

cated than one would have expected and that the "reception" of the common law was a gradual process which bridged the first two centuries. The entire pre-revolutionary period is beginning to emerge as one in which the interaction of several varieties of English law with the requirements of the American situation provides a strong theme of continuity. Work on the law during the revolutionary period is still in a primitive state, but it is beginning to look as though the last part of the eighteenth century was a transitional stage rather than a fresh start. It is clear that in the early nineteenth century sweeping economic change and a new sense of the positive powers of government affected American law. We have ignored, however, the possibilities that the activity of the period did not occur *in vacuo* and that the "formative era" might perhaps better be called the "transformative era." If we expand our methods and extend our view, we may discover that the lawyers and judges of the "golden age" were the children of their fathers.

STANLEY N. KATZ*

* Assistant Professor of History, The University of Wisconsin.

The American Jury. HARRY KALVEN, JR. & HANS ZEISEL, with the collaboration of Thomas Callahan and Philip Ennis. Boston: Little, Brown and Company. 1966. Pp. xii, 559. \$15.00.

This is the sort of law book that appears once in a decade. If perchance the sensitive ears of Professors Kalven and Zeisel detect in that statement something of a *double entendre*—embodying, in their terminology, the imposition of a fact judgment on a value judgment—it really wasn't meant that way. This volume has indeed been long in coming. But if the authors had written the book rapidly, they would not have written the book they have. A pioneering work like this needs time. Entirely new tools had to be engineered, tested and remodeled; data had to be collected, analyzed, and reanalyzed. Then came the task of writing; one may guess that few chapters still have the form in which they sprang even from such a pair of fast and fertile minds. Wine from this new species of grape first had to mature in the cask. Now, bottled at precisely the right age, it will keep growing. This is a book to be savored and reread, not one to be gulped at a single sitting. Brilliantly avoiding Professor T. R. Powell's barb at the kind of research where "counters don't think and thinkers don't

count," it shows how, in the hands of imaginative scholars and skillful writers, figures can enrich old insights and afford new ones.

The authors would have done better to adopt the more modest title "The American Criminal Jury"; the companion volume on the civil jury is promised for 1968. The basic data are reports of 3576 criminal jury trials furnished by 555 judges.¹ Attention is focused on 1063 cases, 30% of the total,² where the judge would have found otherwise than the jury in some respect.³ For all but 10% of these disagreements an explanation by the judge was forthcoming. The basic technique was to check this "reason assessment" by "cross-tabulation," a method which compares the frequency of disagreement where a particular phenomenon is present with the over-all ratio of disagreement.⁴ When the two methods failed to reveal a convergence, the authors chose not to draw a conclusion.⁵ The statistics, whence every drop of enlightenment has been extracted, afford a sort of continuo to the themes.

In 87% of the disagreements the judge would have been more severe than the jury, in 13% the jury more severe than the judge.⁶ The disagreements divide into three categories—on guilt, on the charge, and where the jury hung. Of the cases where the judge was more severe, characterized as "normal" disagreements, 57% were on guilt, 15% were on the charge, and 15% were where the jury hung; of those where the jury was more severe, called "cross-overs," 7% were on guilt, 2% were on the charge, and 4% were hung juries.⁷ The six categories are then broken down among five major sets of reasons, more than one of which, of course, may exist in any case—sentiments on the law, sentiments on the defendant, evidence factors, facts only the judge knew, and disparity of counsel.⁸

The first roll-call is a resounding triumph for the jury. Evidence

¹ Pp. 32-35.

² P. 110.

³ To the unknown extent that the judges did not comply with the request to render their "verdict" before knowing the jury's, p. 52, the figures are biased, presumably in the direction of agreement.

⁴ To avoid "spurious correlations" caused by the presence of other factors, the sample usually must be divided into sub-groups; here the authors encountered the difficulty "that the necessity of cross-tabulating by relevant sub-groups, to insure some homogeneity, very soon exhausted our sample; after using a matrix of just a few factors, we would encounter cells that had hardly any or even no cases." P. 91.

⁵ P. 98.

⁶ Stated in terms of the *total* number of cases, the jury was more lenient in 19%, the judge in 3%. P. 58, table 12.

⁷ P. 110, table 24. These percentages are of total disagreements, as addition makes plain.

