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Recommended Citation

Harry Kalven, Jr. & Hans Zeisel, "The American Jury: Notes for an English Controversy," 48 Chicago Bar Association Record 195 (1967).

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THE AMERICAN JURY

NOTES FOR AN ENGLISH CONTROVERSY

HARRY KALVEN, JR. AND HANS ZEISEL

Introductory Note: Some time last Fall the British Home Secretary introduced legislation designed to abolish the unanimity requirement for jury verdicts in criminal cases, and to allow 10:2 or 11:1 verdicts. Reports of bribed hold-out jurors, who would hang the jury, were put forward as the reason for the proposal. In a television debate with the Home Secretary, Oxford University's distinguished professor of criminal law, Rupert Cross, drew attention to evidence from "The American Jury," the study by Professors Harry Kalven, Jr. and Hans Zeisel of the University of Chicago Law School, published last August by Little, Brown and Company, Boston. It showed that the proposed reform made doubtful sense.

The Round Table, a British quarterly, devoted to affairs of the Commonwealth, invited Professors Kalven and Zeisel to present their thesis in more detail. The authors obliged with a paper which we are happy to republish here. It offers a fine example of how this type of research can aid in policy decisions.

The paper caused something of a stir in English public life. On April 4, the London *Times* devoted five of its seven columns on its editorial page to the evidence from the United States, and demanded in its leading editorial that the Home Secretary withdraw his proposal. On April 6, the liberal *Manchester Guardian Weekly* joined the *Times* in its request to heed the "evidence about the . . . American jury."

On April 26 and 27, 1967, the days appointed for the debate in Parliament, 13 members spoke against the proposed law, all referring to the "American evidence."

Remarked Sir Lionel Heald:

I came here . . . disposed to accept the view of the Home Secretary. But I have been changed in my view by what I have heard in the debate.

And the member from Blackpool:

If the House were given a free vote, the proposal would be thrown out neck and crop, and quite rightly so.

When it became clear that the vote would not be "freed" and party discipline invoked instead, the member from Tiverton asked why "the Home Secretary has nobbled his own jury." In the end party discipline did in fact decide the case of the Home Secretary versus Kalven-Zeisel and their "American evidence," by a vote of 180 to 102.

The *Chicago Bar Record* is pleased to let the argument speak for itself:

AS a blueprint, the Anglo-American jury appears to be an extraordinary way of arranging the administration of human justice. It recruits at random from a wide population a group of lay-

men; it entrusts them with great powers; it requires from them formidable feats of attention, recall, and judgment; it permits them to carry out their deliberations in secret and to report on their de-

cisions without giving reasons; although their function is to arbitrate sharply contested disputes, it asks that they come to a unanimous conclusion; and when their momentary service to the state has been completed, it orders them to disband and return to private life. The jury personnel is ever-changing and ever inexperienced. The jury is thus by definition an exciting experiment in government, and it is not surprising that virtually from its inception it has been the subject of deep controversy attracting in each generation the most harsh criticism and the most extravagant praise.

For over a decade the University of Chicago Law School has been engaged in a large scale study of the jury system. By a variety of methods it has sought to discover how in fact the jury does behave. A principal report of the project was published by us late last summer as *The American Jury*.^{*} It is our present purpose to give a brief sketch of the method, scope, and principal findings of the study, and then to turn directly to the current English controversy over the jury which, as we understand it, centers on the desirability of relaxing the rule that jury verdicts be unanimous.

The American Jury is devoted to answering a single question, which we believe to underlie most debate over the jury: *How would judge and jury decide the same case?* Implicit in arguments over the institution must be an assumption that in some instances trial by jury and trial by judge will yield different results and that in these differences will be found the basis either for praising the jury's distinctive contributions or the basis for condemning its distinctive shortcomings.

