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The lamp that shows that freedom lives - is it worth the candle?

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***Crim. L.R. 740** My aim is to question the traditional justifications used in praise and defence of the jury, suggesting that some of them are conceptually unsound. I argue that jury defenders inflate the jury's importance by portraying the “right” to jury trial as central to the criminal justice system and as a guardian of due process and civil liberties.

In this paper, I hope to examine some of the commonly held beliefs and assumptions which underlie traditional and oft-repeated adulation of jury trial. I take as my starting point Ashworth's 1979 plea on the criminal justice system that we “should devote some time to reflection on the theory behind it all.”[1] Theory, says Ashworth, “is essential, because social and legal arrangements--especially in so sensitive an area as criminal justice--need to be *justified* if they are to be acceptable.” Ashworth suggests, and I accept for the purposes of this paper, that the general justifying aim of the administration of criminal justice is that the guilty should be detected, convicted and duly sentenced, which he calls, for convenience, “crime control.”

The jury has probably provoked more comment and research than any other component of the criminal justice system. It seems to attract the most praise and least theoretical analysis. There is a wealth of material on the common law jury, predominantly American, English and Australian, and defenders of the jury seem to outnumber its opponents by about a hundred to one. There are few notable works which make a serious attempt to analyse the basis of the jury: Bankowski and Mungham[2] ; Freeman[3] ; Duff and Findlay[4] and Bankowski.[5]

Everyone seems to have an opinion on the jury and few are indifferent. It is as much the territory of the journalist, the politician, the pressure group and the lay person as it is of the lawyer or the academic. This is as it should be and hardly surprising, considering its very essence as a powerfully symbolic lay element in the criminal justice system. Juries, as Baldwin and McConville observe,[6] provoke comments which are little short of hysterical. The academic owes it to the rest, however, to be a little more analytical and to justify her or his assertions.

***Crim. L.R. 741** The English legal system has traditionally been characterised by smug complacency amongst lawyers, politicians and lay people alike. We seldom feel the need to justify our institutions, in the way required by Ashworth. Knowing that our legal system has been copied by newer anglophone countries, we assume that it must be a sound model. We have heard propaganda, since childhood, that our legal system is the best in the world, the epitome of the due process model.

Such complacency has allowed our legal system to remain virtually static between the Judicature Acts of the 1870s and the sweeping reforms 1980s and 1990s, with minor disturbances such as the introduction of juvenile courts and the C.P.S. When we do examine our legal system, via Royal Commissions, review boards, working parties and the like, we tend to focus on existing institutions and to examine the part and not the whole. Most proposals for change, this century, have been shelved or rejected. The Civil Justice Review was quite revolutionary in its breadth, its depth and it success rate. Moreover, it was shockingly heretical in asking whether we really need two levels of trial court and on what basis we can justify dividing the work between them. One can only hope that this pattern is repeated by the new Royal Commission on Criminal Justice.

The Commission must ask the parallel questions of why we have two levels of criminal trial court and whether we are justified, in the sense Ashworth demands, in retaining three sets of decision makers within them: lay magistrates, advised mostly by non-lawyers; stipendiary magistrates, advised mostly by lawyers; and the judge and jury. There is little legal logic or design in the division of their jurisdictions. They have simply evolved through the last 10 centuries or more.

If the jury is such a “palladium” of English justice (Blackstone[7]), why is it reserved for such a small number of cases, most defendants being treated to the quicker, cheaper, less flamboyant “trivial”[8]

justice of the magistrates' court? If the jury is such a guardian of our liberties and of justice, are we implying that magistrates dispense some lesser form of justice? Are we implying, since we invest so much cash and rhetoric in the jury system, that it is more likely to do justice and get the verdict right, whatever that means, than the magistrates? If so, why do we, in this, the fairest of legal systems, allow most of our defendants to be processed by the magistrates' courts? And, this being the case, why have academics invested so much argument and research into the jury?

