in effect, remove the defendant's opportunity to refuse to consent to being tried summarily, and would greatly increase the level of sentence to which a defendant would be exposed without the chance to elect for jury trial.

At the time the Narey report appeared in 1997, the Conservative Party was still in power in Britain. In opposition, the Labour Party said it would not support this proposed change. However, the Labour government has since begun to consult further on the proposal.[94]

C. Juries in Fraud Cases

Juries' competence to try complex cases, especially complex fraud prosecutions, has been questioned repeatedly, and was the subject of inquiry by the Fraud Trials Committee chaired by Lord Roskill.[95] Research conducted for the Roskill Committee by psychologists at Cambridge University showed that juror comprehension of complex information could be significantly improved by providing aides such as glossaries and written summaries and by using visual aids to present the information. Nonetheless, the Roskill Committee recommended that complex fraud trials should no longer be tried by juries,[96] but by a fraud trials tribunal comprised of one judge and two lay experts.[97] The recommendation was not implemented, but is still widely discussed.

Debate over the role of juries in serious fraud cases intensified following the 1996 *Maxwell* case in which a jury acquitted the Maxwell brothers of conspiracy to defraud a company pension scheme.[98] The acquittals followed an extremely expensive investigation and a lengthy, high-profile trial, and the outcome was highly embarrassing to the Serious Fraud Office,[99] which called for the abolition of jury trials in serious fraud cases. The Bar has staunchly op-

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93. *See id.*

94. *See* HOME OFFICE, *supra* note 83.

95. *See* ROSKILL REPORT, *supra* note 33, at 5.

96. *See id.* at annex (MEDICAL RESEARCH COUNCIL APPLIED PSYCHOLOGY UNIT, CAMBRIDGE UNIVERSITY, IMPROVING THE PRESENTATION OF INFORMATION TO JURIES IN FRAUD TRIALS: A REPORT OF FOUR RESEARCH STUDIES).

97. *See id.* at 147.

98. Kevin and Ian Maxwell are the sons of the flamboyant entrepreneur Robert Maxwell, whose death precipitated an investigation into his business affairs and uncovered extensive illegal activity including misuse of pension funds. It was argued that the Maxwell brothers were implicated, but they were acquitted in January 1996. *See* Francis Gibb, *Not-guilty Verdicts Put System Back in the Dock*, TIMES (London), Jan. 20, 1996, at 3; Gibb, *supra* note 45, at 31.

99. The Serious Fraud Office was set up by the Criminal Justice Act of 1987 following the Roskill Committee's report in 1986. It institutes and conducts prosecutions in a comparatively small number of the most serious fraud cases which it investigates and prepares. The prosecution of other fraud cases continues to be handled by the Fraud Investigation group within the Crown Prosecution Service. *See* Robert Rice, *Case Against the Jury: Lord Roskill Tells Robert Rice That Fraud Trials Need Rethinking*, FINANCIAL TIMES (London), Feb. 12. 1992, at 17.

posed such a move.[100] Taking a more moderate position, the Commissioner of the City of London Police called for more research and a review of the role of juries in complex fraud cases.[101] One idea favoured by some prosecutors is the introduction of a new straightforward offence of fraud, which would make cases easier to present to juries.[102] Others favour the Hong Kong system of small fraud juries consisting of six or seven jurors, each of whom must reach a certain educational standard.[103]

The *Maxwell* case has not so far led to extensive reform. However, the management of the case by Justice Phillips was innovative in several respects, and highlighted procedures already within the powers of the judge that could enable juries to deal more easily with complex cases, some of which reflected the findings of the Cambridge research for the Roskill Committee. Justice Phillips began by reducing the number of charges from ten to two, considering this to be more manageable for the jurors in a single trial.[104] He also reduced the length of the court day to 9:30 a.m. to 1:30 p.m. and reserved the afternoons for legal argument.[105] This not only meant that jurors had to concentrate for a shorter day, but also that counsel discussed legal points in the jury's absence without the need for the jury to keep leaving and returning to the courtroom.[106] The judge also made extensive use of the court computer system.[107] Prosecuting counsel produced a "road map" of documents that would be called and highlighted specific passages to be examined.[108] Several monitors in the courtroom then all displayed the highlighted passages.[109] Finally, before the jury retired to consider its verdict, the judge provided the jurors with a written summary of his three-and-a-half-day summing up, although his refusal to allow jurors to have daily transcripts was controversial.[110]

More than a decade after the Roskill Committee reported, debate over the use of juries in fraud trials is still very much alive. There are indications that the current Labour Government is considering the case for abolishing juries in fraud trials, and the Home Office has produced a consultation document setting out various options.[111] At the time of writing, however, there has yet to be a firm statement on the issue. The Serious Fraud Office has had greater success

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100. *See* Gibb, *supra* note 98.

101. *See Police Urge Jury Review*, TIMES (London), Oct. 17, 1996, at 28.

102. *See* Robert Rice, *Jury role in fraud trials to be probed*, FINANCIAL TIMES (London), Sept. 21, 1996, at O6.

103. *See id.*

104. *See* Gibb, *supra* note 98, at 3.

105. *See id.*

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.*

110. *See id.*

111. *See* Home Office, *Home Office Internet Service, Juries in Serious Fraud Trials: A Consultation Document* (last modified Feb. 1998) <http://www.homeoffice.gov.uk/jsft.htm>.

in obtaining convictions since the *Maxwell* case, which may reduce the pressure to abolish juries in fraud cases.

V

SELECTION FOR JURY SERVICE

The qualifications and prohibitions determining who can serve on a jury have undergone some significant changes in the last few decades. The number of jurors has remained twelve,[112] but the age limit has been lowered to eighteen years[113] and eligibility has been extended to include anyone on the electoral register not excluded for some specific reason.[114] To qualify for jury service, a person must be between eighteen and seventy years of age and must have been a resident in the United Kingdom for at least five years since reaching the age of thirteen.[115] Persons who have been sentenced in the United Kingdom to more than five years' imprisonment are disqualified from serving, as are persons who have served any part of certain sentences in the past ten years, have been placed on probation in the last five years, or are currently on bail in criminal proceedings.[116]

Several categories of persons are ineligible rather than disqualified. These include judges and those concerned with the administration of justice (including barristers, solicitors, police officers, prison officers, and court staff), the clergy, and mentally disordered persons.[117] In addition, members of several professions currently have the legal right to refuse to serve, including Members of Parliament, peers, doctors, dentists, nurses, veterinary surgeons, chemists, and anyone in the armed forces. With the aim of reducing requests to be excused, the Criminal Justice Act of 1988 introduced the possibility of deferring jury service and requiring those who have specific commitments to serve at a later date.[118]

Potential jurors are randomly selected from the electoral register. Before 1972, jurors were drawn only from those who owned property of a prescribed rateable value, which ensured that juries were "predominantly male, mid-

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112. The historical reasons for using this number are unknown, although it has been pointed out that this is "the same number as the Apostles of Christ and the ancient tribes of Israel." S.H. BAILEY & M.J. GUNN, SMITH & BAILEY ON THE MODERN ENGLISH LEGAL SYSTEM 798 n.38 (Sweet & Maxwell, 2d ed. 1991).

113. *See* Juries Act, 1974, § 1 (Eng.).

114. *See id.* § 3.

115. *See id.* § 1. The upper age limit was raised to 70 by the Criminal Justice Act, 1998, § 119 (Eng.).

116. *See* Juries Act, 1974, § 1 (Eng.) (as amended by the Juries Disqualification Act, 1984, § 1 (Eng.)). The last category, those on bail, was added by the Criminal Justice and Public Order Act, 1994, § 40 (Eng.).