The research design was simple and straightforward. With the cooperation of a national sample of

over 500 trial judges, we collected reports on 3,576 actual criminal jury trials. These reports furnished four sets of information about each case: (i) descriptive facts about the case, the charge, the parties, the evidence, the counsel, etc.; (ii) the actual verdict of the jury; (iii) how the judge would have decided the case had it been tried before him without a jury, that is, a hypothetical judge verdict; and (iv) in cases where the two verdicts differed, comments by the judge as to what in his opinion accounted for the disagreement. It was thus possible for us to approximate the grand experiment of having each case, across the whole range of jury business, tried twice—once to the judge and once to the jury. The heart of the study, therefore, is a careful comparison and analysis of the two verdicts for each case, the actual jury verdict and the hypothetical judge verdict.

We were able to establish that our sample was satisfactorily representative of the roughly 60,000 criminal jury trials conducted in the United States each year. And by a variety of techniques of analysis we were able not only to measure with precision the magnitude and direction of disagreement between judge and jury but also to locate explanations for such disagreements in the overwhelming majority of cases. The result is thus a detailed profile of the way the jury performs, drawn against the baseline of the judge.

One in Four Disagreement

We begin with the basic result. In 13.4 per cent of cases, the jury

^{*} With the collaboration of Thomas Callahan and Philip Ennis. Little, Brown & Co., Boston, 1966. The project has also published Zeisel, Kalven, and Bucholz, *Delay in the Courts* (1959), and will publish later this year, Simon, *The American Jury—The Defense of Insanity*. The project has made extensive use of post-trial juror interviews, mock experimental jury trials, opinion polls, and various other survey techniques.

and judge agree to acquit and in 62.0 per cent of cases they agree to convict. In all then, they agree on the issue of guilt 75.4 per cent of the time. It is not altogether easy to know just what to make of this figure, since there has been so little expectation, in legal tradition, at least in quantitative terms, as to how often the jury *should* agree with the judge. We are really not sure whether this is more or less agreement than we had expected—or wanted. Our own formula has been to read the table as showing that the jury agrees with the judge often enough to be reassuring, and disagrees with him often enough to be interesting!

The direction of the disagreement, as would be expected, shows the jury decisively in favor of the defendant. In 16.9 per cent of cases the jury acquits where the judge would have convicted; whereas in only 2.2 per cent of the cases do we find the converse, the judge acquitting where the jury convicted. In 5.5 per cent of all trials the jury fails to reach unanimity. Further we can say that if all cases now tried to American juries were to be tried to judges alone, the acquittal rate would drop from 30.3 per cent to 16.7 per cent, or to virtually one-half its present level.

One should not unduly stress the directionality of the disagreement nor herald the table as itself an empirical proof that the criminal jury is a safeguard for the citizen accused of crime. It must be remembered that by and large the defendant, especially under American law and practice, can select the cases that are to come to the jury for trial. He has the alternative options of pleading guilty and avoiding trial altogether or, more important, of waiving a jury trial and going to trial before the judge alone. Presumably he goes to jury trial in cases where he thinks he

has something to gain from this mode of trial.

We do not have any directly comparable data on English juries. However, Lord Parker held informal conversations with senior Queen's Bench judges about their impressions as to the frequency with which they disagreed with their juries. Lord Parker was kind enough to communicate the gist of these conversations to us and we were able to offer a tentative tabulation in the appendix of our study. It would seem that, although the direction of disagreement is much the same, the magnitude of disagreement is significantly less for English judges and English juries. Whether this reflects a greater conformity of popular sentiment to law in England or the greater control the English judge exercises over the trial process would be an inviting topic for further research.

The main task of the study was not to measure the disagreement but to explain it. Within the present compass we cannot aspire to do more than sketch the main lines of explanation. The detail, the human interest of the jury's response, the texture, as it were, or the explanations, really cannot be conveyed so briefly.