There is one obvious answer to my questions here. The symbolic function of the jury far outweighs its practical significance. I shall argue in this paper that this sentimental attachment to the symbol of the jury is dangerous. Adulation of the jury is based on no justification or spurious justification. It has fed public complacency with the English legal system and distracted attention from its evils: a systematic lack of due process pre-trial and post-trial and certain deficiencies in the trial process itself. It has distorted the truth. The truth is that for most people who pass through the criminal justice system this palladium is simply not available and for those who can and do submit themselves to its verdict, it will not necessarily safeguard their civil liberties.

*Crim. L.R. 742 A "Constitutional Right" to jury trial

This justification for the jury is perhaps the best known and the most often served up without explanation, as a self-evident truth. Three problems arise under this heading:

a. the supposed guarantee of a right to jury trial in Magna Carta;

b. what is meant by a *constitutional* right to jury trial in the English legal system; and

c. what is meant, in jurisprudential terms, by asserting that there is a *right* to jury trial.

a. Magna Carta

Many writers claim that jury trial was enshrined as a constitutional right in Magna Carta, 1215, clause 39, which provided for a "trial by peers."[9] Later authors undoubtedly derived this myth from Devlin, who perpetuated it in 1956, having taken it from Blackstone's *Commentaries* .[10]

Whilst Blackstone's grandiloquent account of the English legal system in the eighteenth century is of great entertainment value, few later legal historians or constitutional lawyers would accept it as historically accurate. Some of his assertions have been used to quite an alarming extent, however, in establishing the constitutional foundations of newer common law jurisdictions.

The famous clause 39 of Magna Carta reads:

"*Nullus liber homo capiatur vel imprisonetur, aut disseisiatur aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus nec super eum mittemus, nisi per legale judicium parium vel per legum terrae* ."

which Holdsworth[11] translates as:

"No freeman shall be taken or/and imprisoned, or disseised, or exiled, or in any way destroyed, nor will we go upon him nor will we send upon him, except by the lawful judgment of his peers or/and by the law of the land."

Legal historians have been at pains to point out that clause 39 has nothing to do with trial by jury and, as Cornish said,[12] "It has always been bad history to trace the system back to Magna Carta." Holdsworth acknowledges that the misinterpretation of clause 39 has had sweeping effects on English constitutional history but explains:

"…it is also clear that the words *judicium parium* do not refer to trial by jury. A trial by a royal judge and a body of recognitors was exactly what the barons did not want. What they did want was firstly a tribunal of the old type in which all the suitors were judges of both law and fact, and secondly a tribunal in which they would not be judged by their inferiors. Some of *Crim. L.R. 743 them did not consider that the royal judge, none of them would have considered that a body of recognitors, were their peers."

Earlier, in his *History of Trial By Jury* ,[13] Forsyth had said that it was a common but erroneous opinion that *judicium parium* or trial by one's peers had reference to the jury and had misled many, including Blackstone. He explains that *judicium* implies the decision of a judge, not a jury verdict. I would add

that it is crucial to remember that, in 1215, the jury was still a group of oathswearing witnesses, or compurgators. They did not pronounce judgment. The *pares* , suggests Forsyth, were:

“members of the county and other courts, who discharged the function of judges, and who were the peers or fellows of the parties before them.”[14]

As these and other historians have pointed out, by Magna Carta the barons simply sought to secure a deal from King John, within which they safeguarded their right to be judged by judges of no lesser rank then themselves. *Liber homo* has been translated as either “freeman” or “freeholder” and “freeman” did not mean what it does today. As we should remember from school history, freemen were a limited class in the feudal system.

b. A constitutional right?

Even if one were to concede that it has become a constitutional convention, since the fourteenth century, when statute prescribed that jurors be independent, that juries be used in certain criminal trials, I balk at the concept of trial by jury's being “more than one wheel of the constitution.”[15] Devlin and others speak as if there were an entrenched right to jury trial, as there is in the United States Constitution or the Canadian Bill or Rights. The concept of a “constitutional right” has, historically, been so alien to British constitutional lawyers, that the phrase seldom appeared in textbooks before the 1980s and now it only appears in the context of the debate over the need for a Bill of Rights. Indeed, the call for a Bill of Rights has arisen for this very reason: the sovereignty of parliament dictates that we do not have any entrenched rights, especially in issues beyond the grasp of EC or international law. This is manifest in relation to jury trial. Parliament has almost rendered the civil jury extinct and has continually eroded the use and availability of the jury in the criminal trial.

c. A right?