117. *See id.* sched. 1 (Eng.) (as amended by the Mental Health Amendment Act, 1982, sched. 3 (Eng.) and the Mental Health Act, 1983, sched. 4 (Eng.)).

118. *See* Criminal Justice Act, 1988, § 20 (Eng.) (amending Juries Act, 1974, § 9 (Eng.)).

dle-aged, middle-minded and middle class."[119] Research has shown that there have been profound changes in the composition of juries since 1972. They have become much younger and less middle class.[120] However, there still appears to be an under-representation of women and ethnic minorities.

The extension of the jury franchise in 1972 followed the recommendation of the Morris Committee in 1965.[121] In contrast to other changes in the rules relating to juries over the past twenty-five years, this change appears to have been dictated by "due process" rather than "crime control" values.[122] The "elite" nature of the composition of the jury had come to be seen as a threat both to its legitimacy in a democratic society and to claims that it introduced common sense to the system and protected the ordinary citizen from the state. However, Nicholas Blake, writing for the National Council for Civil Liberties, suggests that the results of the changes in juror qualification were not to everyone's liking.[123] According to Blake, police, judges, and some lawyers complained of a deterioration in the standard of jurors, who were now too stupid, too irresponsible, too easily bribed or intimidated, or too much of a security risk.[124]

Random selection of jurors from the electoral register has been done by computer since 1981. The people selected receive a summons requiring them to attend at the Crown Court at a specified time. Those summoned constitute the panel from which the jury for an individual case will be selected if a plea of not guilty is entered. Twelve people are selected from the jury panel by ballot, which is conducted in open court, and after an opportunity for challenges, as discussed below, the jury is sworn and the trial can begin. Random selection by computer is the practice rather than the required procedure. This is illustrated in the 1996 *Salt* case.[125] A Crown Court usher called on his son to sit as a member of the jury when the number of jurors available was insufficient.[126] After a summons was issued and a ballot card created, the son became one of the twelve jurors.[127] When the defendant appealed the conviction on the ground of improper empanelling of the jury, the court held that every practicable effort should be made to ensure random jury selection, but that there is no rule of law

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119. DEVLIN, *supra* note 3, at 20. Bailey & Gunn cite the instance of a case in Derby in 1932, in which Bernard Rothman and others were tried on charges relating to mass trespass on private land in the Peak District. The jury was reported to consist of two brigadier-generals, three colonels, two majors, three captains, and two aldermen. *See* BAILEY & GUNN, *supra* note 6, at 891 n.15.

120. The research findings are summarised by *id.* at 891-93. Sources include JOHN BALDWIN & MICHAEL MCCONVILLE, JURY TRIALS (1979), and ZANDER & HENDERSON, *supra* note 79.

121. *See* DEPARTMENTAL COMM. ON JURY SERVICE, *supra* note 35.

122. For discussion of this point, see Peter Duff & Mark Findlay, *The Politics of Jury Reform*, *in* THE JURY UNDER ATTACK, *supra* note 41, at 209.

123. *See* NICHOLAS BLAKE, *The Case for the Jury*, *in* THE JURY UNDER ATTACK, *supra* note 41, at 140, 142.

124. *See id.* at 142-43.

125. *See Son of Crown Court Usher Acted Regularly as a Juror*, TIMES (London), Feb. 1, 1996, at 38.

126. *See id.*

127. *See id.*

requiring it.[128] Indeed, it appears that an officer of the court can require an eligible member of the public to come in off the street to serve on a jury if there are insufficient numbers.[129] However, in *Salt* it transpired that the son had sat on five or six Crown Court juries during the previous year.[130] The court found that, due to the frequency of his jury service, he had become in danger of being regarded as an establishment person, and that he fell within the spirit of the disqualification that made officers and staff of the court ineligible.[131]

Jury service, especially on long trials, can pose financial and domestic difficulties for individuals. The basic subsistence allowance for jurors does not compensate for most persons' loss of earnings, and many of those summoned ask for either exemption or deferral. While in opposition, the Labour Party announced its intention, if elected, to act to stop people from avoiding jury service by citing business commitments, holidays, or minor illness.[132] It also proposed to revise the list of professionals who have the legal right to be excused, but to date no such changes have been made.[133] Fears had been expressed that juries had become "'skewed' toward the working class and unemployed who are often unsympathetic to police and more likely to acquit criminals."[134] However, according to the Runciman Commission's research, "the occupations of jurors matched the general population 'with a slight over-representation of clerical workers and under-representation of skilled manual workers.'"[135]

If a trial is expected to last more than ten days, prospective jurors will be asked at court if this would be difficult for them.[136] The jury-summoning officer can use his or her discretion to excuse individuals or grant a deferral, usually on the basis of work, childcare commitments, or booked holidays. However, a genuine reason is needed, and people will not generally be excused on account of job demands, even if they are self-employed.[137]

In the *Maxwell* case, for example, in addition to being screened for literacy and possible prejudice arising from publicity in the media, potential jurors were asked about their ability to stay the course of a trial lasting several months.[138] Jury selection took two weeks and reduced 700 potential jurors to seventy by

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128. *See id.*

129. *See, e.g.*, *PC pounds Beat in Search of Jury*, TIMES (London), Mar. 2, 1999, at 3.

130. *See Son of Crown Court Usher Acted Regularly as a Juror*, *supra* note 125, at 38.

131. *See id.* The disqualification making officers and staff of the court ineligible is found in Juries Act, 1974, § 1 (Eng.).

132. *See* Jill Sherman, *Labour Warns Jury Dodgers*, TIMES (London), Feb. 7, 1996, at 1.

133. *See id.*

134. *Id.*

135. *Juries Not Guilty*, TIMES (London), Feb. 13, 1996, at 31 (quoting ZANDER & HENDERSON, *supra* note 79, at 239).

136. A first-hand account of the process from the perspective of an Old Bailey juror is given by Trevor Grove. *See* TREVOR GROVE, THE JURYMAN'S TALE (1998).

137. *See* Hedley Goldberg, *A Random Choice of Jury?*, TIMES (London), June 13, 1995, at 41.

138. *See* Gibb, *supra* note 98, at 3.

using lengthy questionnaires and oral questioning.[139] Potential jurors were asked questions regarding their jobs, what papers they read, what they had read about the Maxwells, whether they had heard about the accusations against the Maxwells, and whether they would be able to be dispassionate.[140] The initial questionnaires excluded 550 potential jurors for a variety of reasons, such as poor health or previously booked holidays.[141] The replies of the remaining 150 potential jurors were screened by the judge as well as the lawyers for both parties and a quarter of them were excluded "on grounds of literacy and 'in the interests of justice.'"[142] Nearly three-quarters of the potential jurors had given answers that were incomplete, ambiguous, or otherwise inconsistent, and were further questioned by the judge in the presence of both sets of lawyers in order to create a final "shortlist" from which twelve jurors could be chosen at random.[143]

After a trial has begun, the judge has power to discharge jurors for a range of irregularities, including frivolous behaviour, drunkenness, acquisition of information that the juror should not have, or discovery of bias that becomes apparent too late to be dealt with at the time for challenge.[144] The judge may also discharge jurors if they become ill or are incapable of continuing to act.[145] In July 1998, for example, the judge removed a juror after he asked the judge for the defendant's birth date in order to draw up a star-chart.[146] The remaining eleven jurors continued and in due course acquitted the defendant.[147] England has no system of alternate jurors attending the trial and ready to take the place of discharged jurors, but the trial can continue as long as the jury does not fall below nine in number.[148]

VI

JURY CHALLENGES

In England the scope for jury challenges during the selection procedure is considerably more restricted than the sometimes lengthy *voir dire* found in the United States. The opportunity for the defence to influence the composition of the jury was all but eliminated in 1988 when the defence's long-standing right of

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139. *See id.*
140. *See id.*
141. *See id.*
142. *Id.*
143. *See id.*
144. There are complex rules governing the powers of the court in respect of juries and how the judge should handle various situations that may arise. These are set out in some detail in JOHN FREDERICK ARCHBOLD, CRIMINAL PLEADING, EVIDENCE & PRACTICE §§ 4-253 to 4-263 (P.J. Richardson ed., 1998).
145. *See id.*
146. *See* Paul Wilkinson, *Juror Wanted to Find Truth in the Stars*, TIMES (London), July 9, 1998, at 3.
147. *See id.*
148. *See* Juries Act, 1974, § 16 (Eng.).

peremptory challenge was completely abolished.[149] In contrast, the prosecution's right to stand jurors by is unchanged. The right of either side to challenge for cause remains, but it is of limited use in practice.