To begin with, we are able to rule out one line of explanation which has had some popularity in the United States—namely, that the jury disagrees with the judge because it does not understand the case before it. We find ample evidence that the jury does understand, and it is striking that only in a single instance does the trial judge suggest the jury's failure to understand as a reason for disagreement. The upshot is that when the jury does diverge from the judge, it does so for more interesting reasons.

We are able, too, to place in perspective the role of the trial lawyer. The judges rated the skill of

opposing counsel in each case, enabling us to study and compare cases in which counsel were evenly matched and cases in which either defense or prosecution counsel was superior. Disparity of counsel served to explain only some 4 per cent of all disagreements. In over three-fourths of the cases the judge found the lawyers equally matched and only in roughly one case in ten where they were not evenly matched, did the imbalance contribute to the disagreement between jury and judge. The study does not eliminate the possibility that some of the legendary heroes of the trial bar did and do have extraordinary powers to move a jury; it does, however, dispel any notion that the jury is constantly swayed by the rhetoric and demagoguery of the trial advocate, or any companion notion that the jury "tries" the lawyers and not the case.

The Place of Sentiment

We find, as observers of the jury have always known, that the jury does not limit itself to its classic role of trying issues of fact. It imports into the trial process its sentiments about the defendant and about the law. For the most part, however, it does so not by any open revolt against the law but in the guise of resolving close questions of fact. The sentiment gives direction to the resolution of the evidentiary doubt; the evidentiary doubt provides a favorable condition for a response to the sentiment. As we put it in the study: "The closeness of the evidence makes it possible for the jury to respond to sentiment *by liberating it* from the discipline of the evidence." Or as one judge put it, in such cases "the jurors hunt for doubt."

An interesting but mysterious cluster of jury sentiments center on the character and personality

of the defendant. To some extent the jury tries the criminal and not the crime. And it is moved more than the judge by the myriad of factors that make a person sympathetic or unsympathetic. Although the Human Comedy seems to march across the pages of the judges' commentaries on the questionnaires—the cripple, the minister, the pregnant wife, the war veteran, the young, the aged, the bullied pretty blonde wife, the helpless alcoholic, the homosexual, and so on—we find in the end that the jury's response to the person of the defendant is modest and accounts for only 11 per cent of the disagreement between judge and jury.

The most colorful sources of disagreement between jury and judge are what we have called jury sentiments about the law. Here we pick up reflections of the popular sense of justice and the study becomes in effect a special kind of comparative law, a juxtaposing of two legal systems, that of the judge and that of the jury. Here especially summarization cannot communicate adequately the flavor and subtlety, and often insight, of the jury response which required over a dozen chapters and a third of the text in a 500 page book to report out. It may be of some small use, however, simply to enumerate the titles of the chapters in which these sentiments are discussed:

The Boundaries of Self Defense
 Contributory Fault of the
 Victim
 De Minimis
 Unpopular Laws
 Defendant Has Been Punished
 Enough
 Punishment Threatened is Too
 Severe
 Preferential Treatment
 Improper Police and Prosecu-
 tion Practices
 Inadvertent Conduct as
 Criminal

Insanity and Intoxication
Crime in a Sub-Culture
Pro-Prosecution Equities

For the most part these sentiments are found in the disagreement cases where it was the jury which was the more lenient; hence they are sentiments favorable to the accused. When, however, we examine the 2.2 per cent cases in which it was the jury which was more punitive than the judge, we continue to find the jury's sense of equity at work, but responding now to "pro-prosecution equities." Our final conclusion, to borrow again the words of the book, is:

We suspect there is little or no intrinsic directionality in the jury's response. It is not fundamentally defendant-prone, rather it is non-rule minded; it will move where the equities are. And where the equities are at any given time will depend on both the state of the law and the climate of public opinion.

English Reform Proposals

So much for a general view of the jury's performance. We turn now to the question immediately before the English bar and public, whether to change the law so as to permit juries in criminal cases to reach verdicts when the vote is 10:2 or 11:1, in lieu of requiring that all verdicts be unanimous. Our study offers some data about deadlocked juries (or in the American usage, hung juries) which, granting differences between English and American juries, may have a bearing on the current controversy.