There is a also a jurisprudential problem with those who justify the use of jury trial as a right. The term “right,” at least to “will” theorists, implies a choice. When we speak of procedural rights in the criminal justice system, we imply a choice. For example, I do not have to exercise my right of silence, Similarly, if I am charged with an offence which is triable either way, I can choose to be tried by judge and jury or magistrates. This choice can properly be called a “right” to jury trial. What of indictable offences? Here, I must appear before the Crown ***Crim. L.R. 744*** Court, where my only choice is as to plea. My only right is as to trial. I cannot choose to be tried by judge alone, as I could in the United States. Thus, it is correct to speak of a “right to jury trial” in the United States but not to speak of jury trial's being a “right,” in general terms, in the English legal system, as so many defenders of the jury are wont to do.[16]

By reasoning thus, I am accepting that the essence of a right must be a power of waiver. MacCormick[17] would take issue with this and argue that restricting my power of waiver does not negate my right. To this, I would repeat Simmonds' reply “It is doubtful if paternalism of this kind is best interpreted as a protection of the party's rights.”[18]

Not only does the concept of a right to jury trial in indictable offences fail to accord with “will” theories of rights, it also fails to satisfy classical “interest” theories of rights and I would extend my argument here to include triable either way offences. According to interest theories, as I would apply them here, jury trial can only be described as a “right” if the intended beneficiary of the court's duty to provide that right is the defendant. If the purpose of jury trial is primarily ideological, as I argue here, as a symbol to legitimate the criminal justice system, then the defendant is the unintended beneficiary and thus cannot be said to have real right to jury trial.

“Trial By Peers”: random or representative or selected by “Voir Dire”?

My next objection is to the jury protagonists' lack of clarity over what virtues they are celebrating in the composition of “trial by peers.” A similar point has been raised before, by Marshall[19] and Duff and Findlay,[20] but bears repeating, since it seems to have been ignored. Frequently, randomness is treated as a synonym for representativeness and some even fail to recognise that any form of *voir dire* is incompatible with the other two concepts. This problem is faced by Enright and Morton[21] and Gobert[22] and touched on but not tackled by Bankowski. While I will accept that a random jury can be said to represent the community in the most abstract sense, many writers assume random selection will, magically, throw up a representative cross section of the population, reflecting the views of the community at large. For example, Frieberg,[23] says:

“The legitimacy of the jury's role depends upon a strict adherence to some basic tenets of jury selection procedures, principally random selection and impartiality. A key factor in ensuring the jury's impartiality is its representativeness. The aim of jury selection is to create a jury of one's peers.”

The conceptual confusion here is quite breathtaking. Indeed, Frieberg cites the Departmental Committee on Jury Service (1965), making the same mistake: “A ***Crim. L.R. 745*** jury should represent a cross-section drawn at random from the community …”

Random selection from the community is unlikely to produce a cross-section, unless some form of stratified sampling is used, which is not the case in summoning a jury. Random selection may throw up juries which are all male, all Conservative, all white.

As to my second point, many civil libertarians hail the right to a randomly selected jury as part of our constitutional heritage and in this notion ground their objections to vetting by the prosecution.[24] Many of these see nothing incompatible in also arguing for defence rights of challenge to be strengthened.

Apart from these problems, civil libertarian claims to a right to trial by random jury is historically and factually inaccurate. Property qualifications were only abolished in 1972, before which jurors were all householders, mostly male. Many assert that “the law” prescribes random selection. For instance, Thompson[25] : “That is the common understanding of the common law of this land.” There is no case authority for this notion. Many rely on the Lord Chief Justice's 1973 Practice Direction, declaring “A jury consists of 12 individuals chosen at random …”[26] but Practice Directions are not “the law.” Indeed, the key statute on jury composition is the Juries Act 1974, which makes no mention of randomness and provides for its very antithesis, its schedules excluding long lists of the ineligible, the disqualified and the excusable.