⁸ P. 111, table 26.

factors occurred in 79% of the total disagreements⁹—in these cases the jury was doing precisely the fact finding job it is supposed to do. Next in size come sentiments on the law, present in 50% of the disagreements. The authors proceed from these unweighted ratios to one of their most significant clarifications—a division of disagreements between facts alone, “values” alone, and a combination of “values” and facts.¹⁰ The combination is the winner, 45%, followed by 34% for facts alone and 21% for values alone. This leads to formulation of a “liberation hypothesis”—that the jury gives way to sentiment predominantly when the evidence is in doubt. “The sentiment gives direction to the resolution of the evidentiary doubt; the evidentiary doubt provides a favorable condition for a response to the sentiment.”¹¹

One point clearly shown is that in weighing evidence the jury is strongly impressed by a defendant with no criminal record who takes the stand,¹² especially when he has been charged with a serious crime.¹³ The figures fail to confirm the supposition that “the jury is differentially skeptical of confessions”¹⁴ or of testimony by an accomplice.¹⁵ As expected, the jury has a somewhat higher threshold of reasonable doubt than the judge, although one cannot determine how far the statistics on this score reflect difference in lay and judicial reaction as compared with the effect of the requirement of unanimity¹⁶—a factor perhaps not sufficiently taken into account in some of the other analyses. The sympathetic defendant has a significant effect on disagreement,¹⁷ but only 19% of defendants are sympathetic, 64% being average and 17% unattractive.¹⁸ Superior defense counsel appears in one of eleven trials and causes normal disagreement once every nine times.¹⁹ Interesting as such over-all figures are, they afford only a paltry indication of the detailed insights which the book gives into the jury’s appraisals.

The most fascinating chapters are those which analyze the jury’s different views of the law. The jury takes a more liberal attitude to-

⁹ *Ibid.*

¹⁰ P. 116, table 30.

¹¹ P. 165.

¹² P. 179, table 56. Surprisingly, the defendant took the stand in 82% of the cases. P. 137, table 35. Of course, this figure reflects inclusion in the data of some not very grave offenses.

¹³ P. 180, table 57.

¹⁴ Pp. 172-74.

¹⁵ Pp. 174-76.

¹⁶ P. 189 n.5.

¹⁷ P. 215, table 68.

¹⁸ P. 214, table 67.

¹⁹ P. 372.

ward self-defense, disregarding many of the law's "complex series of restrictions," but often only to the point of reducing the charge rather than acquitting.²⁰ Somewhat allied to this, it gives weight to the contributory fault of the victim;²¹ it does not truly go along with modern law's sharp distinction between crime and tort. A striking example is rape. Although in aggravated rape the jury acquits in only 12% of the cases where the judge convicts, in simple rape the percentage rises to 60%;²² the jury thinks the woman is in part to blame. So also as to domestic violence if not too violent, and as to the battery which the jury considers a normal incident of overmuch drink. On the other side of the ledger, the jury is likely to take a drastic view of sex offenses on children, finding a higher degree of crime than the judge or occasionally convicting where the judge was not convinced.²³

The jury applies a principle of *de minimis*. It often refuses to convict not merely for thefts of insignificant amount,²⁴ but also for such offenses as "the one-punch fight"—as to which its enlarged notion of self-defense and its tort concept are also operative²⁵—and in cases where the victim suffers no loss because the crime is detected quickly²⁶ or displays reluctance to prosecute²⁷—both of these again manifesting the criminal jury's affinity for tort equities. More alarmingly, it sometimes will not convict if it thinks the victim was generally "no good";²⁸ the unsympathetic victim is a factor for acquittal, or for a lesser charge, just as is the sympathetic defendant. There is a modest list, primarily game and liquor laws, where in many cases the jury simply vetoes the legislature.²⁹ Sometimes, in disagreement with the more logically minded judge, the jury will acquit or find on a lower charge because it thinks the defendant, in various ways, has already been punished enough³⁰ or because it regards the threatened punishment as too severe.³¹ The jury resents the prosecution's giving a partner in crime, especially a dominant one, soft treatment compared with that proposed for the man before it.³² Occasionally the jury has taken over