The rationale for the proposed change in the law, as we get it, is that it will prevent one or two corrupt jurors from defeating justice and the will of the overwhelming majority of the jury by forcing the jury to fail to reach agreement. The argument has been buttressed

by the disclosure that a surprisingly high proportion of English jurors have been found to have a criminal record.

Before turning to our data, we cannot suppress one observation about the argument on behalf of the change. It strikes us that the burden of proof has not been met. The very nature of the unanimity rule is that it leaves the jury vulnerable to the bribing of a single juror. The jury has had this weakness, if it be one, for some centuries now and it seems a little late in the day suddenly to notice it. To our ear, admittedly not attuned to the details of the current English debate, it is somewhat like suddenly discovering that the jury has 12 laymen on it and urging, *therefore*, that it be abolished.* We would add, too, that the unanimity rule may provide a useful symbol of the patience of criminal justice and of the traditions requiring proof beyond a reasonable doubt. Moreover, it may provide a guarantee that the jury will deliberate fully since under the unanimity rule the dissenting minority, whatever its size, must be heard. Our special province here, however, is not to add to the theoretical speculations, but to marshal empirical data in order to clarify what a decision either way implies.

We would recall from the basic table of judge and jury verdicts, that the American jury fails to agree a little over 5 per cent of the time, and there is reason to believe the figure for the English jury is about the same.

More important we have from our study the distribution of the last vote at which the jury was declared deadlocked and thus can ascertain how frequently the one

* Even if there were proof of widespread malfeasance by English juries, the proposal of the Criminal Justice Bill to screen out recent ex-convicts from jury service might for all we know remedy the situation.

or two man hung jury arises. The distribution of votes is as follows:

TABLE 1

<i>Last Vote of Deadlocked Juries</i>	
<i>Vote for Conviction</i>	<i>Per Cent</i>
11:1	24
10:2	10
<hr/>	
9:3	10
8:4	6
7:5	13
6:6	13
5:7	8
4:8	4
3:9	4
<hr/>	
2:10	8
1:11	—
	100%

Number of Juries in Sample—48

We see that (24 + 10 + 8) 42 per cent of the hung juries ended with an 11:1 or 10:2 vote. Since a little over 5 per cent of all juries hang, and since 42 per cent of the hung juries hang with such small minorities in dissent, we can say that in 42 per cent of 5 per cent, or roughly in two trials out of 100 has the problem arisen. Moreover, we can check this estimate against another source. A few American jurisdictions permit majority verdicts in criminal cases although only one, Oregon, allows them in felony cases. If we compare the frequency of hung juries in the two sets of jurisdictions, we arrive at about the same result. The frequency of deadlocked juries in states with unanimity is 5.6 per cent; in states with majority verdicts, it is 3.1 per cent. The reform proposal then would have the consequence of transforming these two cases in 100 from hung juries into verdicts. Can anything be said about the desirability of this step?

Corruption as a Factor

In the course of our study we asked the judges to rate jury verdicts in cases where there was disagreement. We give below the

judges' rating in those cases of hung juries which ended with an 11:1 or 10:2 vote:

A decision a judge might also come to34 per cent
 Tenable for a jury but not for a judge22 per cent
 Without merit44 per cent

The figures thus indicate that in somewhat less than half of these cases does the judge feel that the deadlocking of the jury by the extreme minority was a miscarriage of justice. In the world of the jury, as well as elsewhere in life, there is no guarantee that a minority, even a small minority, will always be wrong.

The real question, of course, is how often the extreme minority dissent is due to corruption of the juror rather than to some difficulty in the case itself. We have two lines of data that bear on this. First, in none of our 200 or so hung jury cases did the trial judge even suggest that there was anything suspicious about the jury deadlock, a fact of perhaps some significance for the problem at hand.