Furthermore, different practices of local summoning officers in excusing summoned jurors further distorts jury randomness or representativeness, as Baldwin and McConville found.[27] Moreover, “self-deselection” of unwilling jurors from the panel exacerbates this distortion.[28] The truth is that juries are far from being either a random or a representative section of the population.

An injection of democracy into the legal system

“Each jury is a little parliament,” says Devlin[29] and cites Blackstone in support. He celebrates and justifies the jury, along with so many others, as a symbol of participatory democracy. This symbolism has been analysed and defended most carefully by Bankowski and Mungham[30] ; Freeman[31] and Bankowski.[32]

One element of this notion is that lay involvement in the legal system gives people confidence in its fairness, especially if they are personally involved. As Cornish said[33] :

Crim. L.R. 746 “… the system has the intrinsic advantage that in drawing upon a steady stream of ordinary citizens it is not only educating them in the work of the courts, but also, since they are generally satisfied with their own performance, sending them back to their ordinary lives with a sense of the fairness and propriety of the judicial process in this country.”

and McEldowney goes as far as to claim: “jury service has now become a citizen's right as well as his duty.”[34] This kind of romaticism is quite devoid of constitutional or jurisprudential support. The power of the symbolism of participatory democracy is, however, highly significant. It underlies most projury polemic produced by lawyers, academics, civil libertarians, politicians and public alike. As Cornish says:

“It would certainly be foolish to dismiss too hastily the obvious fact that a great many people simply *believe* in the jury system.”[35]

If jurors' personal accounts are to be believed, however, many people strain to avoid jury service and, of those who do not, many are bored, resentful and generally disillusioned by their experience.[36]

Most of the those who justify the jury as the quintessence of lay participation in a lawyers' paradise ignore the massive involvement of lay people in decision making in the English legal system. Devlin and Blackstone argue as if democracy would collapse into tyranny if we were to abolish “this sacred bulwark of our nation” (Blackstone) and “the lamp that shows that freedom lives” (Devlin). Modern repitition of these sentiments either ignores the part played by over 28,000 lay justices in our criminal justice system, or disregards them as part of the legal establishment. Blackstone clearly viewed them

as such, in the eighteenth century. While I would concede that the twentieth century lay justices are not representative of the community as a whole,[37] I would point out that neither is the jury, as I have argued above.

I couple these objections with the observation that the jury's symbolic significance is magnified beyond its practical significance by the media, as well as academics, thus unwittingly misleading the public. Of criminal cases, about 5 per cent. are dealt with by the Crown Court. Of those cases, over two thirds are resolved in a guilty plea,[38] leaving just under 2 per cent. to be tried by jury.

Yet, so powerful is the symbol of jury trial that the public image of a criminal trial is surely a Crown Court trial, complete with wigs, gowns, a red judge and Rumpole in defence: a dramatic portrayal repeated on news items which so often focus on the swing doors of the Old Bailey. In contrast, the "trivial" activities of the magistrates' courts seldom make the national news, yet it is to the jus ***Crim. L.R. 747*** tice of the magistrates that most people will, or must, submit, should they be charged with a criminal offence.

Jury equity: our defence against state power

Justifications for the jury under this heading are so often recited that their sources are too many to mention, but among them are Blackstone, Devlin, Thompson, Harman and Griffith, Bankowski and Mungham and most writers in Findlay and Duff. There are several ideas here:

a. that in "State" trials, the jury will acquit where it sees the defendant has been prosecuted unfairly;

b. that the jury will acquit in ordinary cases, where it considers the prosecution unfair or the law to be unpopular, or sympathises with the defendant;

c. that in doing either of these things, if may disobey the law and apply its own equity, thus acting as a democratic brake on the State.

