TRIAL BY JURY: SOME EMPIRICAL EVIDENCE ON CONTESTED CRIMINAL CASES IN ENGLAND

JOHN BALDWIN AND MICHAEL McCONVILLE*

The authors of this article attempt to examine jury performance by collating and comparing views on the jury's verdicts drawn from other participants in the trial. This research is based on a study of jury trials heard in the Crown Court at Birmingham, England, together with additional material drawn from a sample of cases in London. It shows that doubts about both acquittals and convictions by jury were expressed with a surprising frequency. An examination of the remedies available to correct miscarriages of justice demonstrates the ineffectiveness of current appeals procedures. The authors conclude that it is necessary to evaluate the jury's function within a political context.

I. INTRODUCTION

Social institutions cannot be adequately investigated or understood outside their social and political context; and the jury, revered as the very cornerstone of the Anglo-American legal system, is no exception. However, researchers face formidable difficulties when they attempt to examine the context in which juries function, not simply because the institution itself is rigorously protected from detailed scrutiny by a mass of legal and political conventions that have developed over centuries, but also because discussion of the jury system and of its workings tends to reflect profound and immutable passions. The empirical evidence accumulated over the past thirty years has done little to shift the ideological attachments that juries have tended to evoke. The massive literature that now exists provides testimony to intense sympathy or antipathy towards the jury system or, to put it less kindly, of stubborn prejudice unmoved either by rational argument or by empirical evidence.

Much of the disagreement stems from the unresolved question of whether juries are expected to respond to the evidence alone (to react, in other words, as lawyers should) or whether they should be encouraged to introduce an element of social

* We are indebted to the Home Office who generously funded the research discussed in this article. The views expressed in the article are the authors' alone and not to be taken as those of the Home Office.

equity to the exercise of clinical, legal judgment.[1] Forsyth, in a celebrated passage, stated the latter viewpoint as follows:

> [Juries] usurp . . . the prerogative of mercy, forgetting that they have sworn to give a true verdict according to the evidence. But it is an error at which humanity need not blush: it springs from one of the purest instincts of our nature, and is a symptom of kindliness in heart which as a national characteristic is an honour (1830: 430-431).

Others have contended that this sense of "equity" shown by juries can dissolve into lawlessness, arbitrariness, and prejudice.[2] Until this question surrounding the true function of the jury is finally settled, the reception of the results of research is bound to be ambivalent. Research can do little to answer what is at root a philosophical and political question. Having said this, it is important to note that the considerable research effort so far expended, which has been almost entirely concerned with the relatively narrow question of jury competence, has served greatly to increase confidence in the quality of justice that juries dispense. Numerous studies, employing varied and imaginative approaches to the immense methodological difficulties involved, have uncovered little evidence which raises any serious doubts about the accuracy and justice of jury decision making.[3] This is true both of the enormous volume of research conducted in the United States[4] and of the more modest exercises carried out in England.[5] Researchers have found that juries not only are thoroughly conscientious in their deliberations but also reach verdicts very much according to the evidence presented in open court, not in response to emotion, bias, prejudice, or other legally irrelevant factors.

This is, moreover, a view that is readily shared by a great number of practicing lawyers and judges. To take one typical example, Lord Justice Salmon said of the hundreds of criminal trials over which he had presided in England:

> There were not more . . . than about half a dozen cases in which the jury acquitted when I considered that they ought to have convicted—and, on reflection, when I looked back on them, I came to the conclusion that at any rate as far as some of them were concerned there was a good deal to be said for the jury's point of view. A 1 or 2 per cent wrongful acquittal of guilty men is surely a small price to ensure that

---

[1] As it was graphically put in the *Columbia Law Review* (1969: 471), the end of justice is served when dispensed "with the leaven of charity that is added when the jury acts as the conscience of the community."

[2] See particularly Frank (1949: 127-135); also Brooks and Doob (1975: 180) who state that "the fact that minority groups have historically been unfairly subjected to jury lawlessness cannot be doubted."

[3] Further discussion of these studies is to be found in Erlanger (1970); Simon and Marshall (1972); and Baldwin and McConville (1979a: Ch. 1).

[4] The monumental study carried out by Kalven and Zeisel (1966) is the most often quoted.

[5] The most important of the early English studies are McCabe and Purves (1972; 1974), and Zander (1974).

> the innocent should go free. In any event, those acquittals never bothered me, but I should not have slept in my bed if any innocent man had been convicted by the jury. Fortunately, that never happened (*House of Lords Debates*, 14 February, 1973: cols. 1605-1606).