Before 1988, the opportunity to challenge peremptorily occurred after the clerk had asked twelve members of the jury panel to step into the jury box. Defence counsel, or the accused if unrepresented, would call out "challenge" immediately before the juror in question took the oath. No reason needed to be given for the challenge and the juror was replaced by another. The right of the defence to challenge jurors had been steadily eroded over time. In 1925, the number of challenges was reduced from twenty-five to twelve; in 1949, the number was further reduced to seven (or seven per defendant where several were tried together); in 1977, the number was fixed at three; and in 1988, the Criminal Justice Act removed the right altogether.

These progressive reductions appear to have been precipitated by concerns arising in particular cases. The 1977 restriction followed a case in which a number of youths, mainly black, were tried for causing criminal damage and disorder.[150] The defence used their peremptory challenges to try to achieve a representation of ethnic minorities on the jury, and the youths were acquitted.[151] Prior to the most recent change, concern arose when multiple defendants pooled their challenges in single trials, and one trial in particular, the "Cyprus Secrets" case,[152] fuelled the campaign for the abolition of peremptory challenges. When eight men in the Royal Air Force were charged with offences under the Official Secrets Act,[153] it was claimed that their counsel had privately agreed to exercise their peremptory challenges to ensure a young male jury.[154] The defendants were all acquitted,[155] but it is questionable whether this was because of the composition of the jury. There were other reasons why a jury might be sympathetic. In fact, systematic data on the peremptory challenge were available at the time: A study of 2,500 cases showed that the use of peremptory challenges was not associated with an increased likelihood of acquittal.[156]

The right of the defence to a number of peremptory challenges was clearly intended to provide an opportunity for the defendant to attempt to achieve a more sympathetic jury, and predates the principle that a jury should be selected

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149. *See* Criminal Justice Act, 1988, § 118 (Eng.). The right dated back to the 15th century when it was introduced to redress the balance to the defendant's favour.

150. *See* BLAKE, *supra* note 123, at 147.

151. *See id.*

152. The use of the peremptory challenge in the case was discussed in Parliament whilst the 1986 Criminal Justice Bill was on its way through Parliament. *See* 113 PARL. DEB., H.C. (6th ser.) 991-92 (1987). For further details, see MICHAEL ZANDER, A MATTER OF JUSTICE: THE LEGAL SYSTEM IN FERMENT 217-19 (1988).

153. *See* BLAKE, *supra* note 123, at 147.

154. *See id.*

155. *See id.*

156. *See* Julie Vennard & David Riley, *The Use of Peremptory Challenge and Stand By of Jurors and Their Relationship to Trial Outcome*, 1988 CRIM. L. REV. 731.

at random. However, it was discussed by its opponents as if it represented an erosion of the principle of random selection, and its use were an attempt to "rig juries." For example, the report of the Fraud Trials Committee under Lord Roskill states that "[t]he existence of the peremptory right of challenge must necessarily . . . tend to erode the principle of random selection, and may even enable defendants to ensure that a sufficiently large part of a jury is rigged in their favour."[157]

One serious consequence of the abolition of the peremptory challenge is the loss of a potential means to ensure a racially mixed jury. Even a jury representative of the adult population may contain few or no jurors of the same race as the defendant. In 1989, the Court of Appeal in *R. v. Ford* held that there is no principle that a jury should be racially balanced, that race should not be taken into account in selecting jurors, and that the trial judge had no power to interfere with the composition of the jury to achieve a multiracial jury.[158] Doing so would interfere with both the random selection of jurors and the responsibility of the Lord Chancellor's Department to summon jurors.[159] According to the court, such a power would have to be granted by statute.[160] Agreeing with this position in most cases, the Runciman Commission put forward a limited proposal for ensuring that a jury includes at least three members from the same ethnic group as the defendant in exceptional cases. They suggested that such a case might be one in which "black people are accused of violence against a member of an extremist organisation who they said had been making racial taunts against them and their friends."[161] The Commission for Racial Equality has also pressed for special procedures in cases with a racial dimension and where a defendant from an ethnic minority believes an all white jury is unlikely to give him or her a fair trial.[162] As Bailey and Gunn state, "[s]imply relying upon random selection, and failing to address real concerns about jury composition is not likely to satisfy the deep concerns held about the criminal justice system by many people from an ethnic minority."[163]

Even though the right to challenge "for cause" remains, it is normally an empty right for the defence, since the challenging party must adduce prima facie evidence to support the challenge before the juror may be questioned about his or her suitability.[164] The defence has practically no information on which to base such a challenge and no right to ask potential members of the jury exploratory questions about their backgrounds or attitudes with a view to show-

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157. ROSKILL REPORT, *supra* note 33, at 126.

158. *See* R. v. Ford, 3 All E.R. 445 (Eng. C.A. 1989). The defendant was charged with six offences relating to unlawful use of a motor car. His counsel applied to the judge for a multiracial jury, but the application was refused. The defendant was convicted and appealed.

159. *See id.* at 447.

160. *See id.*

161. RUNCIMAN COMMISSION, *supra* note 32, at 133-34.

162. *See id.* at 133.

163. BAILEY & GUNN, *supra* note 6, at 893.

164. *See* ELLIOTT & QUINN, *supra* note 6, at 128.

ing that they should not be on the jury. Not surprisingly, challenges for cause are generally believed to be rare, though statistics are not available.

The right to ask questions of prospective jurors was severely restricted after the so-called Angry Brigade Trial in 1972, which involved charges arising from, amongst other things, bombings of the houses of Members of Parliament.[165] The trial judge agreed to ask jurors to exclude themselves on a number of grounds, including if they had relatives serving in Northern Ireland or in the police force, or if they were members of the Conservative Party. Thirty-nine jurors were removed after questioning.[166] Shortly after the case, the Lord Chief Justice issued a Practice Note designed to stop such questions.[167] In 1973, the Lord Chancellor decided that juror occupations would no longer be available because of evidence of "abuse" by defence counsel, who were using the information when exercising peremptory challenges in cases with political overtones.[168]

The Roskill Committee was particularly critical of the use of the peremptory challenge with reference only to superficial appearance such as dress or the carrying of a particular newspaper.[169] Yet it was not in favour of providing the defence with fuller information. The Committee conceded that if the peremptory challenge were abolished there would be a case for returning to the practice of including jurors' occupations, but did not think "that any further disclosure of information about prospective jurors need be made available to the defence as of right."[170] The Committee repeated concerns that abolishing the right of peremptory challenge might lead to increased use of the challenge for cause, which in turn might lead to "the kind of protracted proceedings which sometimes take place in the United States—the so-called voir dire."[171] It appears that for Roskill it is an abuse to challenge, whether on the basis of superficial information or on the basis of fuller and "relevant" information.