Much of the pro-jury polemic eulogises the jury for departing from the law. For instance, Kalven and Zeisel said:

"It represents also an impressive way of building discretion, equity and flexibility into a legal system. Not the least of the advantages is that the jury, relieved of the burdens of creating precedent, can bend the law without breaking it.

Whether or not one comes to admire the jury system as much as we have, it must rank as a daring effort in human arrangement to work out a solution to the tensions between law and equity and anarchy."[39]

Presented with this image of the plucky little jury battling it out on our behalf against the all powerful State, who can fail to share the civil libertarian outrage when the jury is vetted or statute removes more offences from the ambit of jury trial? This imagery does not, however, bear close scrutiny.

a. "State" trials

This justification has been examined and found waiting by Williams[40] and Cornish,[41] who cited many such trials where the jury convicted. For all those who now cite the acquittal of Clive Ponting, I would remind them of the so called Winchester Three, the Guildford Four, the Maguires and the Birmingham Six. In these last three, the police were clearly over-anxious to secure convictions, to be seen to be satisfying the clamour for crime control from an outraged British public. They appear to have ignored many of the (weak) safeguards of due process provided for the defendants at the pre-trial stage, and to have fabricated evidence and extracted false confessions. The juries were not to be blamed for these wrongful convictions but they failed to remedy the lack of due process at the pre-trial stage and thus did not provide the break on oppress ***Crim. L.R. 748*** ive state activity claimed for the jury by its defenders. Devlin's "lamp that shows that freedom lives" did not offer a glimmer of hope to these defendants.

b. Unfair laws/oppressive prosecutions

Defences of the jury under this heading usually emphasise the examples of juries re-writing the law to suit the defence. Writers conveniently disregard or underrate the fact that jury equity is a double-edged sword which may also convict the innocent. For instance, Freeman[42] and Bankowski[43]

cite McCabe and Purves'[44] example of a hot-dog salesman, acquitted of wounding on the illegitimate ground of provocation, presumably by a sympathetic jury. Freeman concludes:

“What they were saying was that provocation ought to be a defence not merely to charges of murder and in saying this they would have the support of the bulk of the population.”

I have two objections to this. First, in the absence of a reasoned decision, how do we know whether juries acquit out of sympathy or for some extraneous reason? Secondly, the argument ignores the potential for wrongful convictions in allowing the jury to re-write the law.

Baldwin and McConville[45] found little evidence of this romantic notion of jury equity. Unexpected verdicts apparently occurred at random. Personal accounts of ex-jurors indicate that they will sometimes acquit or convict, for a variety of extraneous reasons which have nothing to do with replacing the law with their own sense of fairness or equity. They include the pressure of incarceration in the jury room and the replacement of the high standard of proof “beyond reasonable doubt” with a lesser standard of proof “on the balance of probabilities.”[46]

Jurors also sometimes base their decisions on sympathy or hostility towards other trial participants, notably counsel and witnesses, as indicated by the accounts in Barber and Gordon's book[47] and elsewhere. To illustrate this, I will counter the story of the hot-dog salesman with a story of my own. I sent my new first year law students out to watch courts of their own choice. They were asked to report back to tutorials but to no set structure. Several groups gave me different accounts of the same case which had taken their fancy because of the dramatic content and the surprising result.

A shop assistant was charged with theft of 20 items of clothing from her employers. She did not deny that she had ripped off the price labels, hidden the clothes in a bag in a cupboard and then taken them home and gone abroad for a fortnight's holiday. Her defence was that she had taken the bag home by accident and had meant to pay for the clothes. When she discovered her error, she had panicked and gone away on holiday. The students thought defence counsel's performance was “brilliant” and they had noted (and some had learned) some ***Crim. L.R. 749*** of his tear-jerking lines. By contrast, prosecuting counsel was portrayed as a “wimp,” who was a little disorganised. The defendant was acquitted.