Such comments are of course impressionistic, and as such they are inevitably colored in some measure by ideological predispositions. The research evidence is similarly tainted: it cannot be otherwise. Howard Becker (1967: 245) rightly argues that social scientists cannot remain neutral and dispassionate about the topics they investigate. Whether they make it explicit or try to disguise it, they will invariably take sides. This tendency is readily apparent in a good deal of the research that has been conducted over the years on juries. Researchers have commonly been accused of interpreting their data in a distorted way, thereby—consciously or unconsciously—favoring the jury. They have often been charged with adopting methods that inflate the apparent rationality of juries.[6] They have sometimes been criticized simply for mishandling the fieldwork and the analysis.

These were some of the problems we foresaw when, in 1974, we started our research on jury trials heard in the Birmingham Crown Court. We knew that many of the problems were, in essence, political rather than empirical, that we faced methodological difficulties which would seriously weaken the exercise we were intending to undertake, and that we ourselves could not remain neutral when we came to interpret the findings. The basic approach that we adopted was simple and pragmatic: since we could not eavesdrop on the jury or discuss the outcome of any case with the jurors concerned,[7] we decided to "tap" the views of the other participants involved in each trial to find out what they had made of the jury's verdict. Although this was, of course, very much a second-best procedure, we hoped that it might shed some light on the workings of the jury. A similar approach has been adopted by several other researchers—most notably by Kalven and Zeisel, who had canvassed the views of judges involved in a massive number of jury trials heard in courts throughout the United States. Their book, *The American Jury* (1966), has been widely

---

[6] The phenomenon of jury equity, for instance, is not likely to be encountered in a laboratory, which is the setting where a great number of psychological experiments based on "mock" juries have been conducted. It is only likely that the jury which actually determines the fate of the defendant in question will feel any temptation to acquit a defendant in the teeth of the evidence in the broader interests of what they take to be justice. This question is discussed further in Baldwin and McConville (1979a: 12-15).

[7] We raised at the outset the possibility of contacting jurors in the trials we wished to examine, but the Home Office said that this was "untimely."

acclaimed a sociological classic, though more recently a number of critics have noted certain methodological flaws, some of which relate specifically to the weight that can properly be attached to participants' opinions in evaluating juries' verdicts.[8] We wished to obtain a wider spectrum of views about each trial than Kalven and Zeisel had sought and initially approached the judiciary, the police, the Law Society, and the Senate of the Bar with a view to persuading them to cooperate in the inquiry we were planning. After protracted discussions with each of these bodies, we succeeded in persuading the first three to participate; but, despite assurances of support from local barristers in Birmingham, the Senate of the Bar adamantly refused to allow any barrister to take part in any aspect of our inquiry.[9]

There are a number of serious difficulties in the approach we adopted. It is, for example, an obvious limitation of our methodology that respondents' views may be colored, if only unconsciously, by prejudices they may hold in favor of or against jury trial. One would expect police officers on the whole to be much more critical of juries (especially in cases that result in acquittals) than, say, defense lawyers. It is probably inevitable that the views we received from respondents about particular trials within our sample have been distorted by their existing sympathies or antipathies. We would argue, however, that respondents very commonly gave opinions that displayed an ability to rise above general prejudices they might have held. This was particularly striking in the case of police officers who frequently expressed views (in what were lengthy and testing interviews) which seemed to us balanced and dispassionate, but it was also apparent in the views of other respondents.[10] We set out below three examples of such unexpected responses:

Case 66 (Birmingham) [A woman police officer speaking of an acquittal in a shoplifting case]

> It was a just result. It was so difficult to know whether [the defendant] was telling the truth . . . I was so pleased when she was acquitted that I could have cried.

---

[8] See particularly Walsh (1969); Becker (1970: 326-330); and Bottoms and Walker (1972). A more general critique of the method, and of the assumptions that tend to be implicit when it is adopted, is provided by Mungham and Bankowski (1976).

[9] Details of our dealings with the Senate in this and other aspects of our research are given in Baldwin and McConville (forthcoming, 1979b).

[10] Other examples of this kind of ability are given in Baldwin and McConville (1979a: 34-35).

Case 90 (London) [A police officer in a case where the defendant was acquitted of a serious driving charge]

> The jury came to the right conclusion in the light of the evidence they heard. I had no doubt at all what their verdict was going to be. In my estimation, because of the inherent limitations in the prosecution, there was only one verdict the jury could properly reach.