In some circumstances, not even the names of jurors will be known. Under the standard procedure, the clerk of the court invites members of the jury pool to answer when the names of those selected by ballot are called, before explaining that any challenges are to be made after this process. However, in a recent case, the Court of Appeal held that jurors' names could be withheld if it

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165. *See* ZANDER, *supra* note 152, at 223.

166. *See id.*

167. *See* N.P. Metcalfe, Esq. Barrister, *Practice Note*, 1 All E.R. 240, 240 (1973) (stating that it was "contrary to established practice for jurors to be excluded on . . . general grounds such as race, religion or political beliefs or occupation").

168. *See Practice Direction*, 57 Crim. App. 345 (Eng. 1973).

169. *See* ROSKILL REPORT, *supra* note 33, at 129.

170. *Id.*

171. *Id.* at 128-29. Lord Roskill was confident that

> no such practice would ever be entertained by the judiciary in this country . . . . [W]e would expect judges to continue to be firm and adhere to well-established principles in carrying out their statutory duty of determining the propriety of a challenge for cause and of following the well established practice of not permitting such a challenge . . . without the prima facie evidence referred to above.

Id.

was thought necessary to prevent a jury being "nobbled,"[172] provided that the defendant's right of challenge was preserved.[173] In this drug-related case, after the first jury had been discharged, a second group of jurors was called to the jury box only by numbers allocated to them by the court clerk, sworn in, and given police protection.[174]

VII

STAND-BY FOR THE PROSECUTION AND JURY VETTING

The now-defunct defence right of peremptory challenge is paralleled by the prosecution right to stand a juror by. This technique was developed when the Crown's right to challenge peremptorily was abolished in 1307 due to concern about prosecutors stacking juries.[175] The effect of standing a juror by is to remove him or her without showing cause.[176] There is no limit on the number of jurors who may be stood by.[177] The juror goes back into the pool and may in theory be called again if the pool runs out.[178] The prosecution can thus defer having to show cause until the pool is exhausted. It was widely expected that the prosecution's right to stand by would be removed with the peremptory challenge, but that has not happened. The government argued that the right was being used sparingly in practice and that in the absence of evidence of improper use there was no need to abolish it.[179]

In addition, the prosecution may have access to information on jurors obtained by the police, CID, or Special Branch[180] for purposes of jury vetting. It is up to the Director of Public Prosecutions to authorise vetting. In 1978, responding to public pressure, the Attorney General revealed the guidelines, which provide for juror investigation in cases where strong political motives are involved.[181] If anything indicating "disloyalty" is found, the juror is to be stood by.[182] Use of the stand-by procedure means that no reason is given publicly. The clandestine way in which jury vetting is conducted causes great concern, and the process has been condemned by the National Council for Civil Liberty.[183]

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172. That is, interfered with in some way, such as by bribery or intimidation. The term comes from horseracing and the "nobbling" of horses to prevent them from winning.

173. *See* R. v. Comerford, 1 W.L.R. 191, 195 (Eng. C.A. 1998). The Court of Appeal held that § 12(3) of the Juries Act of 1974 did not contain a mandatory requirement that names be called, as the purpose of that provision was to define the time at which a challenge was to be made.

174. *See id.* at 194.

175. *See* BAILEY & GUNN, *supra* note 6, at 899.

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.*

180. The CID and Special Branch are both divisions within the British Police.

181. *See* ELLIOT & QUINN, *supra* note 6, at 126-27.

182. *See* BLAKE, *supra* note 123, at 148.

183. *See id.* at 159.

VIII

THE EXPERIENCE OF BEING A JUROR

Discussion of juries in England has tended to neglect the perspective of the juror, but there has recently been an increase of interest in the experience of being a juror amongst both the general public and the legal profession. The central concern has been the lasting impact jury service may have on the more than 250,000 jurors called each year. The emotional and psychological impact of serving on juries for murder cases was explored in a BBC television documentary broadcast in 1997. Jurors who had served on murder cases spoke of long-term psychological problems resulting from the experience.[184] Stressful experiences included exposure to horrific evidence and in some cases, intimidation. Some had lingering doubts about the wisdom of the final outcome.

The government has begun to recognise that jury service can have long-term effects. The Lord Chancellor's Department offered counselling to the jurors at the close of the 1995 Rosemary West murder trial to deal with the distress of exposure to particularly horrific and graphic details of the murders of a number of young women.[185] Jurors were given use of a free telephone help-line and the opportunity to consult family doctors or come together for a group session with the Department's own welfare officers.[186] Since the *West* case, court-appointed welfare officers have been made available to speak to jurors at their own request or in cases deemed exceptional by judges.

It is also claimed that jury trials are time consuming and in some cases boring for jurors.[187] In a fascinating and generally positive inside account of his own experience of serving on a jury in a long running case at the Old Bailey, journalist Trevor Grove illustrates many jurors' 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.[188]

IX

JURIES AND PRETRIAL PUBLICITY

Whereas the protected freedom of the press requires courts in the United States to tolerate a high degree of publicity before and during jury trials, the English approach restrains the press to protect the defendant from the possible effects of publicity on jury decisionmaking. The press may even be prevented from reporting court proceedings after the trial is over for fear of prejudicing a

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184. *See Modern Times* (BBC 2 television broadcast, Apr. 16, 1997).

185. *See* David Conn, *Counselling for Counsel*, TIMES (London), Jan. 2, 1996, at 29.

186. *See id.*

187. "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." Goldberg, *supra* note 137, at 41.

188. *See* GROVE, *supra* note 136, at 41-42.

future trial. Prejudicial publicity is dealt with in two main ways. Under the provisions of the Contempt of Court Act of 1981, the media are quite frequently barred from, and occasionally prosecuted for, publishing prejudicial material before or during a trial.[189] In addition, abuse of process jurisdiction empowers the court to stay criminal proceedings on the ground that a fair trial has become impossible.[190] As previously described, the Contempt of Court Act also prohibits revealing anything about jury deliberations.[191] Vidmar argues that use of the provisions of the Contempt of Court Act (including prohibitions on talking to jurors), together with the growing use of the power to stay proceedings, place England at the opposite end of a continuum from the United States.[192]

Where prosecutions under the Contempt of Court Act are concerned, Corker and Levi argue that there is a lacuna in the law which severely limits the ability of the Attorney General to regulate and deter press coverage.[193] For a prosecution to succeed, it must be shown that a particular article or broadcast has created a substantial risk of prejudice. However, in practice, the effect is often cumulative, involving a number of editors, newspaper articles, or broadcasts over a period of time.[194] Corker and Levi argue that this weakness in the law forces responsibility for dealing with prejudicial publicity onto the trial judge, who can influence coverage only after the trial has started.[195]

Until recently, stays of proceedings on the grounds of pretrial publicity were rare, and jurors were treated as capable of following the judge's instructions to avoid prejudice.[196] However, Corker and Levi identify a marked change in recent years as courts increasingly recognise that publicity can cause substantial prejudice and have demonstrated a corresponding willingness to intervene.[197] In several cases in the 1990s, proceedings have been halted and convictions have been overturned in part on the basis that pretrial publicity made or would make a fair trial impossible.[198] In *R. v. McCann*, the Court of Appeal overturned the conviction of alleged Irish terrorists because the trial judge did not discharge the jury following a sudden wave of publicity in the closing stages of the case.[199] The defendants had exercised their right to remain silent under police questioning. Shortly before the jury retired to consider its verdict, both

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189. For discussion of recent developments, see S.H. Bailey, *The Contempt of Court Act 1981*, 45 MOD. L. REV. 301 (1982); David Corker & Michael Levi, *Pre-trial Publicity and Its Treatment in the English Courts*, 1996 CRIM. L. REV. 622.