By great good luck, I met one of the jurors, the following week, socially. When I asked her why they had acquitted, the main reason that she gave was that prosecuting counsel had “put the jury's backs up.” “The judge even had to send us out to give him a ticking-off,” she explained. As my students had already told me, the judge had indeed sent out the jury, in order to conduct a trial within a trial on the admissibility of evidence, which my students had observed from the gallery. The juror then went on to recount the performance of defence counsel, whose impressive lines she had also learned.

Even the most avid jury defenders would find it hard to justify this sort of jury behaviour in terms which are theoretically warrantable. It certainly does not bear out the notion of Bankowski and Mungham[48] and others that the jury helps to “cultivate alternative realities in the courtroom.”

What jury defenders must also face is the research finding of Baldwin and McConville of a disturbingly high number of doubtful convictions, showing that odd decisions by the jury may convict the innocent as well as acquit the guilty. This has serious implications for what Ashworth[49] has termed principles of fairness and weighting in the criminal justice system. As Baldwin and McConville said:

“But the performance of the jury did not always appear to accord with the principle underlying the trial system in England that it is better to acquit those who are probably guilty than to convict any who are possibly innocent. On the contrary, the jury appeared on occasion to be over-ready to acquit those who were probably guilty and insufficiently prepared to protect the possibly innocent.”[50]

This finding has important bearings on the principle upon which our criminal justice system seeks to strike a balance between convicting the innocent and acquitting the guilty and the margins of error we are prepared to allow from the unattainable ideal line of convicting all the guilty and acquitting all the innocent.

Ashworth has examined this principle and pointed out that the two margins are not the same:

“Indeed it has traditionally been said that, far from there being any such equivalence, it is better that 10 guilty men should go free than one innocent man should be convicted. This proposition clearly indicates a weighting of the rules towards protection of the defendant: what are its credentials? Its main strength is said to lie in its valuation of individual rights and individual suffering. Thus it insists

that the liberty of an innocent individual should not be sacrificed in order to increase the efficiency of crime control."[51]

Ashworth, Williams[52] and Allen[53] have all examined this 10 to one ratio, ***Crim. L.R. 750*** acknowledging that it has been variously expressed as 20 to one, five to one and 100 to one. They all point to the great importance of the ratio. As Ashworth says:

"If the maxim is really meant to say something about the balance of the criminal justice system, the ratio it expresses cannot be a matter of indifference."

This ratio is often discussed in the context of procedural rules designed to protect the defendant, as it is by Ashworth and Williams, but I would suggest that, theoretically, the entire functioning and structure of our criminal justice system should be geared towards satisfying the ratio. Baldwin and McConville's findings that 36 per cent. of their sample of acquittals and 5 per cent. of their convictions were questionable clearly indicates that the 10 to one ratio may not always be fulfilled by jury trial.

Furthermore, wrongful convictions are a double failure of abstract justice in a system aimed at crime control tempered by due process. Not only do the real culprits go free, as in a wrongful acquittal, defeating crime control, but there is an overwhelming loss of due process to the innocents convicted.

c. The jury replacing the law with their own equity

My next objection is to the support given to the jury as a re-drafter of the law in the example of the hot-dog salesman. What business have the jury to be rewriting the law? Arguments along this line are not novel. Weber objected to the misfit of jury equity in an otherwise rational legal system and the point has been well expanded by Frank,[54] Duff and Findlay[55] and McHugh,[56] amongst others. The jury is an anti-democratic, irrational and haphazard legislator, whose erratic and secret decisions run counter to the rule of law. Freeman asserts, on the acquittal of the hot-dog salesman, that the jury were saying that the defence of provocation ought to have been available "and in saying this they would have the support of the bulk of the population."[57] How, I would ask, does the jury, or Freeman, know what the bulk of the population want? We have elected the House of Commons and selected the Law Lords to re-write the law for us. As Duff and Findlay argue, far from being Devlin's "little parliament," the jury is the very antithesis, "unaccountable and its decision is designed to permit no argument." They continue, in a point pertinent to Freeman's hot-dog salesman:

"… The jury, so irrationally selected, would appear to be a crude engine for the job of checking unpopular laws … The jury then may be counterproductive in such situations, as the legislature may not feel constrained to intervene if they know that harsh or outdated laws are not being strictly applied."[58]

Finally, I would add, in respect of those instances where the jury base their ***Crim. L.R. 751*** decision on something extraneous, as in my theft example, that we do have a legitimate expectation, surely, that the jury will at least address the issue before them. There is little point in the Court of Appeal and House of Lords, as well as countless academics, agonising over the definitions of the components of Theft Act, such as appropriation and dishonesty, if the jury are to accord their verdict as a reward for the good looks and charm of the best barrister.