20 Ch. 16.

21 Ch. 17.

22 P. 253, table 72.

23 Pp. 396-98.

24 Pp. 261-65.

25 Pp. 265-66.

26 Pp. 268-70.

27 Pp. 270-72.

28 Pp. 282-84.

29 Ch. 19.

30 Ch. 20.

31 Ch. 21.

32 Ch. 22.

what is now increasingly the court's role of protecting against improper police and prosecution practice; it is particularly sensitive to cases where it believes a defendant is being prosecuted *only* because he irritated the police.³³

As against this long list of instances where the jury tempers the wind to the defendant, there are a few "pro-prosecution equities."³⁴ I have already mentioned sex offenses against children; another is neglect of them—the American jury loves children. A less attractive instance involves racial factors. A group of cases in which the jury is more severe to an insanity defense than the judge because it doesn't want the accused left free³⁵ provokes thought in this age when the defense is being liberalized without sufficient provision for civil custody.

This portion of the study—to borrow Professor Llewellyn's phrase³⁶—contains "rich ore, if worked with care." If the jury will not follow the law, should not the law follow the jury? However much we may approve the jury's service as a law reviser, it operates eccentrically. The authors' focus on instances where the jury's views on what the criminal law ought to be have led it to act less or sometimes more severely than the judge should not obscure the many similar instances where they have not; the trouble with "jury equity" is that it is anything but even-handed.³⁷ The defendant given a long sentence for raping a woman who led him on before allegedly changing her mind will not be much comforted because his counterpart has gone scot-free. If we are convinced of the good sense of the American criminal jury, we ought to pay it the compliment of sublimating its views, at least in some degree, by changed definitions of crime and provisions for punishment. The authors' delineation of the trouble spots is thus a great contribution to criminology—or will be if anything is done about it.

The book's "single most basic finding is that the jury, despite its autonomy, spins so close to the legal baseline."³⁸ Rarely does it exercise "the power to bring in a verdict in the teeth of both law and facts."³⁹ When it does, it generally has some valid reason—often, as the

³³ Ch. 23.

³⁴ Ch. 31.

³⁵ Pp. 402-03.

³⁶ LLEWELLYN, *THE COMMON-LAW TRADITION—DECIDING APPEALS* 132 (1960).

³⁷ This is particularly so if, as the authors conclude, the jury gives vent to its sentiments on the law predominantly when the evidence leaves it in doubt. See p. 165.

³⁸ P. 498.

³⁹ *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920) (Holmes, J.), quoted in *Dunn v. United States*, 284 U.S. 390, 393 (1932) (Holmes, J.).

book points out, its verdict would be called for by the law of some other jurisdiction.⁴⁰ The jury has indeed completed its slow process of becoming "rationalized" so as to be entitled to be "regarded as a judicial body."⁴¹ It generally uses its freedom to be less "rule-minded" than the judge so as to reach results according with community notions of common sense and decency, and thus of "justice." Yet, for reasons partially indicated above, our applause for the jury's virtuoso performance should not lead us to place undue reliance on it as an agent for keeping the law in touch with reality. While we would probably not like to live in a world in which there was complete congruence between judge and jury determinations in criminal cases, we ought to be able to reduce the divergence. This volume contains enough material to keep reformers of criminal law and procedure busy for many decades.

A reviewer is tempted to go on recording the *aperçus* the authors give in such liberal measure. One concerns the process of decision-making—the jury decides in the direction of the initial majority in nine out of ten cases.⁴² Another is the judge's view of the jury's disagreement. In 69% of such cases he considers the jury's action "quite correct"; only 9% are rated as "without merit," with the heaviest condemnation meted out to hung juries.⁴³ In deference to the tradition against unalloyed praise, I might make the rather obvious point that in some instances the sample seems too small to warrant the conclusion drawn from it.⁴⁴ But the authors have fielded this one in advance, arguing that, apart from other considerations, "in new efforts it must be better to learn something, however imperfectly, than to withdraw from inquiry altogether when preferred methods are as a practical matter not available."⁴⁵

There is only one more thing for me to say about this book—read it.

HENRY J. FRIENDLY*

⁴⁰ *E.g.*, p. 232 n.17.

⁴¹ PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 125 (5th ed. 1956).

⁴² P. 488.

⁴³ Pp. 429-35.

⁴⁴ See note 2 *supra*.

⁴⁵ P. 39.

* Judge, United States Court of Appeals for the Second Circuit.