190. *See* Bailey, *supra* note 189; Corker & Levi, *supra* note 189.

191. *See supra* text accompanying note 40.

192. *See* Neil Vidmar, *The Canadian Criminal Jury: Searching for a Middle Ground*, 62 LAW & CONTEMP. PROBS. 141, 151-55 (Spring 1999).

193. *See* Corker & Levi, *supra* note 189, at 628-29.

194. *See id.* at 629-30

195. *See generally id.*

196. *See id.* at 625 (quoting, for example, Chief Judge Taylor in *Ex parte* Telegraph Plc, [1993] 1 W.L.R. 980, 987).

197. *See id.* at 624.

198. *See id.*

199. *See* R. v. McCann, 92 Crim. App. 239 (Eng. C.A. 1991).

the then-Secretary of State for Northern Ireland and Lord Denning (former Master of the Rolls) made widely publicised comments that implied that individuals who did not answer police questions probably were guilty.[200] The Court of Appeal stated that "we are left with a 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."[201]

Another example of the court intervening due to pretrial publicity involved the prosecution of detectives responsible for investigating the Birmingham Six.[202] The trial judge controversially ruled that the effect of pretrial publicity damaging to the detectives was irreparable.[203] In a case in 1995, following the arrest of a soap opera star and her common law husband for having oral sex in their car parked on the exit lane of a motorway, a stay of proceedings was ordered when a number of newspapers published details of the man's previous criminal convictions and incidents involving the police that would have been inadmissible at trial.[204] In ordering the stay, the trial judge stated, "I have absolutely no doubt that the massive media publicity in this case was unfair, outrageous and oppressive."[205]

In the *Maxwell* case, an application for a stay of proceedings was not granted, but the judge took a number of other steps to deal with prejudicial publicity. In England, it is unusual to screen jurors for their contact with prejudicial pretrial publicity, but potential jurors for the *Maxwell* case were screened for what they had read or heard about the case in the media.[206] The judge also ordered that a transcript of his warning to editors to refrain from future prejudicial publicity be widely distributed.[207]

In addition, Kevin Maxwell was permitted to use opinion poll evidence on the depth of prejudice against him. Unlike U.S. and Canadian courts, English courts are generally resistant to expert testimony on the effects of publicity on jury decisionmaking. However, when Maxwell applied for a stay of proceedings on the ground of prejudicial pretrial publicity, three Gallup opinion polls were submitted to Justice Phillips as evidence.[208] In rejecting the application for a stay, Justice Phillips found the evidence from the opinion polls of little use, and said that he hoped that "their use in this case will not be taken as a precedent in the future."[209] Nonetheless, he permitted screening of jurors for expo-

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200. *See* Corker & Levi, *supra* note 189, at 626 n.22.

201. 92 Crim. App. at 253.

202. The Birmingham Six case was one of the notorious miscarriage of justice cases involving IRA bombings in the 1970s. Six men wrongly were convicted of bombing two Birmingham public houses in 1974. The convictions were based on forensic and police evidence which was later discredited. *See* CHRIS MULLIN, ERROR OF JUDGMENT (1986).

203. *See* Corker & Levi, *supra* note 189, at 627.

204. *See id.*

205. *Id.*

206. *See id.* at 628-29.

207. *See id.* at 628.

208. *See id.* at 631.

209. *Id.* at 614 n.45.

sure to pretrial publicity, despite the general preference in England for retaining a randomly selected jury as far as possible.[210]

X

EVIDENCE AND INSTRUCTIONS HEARD BY THE JURY

As in other jurisdictions, many rules limit the evidence that English jurors may hear and require judges to give jurors particular instructions for deliberation. The rules are often implicitly based on assumptions about the limits to jury competence and the likelihood that juries will be unduly prejudiced by certain types of evidence. It has become established, for example, that juries should be warned that several impressive and truthful identification witnesses can be in error,[211] a jury instruction referred to as the "Turnbull" direction. According to Lord Steyn, a "sea change" in judicial thinking has recently occurred obligating the trial judge to give a direction regarding good character.[212]

On the other hand, the English jury is charged with deciding matters that, in other jurisdictions, are considered matters for experts. Under the basic rule set out by the Court of Appeal in *R. v. Turner*,[213] expert evidence is not admissible if it is "within the competence and experience of a jury,"[214] making the scope for expert evidence from psychologists and psychiatrists much more limited than in the United States. For example, the reliability of witness testimony is considered a matter of common sense, and expert evidence from psychologists is not normally admitted on this question.[215] The rule has been applied particularly restrictively to psychiatric evidence. As Lord Justice Lawton noted in *Turner*, "[j]urors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life."[216] While rules have become established in relation to some categories of expert evidence, it is for the individual judge to decide whether expert evidence will be admitted and whether he or she will comment on it.[217] In discussing the admissibility of scientific evidence in a range of jurisdictions, Gatowski et al. characterise the approach of the English courts as based on a test of "'relevancy' and 'helpfulness.'"[218] The judge determines whether the

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210. *See id.* at 628-29.

211. *See* R. v. Turnbull, 1977 Q.B. 224, 228 (Eng. C.A.).

212. *See* R. v. Aziz, Tosum & Yorganci, 3 W.L.R. 53, 60 (Eng. H.L. 1995).

213. 1975 Q.B. 834 (Eng. C.A.).

214. *Id.* at 834.

215. *See* Gisli Gudjonsson, *Psychological Evidence in Court*, 9 PSYCHOLOGIST 213 (1996).

216. 1975 Q.B. at 841. For further discussion of expert evidence from psychology and psychiatry, see R.D. Mackay & A.M. Colman, *Equivocal Rulings on Expert Psychological and Psychiatric Evidence: Turning a Muddle into a Nonsense*, 1996 CRIM. L. REV. 88.

217. For further discussion, see D. Carson, *Some Legal Issues Affecting Novel Forms of Expert Evidence*, 1992 EXPERT EVIDENCE 79, 82-83.

218. Sophia I. Gatowski et al., *The Diffusion of Scientific Evidence: A Comparative Analysis of Admissibility Standards in Australia, Canada, England, and the United States and Their Impact on Social and Behavioural Sciences*, 1996 EXPERT EVIDENCE 86, 89.

probative value outweighs any prejudicial effects and whether the evidence is outside the jurors' common knowledge.[219]

One type of evidence that has caused particular concern in England in recent years has been that of previous convictions, especially in cases of indecent assaults on children. Unless there are certain specified reasons to allow it, such evidence is excluded. There has been a growing sense that this approach may favour defendants too much. However, according to research conducted for the Home Office, caution about allowing evidence of previous convictions to go to a jury is well founded.[220] In a simulation study, a recent conviction for a similar offence had a marked effect on the perceived likelihood that the defendant committed the offence currently charged.[221] Evidence of a previous conviction for indecently assaulting a child was found to be especially prejudicial.[222] These effects were found even though the only information provided about the previous conviction was the offence charged, with no further details of the offence or its circumstances.[223] The study also showed the dangers of making assumptions about jury bias.[224] The findings indicated that revealing a previous conviction for an offence dissimilar to the one currently charged may actually be *more* favourable to the defendant than revealing that he is of good character.[225] The research also confirmed earlier findings that jury instructions to use the information for decisions regarding propensity rather than credibility are likely to be totally ineffective.[226]

The defendant's right of silence is another area where rules favourable to the defendant have come under attack. The right clearly has considerable symbolic significance, though its actual effects are unclear. As the result of a major change introduced in the Criminal Justice and Public Order Act of 1994, a jury can now be told of a defendant's refusal to answer questions in police custody. Moreover, a jury can now be instructed that it may draw inferences from the fact that a defendant chooses not to testify in his or her own defence.[227] The change was justified on the ground that professional or hardened criminals

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219. *See id.* at 86-92; *see also* D. Carson, *Expert Evidence in the Courts*, 1992 EXPERT EVIDENCE 3; D. Carson, *supra* note 217.