Freeman and Bankowski and Mungham have attempted to defend jury irrationality in an otherwise supposedly rational adversarial system. I would argue that this is anomalous. Lay justices and judges are frequently criticised for their irrational and inconsistent sentencing patterns and gratuitous remarks, as are civil juries criticised for irrational awards of damages. Why, then, is it theoretically warrantable and praiseworthy behaviour in this tiny element of decision-making in our criminal justice system that they act irrationally?

The sacrosanctity of the verdict

One more undesirable aspect of the sacrosanctity of the jury is the sheer impenetrability of its verdict. The consequences of this have been discussed by Williams[59] ; Baldwin and McConville[60] ; Duff and Findlay[61] ; McHugh[62] and others. There are two important results: first, the reluctance of the Court of Appeal to overturn a jury's verdict, which has been criticised repeatedly, especially by Justice and the Home Affairs Select Committee (1981-1982) as being almost a brick wall in the path of access to justice at the post-trial stage. This point has been explored at length before, so I would only add that Lord Lane L.C.J. used the excuse of non-interference with the jury's verdict, for disallowing the 1987

appeal of the Birmingham Six.

The second major result of jury sacrosanctity is section 8 of the Contempt of Court Act 1981, which precludes discussion and observation of a real jury verdict and thus renders much of the debate on the jury's function purely speculative[63]

Conclusion

Too often, eulogies are heaped upon the jury by its defenders who blindly follow their predecessors' mistakes (on Magna Carta) or atheoretical assertions (on jury trial as a constitutional right). They confuse randomness with representativeness and justify the jury as a democractic guardian of civil liberties re-writing the law on our behalf.

In heaping unquestioning praise on the jury, the commentators deceive themselves and the public into thinking jury trial is the “centrepiece” (Blake),[64] of the criminal justice system. A mass of research on pre-trial decision-making and ***Crim. L.R. 752*** plea-bargaining[65] has taught us that this is simply not the case. As Ashworth reminded us in 1988: “There are few who would now propound the view that the centrepiece of the English criminal process is the trial,”[66] but the jury defenders are still doing just this.

In reality, only a tiny fraction of cases find their way to the Crown Court, with many defendants “opting” for summary trial simply because they do not know or understand or care about their “right” to jury trial or because they want to “get it over with” in the magistrates' court. Most people pass through the court simply to be sentenced for a guilty plea, which may be the result of a bargain struck by a calculating and persuasive lawyer, who may leave his client protesting his innocence years later.

Of the minority of cases where a trial does take place, its usual forum is the unromantic and unseen magistrates' court, where McBarnet's[67] “ideology of triviality” is daily acted out and upon which the majority of defendants must rely for the benefit of “participatory democracy” and the safeguarding of their civil liberties.

There is not space in this article to explore alternative decision-makers. Existing ones, such as magistrates and judge-only courts are fraught with problems of their own,[68] but it should be remembered that existing models are not the only ones. In an atmosphere of reform and argument surrounding the Royal Commission on Criminal Justice, there has never been a better time to question the status quo and the traditional justifications which have underpinned it and to see if there is not some better, new, alternative.

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17. As paraphrased by Simmonds, *infra* .

18. Simmonds, N.E., *Central Issues In Jurisprudence* , 1986, at p.138.

19. Marshall, G., “The Judgment of One's Peers,” in *The British Jury System* , 1975, at p.5.

20. 1982, *op. cit.*

21. 1990, *op. cit.*

22. Gobert, J.J., “The Peremptory Challenge--An Obituary,” [1989] Crim.L.R. 528.

23. *op. cit.* , at p. 133.