More important, we have data on the *first ballot* votes of juries that eventually deadlock. The following figures are for a special sample of 155 juries for which we have first ballot votes and final outcomes:

TABLE 2

<i>Per Cent of Deadlocked Juries as Related to their First Ballot</i>			
<i>First Ballot</i>		<i>Per Cent of Juries that</i>	
<i>Guilty</i>	<i>Not Guilty</i>	<i>Reached a Verdict</i>	<i>Disagreed</i>
11	1	100%	—
10	2	100%	—
9	3	100%	—
8	4	85%	15%
7	5		
6	6		
5	7	93%	7%
4	8		
3	9		
2	10	100%	—
1	11		

The figures suggest a fascinating point about human behavior. A jury will not hang *unless there is initially* a massive minority of four to five jurors. The point is that for most men, as other experiments in group psychology corroborate, companionship in dissent, at least at the outset, is required if they are to withstand the pressure of confronting a large majority. Hence the lone juror who finally hangs the jury will not emerge, according to these data, unless at the start his view had some support.

The point is relevant, too, to the rationale for the proposed change. The first ballot vote may be taken as some index of the ambiguity and difficulty of the case. And, if we so read it, it follows that hung juries, whatever the final vote, are largely the product of difficulties in the case. Hence in the absence of direct and specific evidence of scandal, there is nothing in the hung jury phenomenon, even when a small minority finally deadlocks the jury, which compels, or is even compatible with the view that hung juries are caused by a lone corrupt juror holding out against the objective weight of the evidence.

Nor is this quite all. There is the question of whether abandoning the unanimity rule will increase the number of non-unanimous verdicts. We can project from Table 2 that there will be such verdicts in at least 2 per cent of all cases, those that were formerly hung at 11:1 or 10:2. However the experience in Oregon has been that under the majority verdict rule the number of non-unanimous verdicts rose to 25 per cent. Apparently the jury simply stops deliberating when it reaches the requisite majority. English traditions may thus find jury verdicts under the proposed rule more disturbing than has been realized.

For it will mean convicting men in a substantial number of cases when it is publicly disclosed that some of those trying them did not find them guilty.

To summarize then what the data about hung juries has shown: (i) The proposed reform will affect only two out of every 100 jury verdicts—the jury will still be deadlocked in three out of every 100 trials; (ii) The most likely explanation for the 10:2 or 11:1 deadlocked juries is that it is a response to genuine difficulties in the case; instances of corrupt or idiosyncratic lone jurors hanging the jury would appear to be exceedingly rare; (iii) Under the reform, convictions based on non-unanimous verdicts are likely to appear in considerably more than two out of every 100 trials.*

We hope that this report on some aspects of our research on the jury has served as an introduction to a new kind of study of legal institutions and problems, one that is empirically oriented and depends upon a partnership of lawyer and social scientist, and also that it has served as a reminder, if one were needed, of how extraordinarily interesting and daring an experiment the Anglo-American jury is. And finally we hope that the discussion of the unanimity rule can furnish a modest example of how empirical study can assist in the resolution of issues of policy.

* To be sure, other jury systems operate quite satisfactorily without requiring a public verdict that is unanimous. The Scottish 15 men jury, for instance, as is well known, decides with a simple majority of votes. The 12 men juries on the European continent require usually a three-fourths majority for a finding of guilty; anything less acquits the defendant, there can be therefore no jury deadlock. An odd variant is probably the Brazilian jury which is not allowed to deliberate: at the end of the trial each juror is simply polled in writing, the votes are counted and the majority decides. And then there is, of course, the State of Oregon which allows the very 10:2 and 11:1 verdicts which the Criminal Justice Bill proposes for England, and justice in Oregon has not broken down; but then also nobody has ever claimed that Oregon justice is superior to justice elsewhere.

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