220. *See* Law Reform Comm'n, Evidence in Criminal Proceedings: Previous Misconduct of a Defendant app. D: The Oxford Study (Consultation Paper No. 141, 1995). A second study replicating the jury experiment with a sample of magistrates is in press. *See* Sally Lloyd-Bostock, The Effects of Informing Magistrates That the Defendant Has Previous Convictions (Lord Chancellor's Department Research Series 1998) (on file with author). A final report from the Law Commission on the law relating to evidence of previous misconduct is imminent at the time of writing.

221. *See* Law Reform Comm'n, *supra* note 220, at 329.

222. *See id.*

223. *See id.* at 326.

224. *See id.* at 329.

225. *See id.*

226. *See* R. Wissler & M. Saks, *On the Inefficacy of Limiting Instructions*, 9 LAW & HUM. BEHAV. 37 (1986).

227. Criminal Justice and Public Order Act, 1994, §§ 34-35 (Eng.). These sections deal with the inferences a jury could reasonably draw from a defendant's failure to answer questions when interviewed and the failure to give evidence. Recommendations as to the essential points to be included in a judge's direction were made by the Court of Appeal in *R. v. Cowan*, 1996 Q.B. 373 (Eng. C.A.).

were taking advantage of the right of silence and escaping conviction, although this claim was unsupported by available evidence.[228] The effects of the changes and new instructions on juries' decisions are unknown.

Although the trial judge has considerable discretion, his or her directions to the jury are likely to be based very closely, if not totally, on specimen directions prepared by the Judicial Studies Board.[229] Using the specimen directions minimises the likelihood of an appeal. The judge's summing up will normally include directions as to the respective tasks of judge and jury, the burden and standard of proof, the definition of the offence charged, and the facts that must be proved.[230] Directions may include, for example, directions on the legal definition of "intention," "knowing or believing," or other terms such as "dishonesty" or "indecency." The jury may be instructed that some questions, such as whether there was indecency, are to be answered on the basis of ordinary common sense.[231] Directions may also be given on evidential points, such as a "Turnbull" warning[232] on the use of evidence of identification, confessions, or previous convictions.[233]

Researchers conducting the 1993 Crown Court Study had the unusual opportunity to ask jurors in a large number of criminal cases to complete questionnaires. The jurors were asked whether they found it difficult to understand and remember the evidence, including scientific evidence, and whether they had any difficulty following the judge's instructions about the law.[234] Most jurors thought they had no great problems.[235] To every question on these matters, more than ninety percent answered "not at all" or "not very" difficult.[236] As the researchers rightly stress, the fact that jurors report that they think they understood evidence and instructions does not prove that they actually did understand them.[237] People are not always very good at describing how well they remember facts and how they make decisions. As with the research on judges' summing up, outlined below, which was conducted as part of the same study,

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228. *See* D. DIXON, LAW IN POLICING: LEGAL REGULATION AND POLICE PRACTICES 229-30 (1997).

229. The specimen directions are not officially recognised, but in practice their existence and use has become increasingly openly acknowledged and indeed encouraged by senior judges. *See* Roderick Munday, *The Bench Books: Can the Judiciary Keep a Secret?*, 1996 CRIM. L. REV. 296, 296.

230. *See* BAILEY & GUNN, *supra* note 6, at 881-86.

231. *See id.* at 883.

232. *See supra* text accompanying note 211.

233. *See, e.g.*, R. v. Aziz, Tosum & Yorganci, 3 W.L.R. 53, 60 (Eng. H.L. 1995) (regarding trial judge's direction on good character).

234. *See* ZANDER & HENDERSON, *supra* note 79, at 206, 216-17. The study was one of a number of special studies requested by and carried out for the Runciman Commission, and was published as a supplement to the Runciman Commission's main report. The questioning was conducted within the constraints of the Contempt of Court Act, 1981, § 8 (Eng.).

235. *See* ZANDER & HENDERSON, *supra* note 79, at 206, 216-17.

236. *See id.*

237. *See id.* at 205.

the restrictions in the Contempt of Court Act of 1981 meant that jurors' replies could not be related to other factual information about the cases.[238]

Jurors may take notes and ask questions during the trial if they wish, although they rarely do so.[239] After retiring to deliberate, they may send out questions, but they cannot be provided with any new evidence at this stage.[240] In the Crown Court Study, thirty-two percent of jurors said that one or more of the jurors in their case had wanted to ask the judge for further directions after they had retired to consider their verdict, but twenty-seven percent of those who wished to ask for further directions had not actually done so, and of them, thirty percent had not realised that they could do so.[241]

XI

THE INFLUENCE OF THE JUDGE

Hints from the judge are very likely to be a powerful influence on jury verdicts. The last stage of the trial before the jury retires is a summing up from the judge, which will include a summary of the evidence as well as directions to the jury on matters of law. The judge has considerable latitude to let the jury know his or her own view of the evidence, and the summing up may last up to several hours. An extreme example of a biased summing up by the judge is that given in the case of David Bentley in 1953: In July 1998, Lord Chief Justice Bingham overturned the murder conviction,[242] following more than forty years of campaigning by Bentley's family. Lord Bingham, heavily criticised the then-Lord Chief Justice Goddard's summing up at the original trial which, he said, gave the jury little choice but to convict, and deprived Bentley of his birthright as a British citizen, namely a fair trial.[243]

The judge's scope to comment on evidence and witnesses during the summing up in England contrasts markedly with the United States. The contrast was very apparent in the 1997 case of the British *au pair*, Louise Woodward, who was convicted in a Massachusetts court of murdering a child under her care.[244] In most U.S. courts, interpreting the evidence is a responsibility re-

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238. Contempt of Court Act, 1981, § 8 (Eng.).

239. The procedure for asking questions (or indeed for making any kind of request of the judge such as asking for a break) is for the juror to write it down and catch the attention of an usher who will pass the note to the judge. There may, of course, be reasons why the question the juror wants to ask cannot be put to a witness.

240. For discussion of problems this may cause for juries, see Brian Clapham, *Introducing Psychological Evidence in the Courts*, *in* PSYCHOLOGY IN LEGAL CONTEXTS 101 (Sally Lloyd-Bostock ed., 1981).

241. *See* ZANDER & HENDERSON, *supra* note 79, at 205.

242. *See* R. v. Bentley, T.L.R., July 31, 1998, at 492.

243. *See* Adrian Lee, *The Verdict Comes 45 Years Too Late: Bentley Is Innocent*, TIMES (London), July 31, 1998, at 1.

244. The conviction was reduced by the judge to one for manslaughter. The decision was appealed by both the prosecution and defence; the result was affirmed. *See* Commonwealth v. Woodward, 694 N.E.2d 1277 (Mass. 1998), *aff'g* Commonwealth v. Woodward, No. Crim. 97-0433, 1997 WL 694119 (Mass. Super. Ct. Nov. 10, 1997).

served for the jury, and it can seek no help in this task.[245] In the *Woodward* case, the judge did not summarise or comment on the evidence but only gave the customary directions on the law.[246] The contrast with the practice in England gave rise to discussion in the British newspapers.