24. Thompson, E.P., “The State Versus Its Enemies,” 1978, *New Society* 127: Harman, H. and Griffith, J.A.G., *Justice Deserted* , 1979; Lord Denning in *R. v. Crown Court at Sheffield, ex parte Brownlow* [1980] 2 All E.R. 444, at p.453; East, R., “Jury Packing: A Thing of the Past?” 48 M.L.R. 520 (1985) and several writers in Findlay and Duff, 1988.

25. *op. cit.*

26. (1973) 57 Cr.App.R. 345.

27. *op. cit.* , Chap. 6.

28. I explore this point at length in Darbyshire, P., “Notes of A Lawyer Juror,” [1990] N.L.J. 1264.

29. *op. cit.* , at p. 164.

30. *op. cit.*

31. *op. cit.*

32. *op. cit.*

33. *op. cit.* , at p.255.

34. McEldowney, J.F., “‘Stand By For The Crown’: An Historical Analysis,” [1979] Crim.L.R. 272.

35. *op. cit.* , at p.254.

36. For an exploration of this point, see Darbyshire. *op. cit.*

37. See Baldwin, J., “The Social Composition of The Magistracy,” (1976) 28 Brit. J. Criminol. 171; Burney, E., J.P.: *Magistrate, Court and Community* , 1979; King, M., and May, C., *Black Magistrates* , 1985.

38. See the Annual Judicial Statistics and Zander, M., “What the Annual Statistics Tell Us About Pleas and Acquittals,” [1991] Crim.L.R. 252.

39. Kalven, H. and Zeisel, H., “The American Jury,” (1966) *New Society* 290.

40. Williams, G., *The Proof of Guilt* , 3rd. ed., 1963.

41. *op. cit.*

42. *op. cit.*

43. *op. cit.*

44. McCabe, S. and Purves, R., *The Jury At Work* , 1972.

45. *op. cit.*

46. See Darbyshire, P., *op. cit.*

47. Barber, D., and Gordon, G., *Members of the Jury* , 1976.

48. 1976, *op. cit.* , at p.222.

49. 1979, *op. cit.*

50. 1979, *op. cit.* , at p.128.

51. *op. cit.* , at p.416.

52. *op. cit.* , at p.186.

53. Allen, C.K., *Law in the Making* , 1931, p.286.

54. Frank, J., 1949, as cited by Duff and Findlay, 1982, *infra* .

55. 1982, *loc. cit.*

56. McHugh, M., “Jurors' Deliberations, Jury Secrecy, Public Policy and the Law of Contempt,” in Findlay and Duff, 1988, *loc. cit.*

57. *loc. cit.* , at p.93.

58. *op. cit.* , at p.259.

59. *op. cit.*

60. 1979, *op. cit.*

61. 1982, *op. cit.*

62. *op. cit.*

63. Note the failure of the recent Courts (Research) Bill, which would have repealed this section, in relation to genuine research.

64. *op. cit.*

65. For instance, Dell, S, *Silent in Court* , 1971; Bottomley, A.K., *Decisions in the Penal Process* , 1973; Bottoms, A.E. and McClean, J.D., *Defendants in the Criminal Process* , 1976; Baldwin, J., and McConville. M., *Negotiated Justice* , 1977.

66. Ashworth, A.J., “Criminal Justice and the Criminal Process,” 28 Brit. J. Criminol. 111 (1988).

67. McBarnet, D., *op. cit.*

68. On magistrates' courts, see Hood, R., *Sentencing in Magistrates' Courts* , 1962; Burney, *op. cit.* ; McBarnet, *op. cit.* : Darbyshire, P., *The Magistrates' Clerk* , 1984; Carlen, P., *Magistrates' Justice* , 1976; King and May, *op. cit.* ; Parker, H., Sumner, M., and Jarvis, G., *Unmasking the Magistrates* , 1989 and many Home Office Studies. The judge-only courts in Northern Ireland are not unproblematic, in principle and practice.