The 1993 Crown Court Study explored jurors' views about the judge's summing up in a survey sampling more than 800 Crown Court cases.[247] Nearly one half of the jurors surveyed thought it would have made no difference to the difficulty of this task if the judge had not summed up on the facts.[248] However, nineteen percent said it would have made their task "much harder."[249] Not surprisingly, the longer the case, the more likely jurors were to say that the judge's summing up on the facts was useful.[250] Remarkably few jurors, just over six percent, reported finding the judge's directions on the law difficult to understand,[251] although we do not know whether their perceptions were accurate.

The extent to which jurors are swayed by comments or hints from the judge has proved difficult to study,[252] but the Crown Court Study provides some intriguing findings on this point. Jurors were asked whether they thought the judge's summing up pointed toward conviction or acquittal, and to what extent they felt any "tilt" was justified by the evidence.[253] The results were complex. Thirty-three percent of jurors said the summing up was "tilted" toward either conviction or acquittal—almost exactly equally often in each direction.[254] The "tilt" in the summing up was, as expected, very closely associated with the result of the case, but there were cases in which the jury did not follow their perception of the judge's tilt.[255] Thus, nine percent of jurors who viewed the summing up as pro-conviction reported that the jury had in fact acquitted.[256] Of those viewing the summing up as "somewhat" for conviction, thirteen percent reported that the jury acquitted,[257] suggesting that juries are capable of resisting the influence of the judge if they disagree with his or her view. However, results also showed that sometimes juries acquitted or convicted against what

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245. It should be noted, however, that in U.S. federal courts and in some state courts, the judge has the legal authority to comment on the evidence, but this power is rarely exercised and only then under limited conditions.

246. *See* Frances Gibb, *Trial Exposes Worst Traits of US Justice*, TIMES (London), Oct. 31, 1997, at 4.

247. *See* ZANDER & HENDERSON, *supra* note 79, at 249.

248. *See id.* at 214.

249. *See id.*

250. *See id.*

251. *See id.* at 216.

252. *See, e.g.*, Zenon Bankowski, *The Jury and Reality*, *in* THE JURY UNDER ATTACK, *supra* note 41, at 8-26.

253. *See* ZANDER & HENDERSON, *supra* note 79, at 217-18.

254. *See id.* at 218. Sixteen percent said that it pointed slightly or strongly to acquittal, and 16% said that it pointed slightly or strongly to conviction. Where they felt it had been tipped one way or the other, 88% thought it was supported by the weight of the evidence. *See id.*

255. *See id.* at 219.

256. *See id.*

257. *See id.* Note that these results are for individual jurors reporting their views of the summing up and their recall of the verdict.

they themselves saw as the weight of the evidence because of the way the judge had summed up.[258] It is important to bear in mind that when it comes down to these subgroups, the numbers of cases are quite small. In addition, the research was hampered by the provisions of the Contempt of Court Act of 1981, which prevented jurors' answers to questions from being directly related to other information the researchers had collected about the cases. Relaxation of these restrictions would allow much more informative research to be conducted.

XII

THE VERDICT

For centuries, juries' verdicts in England had to be unanimous, and this served as the model for the United States. In England, however, the requirement of a unanimous verdict was dropped in 1967 by the Criminal Justice Act, which permitted majority verdicts of ten to two.[259] Juries are now initially instructed that they must seek a unanimous verdict, but that "a time may come" when a majority verdict will be permissible, at which point they will receive further directions.[260] Juries must try for at least two hours to reach a unanimous verdict,[261] and judicial statistics for 1996 show that only twenty percent of convictions following a plea of not guilty in the Crown Court were majority verdicts.[262] When the jury delivers its verdict, the foreman will be asked in open court whether the verdict is unanimous, and, if not, by what majority.[263]

Debate surrounding the change to majority verdicts raises familiar issues of "crime control" versus the "due process" rights of the defendant. The official rationale for the change was to prevent professional criminals from escaping conviction by intimidating or bribing individual jurors.[264] It has also been argued that majority verdicts allow the views of extremists to be discounted in jury decisions.[265] However, critics believe that this change was motivated more by a desire to save the expense of retrials and that it undermines the principle that guilt must be proved beyond a reasonable doubt.[266] As Sanders and Young indicate, there is a double standard in the argument that a majority verdict can neutralise extremists.[267] As with jury vetting, the government accepts the de-

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258. Using a score of average juror responses, the researchers conclude that when the judge "summed up for an acquittal 'against the weight of the evidence,'" the judge directed "an acquittal in four cases and the jury acquitted in the other nine." *Id.* By the same averaging measure, they conclude that "[w]hen the judge summed up for a conviction 'against the weight of the evidence,' the jury acquitted in four" cases, but convicted in four, and in the remaining four cases convicted on some charges. *Id.*

259. The governing provision is now the Juries Act, 1974, § 17 (Eng.).

260. *See id.*

261. *See id.*

262. *See* LORD CHANCELLOR'S DEP'T, JUDICIAL STATISTICS, 1996 tbl. 6.11.

263. *See* Juries Act, 1974, § 17 (Eng.).

264. *See* SANDERS & YOUNG, *supra* note 6, at 362.

265. *See id.*

266. For discussion of the arguments, see *id.* at 361-64.

267. *See id.* at 363.

fects of a random selection procedure when this serves prosecution interests but not when it serves the interests of the defence. Sanders and Young also argue that it is misleading to draw bare comparisons with the Scottish system, where it is possible to convict on a simple majority of eight out of fifteen[268] because, as Duff points out, Scotland has means of safeguarding the defendant that have no parallel in England.[269] For example, unlike in Scotland, in England it is possible for a defendant to be convicted on the uncorroborated evidence of a single witness or on uncorroborated confession evidence.[270] The rules in Scotland require the prosecution evidence to be corroborated. Moreover, if a Scottish jury cannot achieve a majority for conviction, the defendant is entitled to be acquitted.[271] In England, failure to achieve a sufficient majority either way results in a "hung" jury, with the possibility of a retrial.[272] Only a finding of not guilty by at least ten out of twelve jurors entitles the defendant to be acquitted. Sanders and Young suggest that this symmetry between the requirements of a guilty and a not guilty verdict "is impossible to reconcile with the presumption of innocence."[273]

XIII

"QUESTIONABLE" VERDICTS AND JURY NULLIFICATION

Throughout the centuries of their existence, English juries have been known to acquit in the face of both overwhelming evidence of guilt and a judicial direction for conviction. Although such acquittals may be unpopular with those seeking a conviction, they have long been legally justified. In 1784, Lord Mansfield stated that in his judgment, the jury in the sedition trial of the Dean of St. Asaph had the duty of "blending law and fact" in its verdict and in doing so the jurors might follow "the prejudices of their affections or passions."[274] Even though the judge might direct the jury how to reach the right legal answer, the jurors have it in their power to do wrong, "which is a matter entirely between God and their own consciences."[275]

Various categories of "jury nullification" can be distinguished.[276] A jury's refusal to apply a law in a specific case can be seen as a show of support for individuals who have taken a stand against the government. A prime example is the jury's refusal to apply Section 2 of the Official Secrets Act in the *Ponting*

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268. *See id*.
269. *See* Duff, *supra* note 84, at 190-94.
270. *See* SANDERS & YOUNG, *supra* note 6, at 363.
271. *See id.*
272. *See id.*
273. *Id.*
274. R. v. Shipley, 99 Eng. Rep. 774, 820 (1784).
275. *Id*. at 824.
276. *See* Nancy S. Marder, The Myth of the Nullifying Jury (June 1998) (draft paper presented at the Annual Meeting of the Law and Society Association in Aspen, Colorado). As Marder also points out, it is entirely possible that in some questionable acquittals a combination of these categories may be operating.

case discussed above. In another well-known case, Pottle and Randle were acquitted in 1991 of their part in the escape of traitor George Blake from Wormwood Scrubs prison in 1966 despite a published admission in their book subtitled *How We Freed George Blake—And Why*.[277] More recently, in August 1996, four women were acquitted of damaging a British Aerospace Hawk jet in protest against their sale to Third World regimes.[278]

In some cases, juries may be refusing to apply what they see as bad law. For instance, the legal definition of murder in England does not require an intention to kill. In a case heard before Lord Goff, the jury appeared to reject this definition of murder.[279] The defendant had rammed a jagged glass into his victim's face and severed the man's jugular vein. The defendant did not intend to kill him, and indeed, was horrified at his victim's death. He did, however, clearly intend to cause "really serious harm" which constituted sufficient *mens rea* for murder.[280] The jury, despite being directed to that effect, acquitted him of murder. According to Lord Goff, the jurors could not bring themselves to call him a murderer, a position with which Lord Goff himself entirely sympathised. In other cases, juries may be protesting about something other than a specific law, for instance racism, poverty, or police misconduct.

Instances of deliberate jury nullification would seem to be different in kind from cases where the jury appears to have simply got it wrong. However, it is not always possible to distinguish clearly between verdicts where a jury is using its power to decide in defiance of the law or government and verdicts where the jury has been confused, incompetent, or prejudiced. As commentators have pointed out, the notion that a verdict can be "wrong" or "perverse" is premised on a particular view of the nature of truth and jury trials,[281] and it often means little more than "a verdict I disagree with." Baldwin and McConville's study of the Birmingham Crown Court in the 1970s revealed a lack of consensus among "experts" (that is, lawyers, judges, and police[282]) as to what was a questionable verdict.[283] Adopting a method similar to that used by Kalven and Zeisel,[284] they asked judges, lawyers, and police involved in jury trials for their opinions on juries' verdicts, both acquittals and convictions. A clear pattern emerged in ac-

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277. For a fuller discussion of the Pottle and Randle case, see Simon Jolly, Images and Ideologies of the Jury (1995) (paper presented at the Annual Meeting of the Law and Society Association in Toronto, Canada) (on file with author).

278. *See Jury out on Trial Research: Recent Verdicts Have Sparked Concern Says Robert Rice*, FINANCIAL TIMES (London), Aug. 6, 1996, at 22.

279. *See* Lord Goff, *The Mental Element in the Crime of Murder*, 104 LAW Q. REV. 30 (1988). Lord Goff is a judge in the House of Lords, the most senior court in England.

280. *See Murder Jury Direction on Accused's Intention*, TIMES (London), July 23, 1998, at 43 (referring to R. v. Nedrick, 1 W.L.R. 1025, 1028 (Eng. C.A. 1986)). The direction to be given a jury on the *mens rea* required to establish murder remains unsettled despite a series of House of Lords decisions since the 1960s. In the recent case of the House of Lords in *R. v. Woollin*, the House looks for guidance from *R. v. Nedrick*.

281. *See generally, e.g.*, Bankowski, *supra* note 252.

282. *See* BALDWIN & MCCONVILLE, *supra* note 120, at 27-29.

283. *See id.* at 37-87.

284. *See* HARRY KALVEN JR. & HANS ZEISEL, THE AMERICAN JURY 10 (1996).

quittals. Those involved on the defence side tended to see acquittals as justified, and those involved on the prosecution side tended to see them as questionable.[285] Acquittals were seen as fully justified eighty-three percent of the time by defence solicitors, compared with sixty-five percent by prosecuting solicitors, and forty-eight percent by the police.[286] The defence solicitor expressed "serious doubts" about only ten percent of acquittals, while the prosecuting solicitor expressed "serious doubts" about twenty-six percent of acquittals and the police forty-four percent.[287]

Not surprisingly, the pattern was reversed in cases of doubtful conviction. Prosecuting solicitors doubted the convictions least often and defence solicitors doubted them the most often.[288] Surprisingly, the police expressed the most doubt about both convictions and acquittals,[289] suggesting an overall scepticism of jury verdicts. Although questionable verdicts may be either acquittals or convictions, the consequences of doubtful convictions can clearly be much more serious and may result in a deprivation of liberty. Baldwin and McConville observed that little research had been done on the question of doubtful jury convictions,[290] and that remains true today.

XIV

CONCLUSION

The jury may be one of the most venerated institutions in the English legal system, but it is proving vulnerable to attack. Over the last century, the right to trial by jury has been steadily eroded, from the virtual abolition of jury trials in civil cases to the removal of the option of jury trial in a large number of criminal cases. Increasingly serious criminal offences are being tried before benches of lay magistrates, which is, as McBarnet puts it "a different brand of justice altogether."[291] The trend looks set to continue. The current Labour Government is already looking at proposals to limit the role of juries in fraud trials and to remove the defendant's right to insist on jury trial in either way cases.

Jury trials are undeniably more costly and time consuming than trials in magistrates' courts, but many of the other criticisms made of juries and jury trials are much more questionable. Arguments both for and against the jury quickly become entangled in ideology and metaphor, the politics of crime control and efficiency, and the rhetoric of justice and liberty. Justifications put forward for change often include claims that jury trial tends to favour the defendant, but these claims are frequently based on no more than anecdote and

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285. *See* BALDWIN & MCCONVILLE, *supra* note 120, at 46.
286. *See id.*
287. *See id.*
288. *See id.* at 71.
289. *See id.* at 46, 71.
290. *See id.* at 68-69.
291. DOREEN J. MCBARNET, CONVICTION: LAW, THE STATE AND THE CONSTRUCTION OF JUSTICE 122 (1979).

have sometimes even run counter to the evidence available. There was no reliable evidence, for example, that the right of silence was being abused by professional criminals, nor that the peremptory challenge was leading to acquittals by stacked juries. And it is by no means clear that juries acquit in serious fraud cases because they cannot understand complex evidence.

To seek sound justification for reform in terms of the jury's rationality, competence, or efficiency may be to miss the point. Many commentators have stressed the importance of understanding the jury in terms of politics and the organisation of power.[292] Brown and Leal write, for example, that several centuries ago

> jury trial became an element in the historical struggle between a judiciary claiming pre-parliamentary, constitutional authority grounded in the Magna Carta and parliament exercising its prerogative to create summary jurisdiction by statute . . . .
>
> To the present day . . . governments have not liked them. They rightly thought that juries could not be relied on to convict in certain sorts of cases . . . .[293]

It is ironic that the English jury, which has served as a model for other countries, is in a state of continuing decline just as jury trial is being revived in a number of countries. Spain has recently reintroduced the right to trial by jury in limited cases, and in a number of former communist regimes in Eastern Europe, including Russia, the introduction of jury trials is seen as a move toward the establishment of the rule of law. It remains to be seen whether the decline of the English jury is terminal. In a subset of criminal trials at least, the jury has so far proven robust, maintaining strong support amongst the general public and many senior members of the legal profession who are well aware of its failings and drawbacks. The jury has great symbolic significance and is still highly prized, not least because it continues to exercise its long-standing right to reach a verdict based on conscience, against the letter of the law, and occasionally in defiance of government.

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292. *See generally* THE JURY UNDER ATTACK, *supra* note 41.

293. David Brown & David Neal, *Show Trials: The Media and the Gang of Twelve*, *in id.* at 126, 129.