Case 385 (Birmingham) [A defense lawyer in a robbery case where the defendant was convicted]

> There was never any doubt that the jury would convict. It was a classic case of a reprobate wasting the court's time and the taxpayers' money.

Although it is a limitation of our study that respondents' views may to a degree have been influenced by their general sympathies or prejudices, it appeared to us that most genuinely attempted to make a clear-cut analytical distinction between their general views and their opinion about the outcome of a particular case.[11]

There were other problems with our research, not the least of which was trying to persuade each group to participate in the inquiry along the broad lines we wished to pursue. This seemed in the early stages a quite insurmountable limitation, since some groups were unwilling to allow us to seek views about the propriety of verdicts. However, we were relieved to find that, once the study was under way, individual respondents were as a rule encouragingly forthcoming. Our fears that the restrictions which had been imposed upon us might make an evaluation of juries' verdicts difficult to achieve fortunately proved to be unfounded. Most respondents, even judges, seemed only too happy to volunteer forthright opinions that left us in no doubt about what they thought of the verdicts in question.

We were able to obtain the views of four groups of respondents about the outcome of each trial—the trial judge, the defense and prosecuting solicitors (all of whom were given questionnaires to complete immediately following trial), and

[11] Much of the data collected in the course of this research is in the nature of opinions about jury verdicts and the factors that may have influenced them. Although this may be thought second-best information, in the absence of unrestricted access to the jury room itself, this constraint is imposed upon all jury researchers. Since the jury's verdict is a collective opinion, it seems to us appropriate to assess the verdict alongside the opinions of others involved in the trial. At a minimum, the value of this approach is that it makes for a better understanding of the circumstances in which those with a professional attachment to the criminal justice system will differ from laymen in their assessment of guilt and responsibility. It is also a measure of the acceptability to experts of the verdicts of laymen.

the police officer involved in the case (who was interviewed).[12] The response rates for each group were very high: for the judges it was 97 percent; for defense solicitors, 84 percent; for prosecuting solicitors, 96 percent; and for the police, 98 percent. (We also interviewed the defendants involved, though their views are not dealt with in the present paper.) The high response rates, together with the frankness of the opinions expressed about particular verdicts, made us confident that, despite the limitations of our methodology, a rigorous evaluation of jury verdicts could be made.

Our main sample of cases was drawn from jury trials heard in the Crown Court in Birmingham, England, in 1975 and 1976. In addition, we conducted a partial replication of the study in London, consisting of interviews with police officers from the Metropolitan Police District. Though this latter extension was only a limited exercise, we think that the material it produced affords some worthwhile comparisons with that collected in Birmingham. In Birmingham we examined all contested trials heard over a 21-month time period, and this yielded a sample of 370 jury trials, 114 of which (30.8 percent) we classified as acquittals, and the rest of which were treated as convictions.[13] In London, we included 358 jury trials in our sample of cases, of which 171 (47.8 percent) were classified as acquittals.[14] Table 1 shows the types of case dealt with by juries in the two cities in the sample periods.

Our interest lay in obtaining the opinions of respondents on the merits of each jury verdict and on the factors that might have brought it about. To fulfill even these limited objectives, however, we were forced to rely mainly on answers to indirect questions. When a trial ended in an acquittal, each group of respondents was presented with a list of factors and asked to indicate which of these, if any, might have explained the verdict.

[12] Almost 700 interviews were carried out with police officers in Birmingham and London. Over four-fifths of these were conducted by the present authors, the remainder by our two research fellows. A fairly highly structured interview schedule, along the same lines as the questionnaires we had devised, was used. The interviews which took place within a few weeks of trial were tape-recorded, and respondents were encouraged to discuss their views about each case in depth. No limits were imposed by the police on the nature of the questions put to individual officers. Virtually all the interviews were carried out at police stations.

[13] As other researchers have found, numerous problems arise in determining exactly which cases should be classified as acquittals: see Zander (1974) and Baldwin and McConville (1978).

[14] Many of the acquittals in both Birmingham and London were nonjury acquittals. In such cases the judge had ordered a not-guilty verdict to be recorded before the jury was empaneled or had directed the jury to acquit before the trial had run its full course. These cases are not included in the present discussion.

Table 1. Cases Tried by Jury in Birmingham and London

	Birmingham defendants		London defendants	
	N	(%)	N	(%)
Violent offenses (including robbery)	143	38.7	77	21.5
Sexual offenses	16	4.3	10	2.8
Burglary, theft, and handling offenses	151	40.8	150	41.9
Other property offenses	23	6.2	37	10.3
Motoring offenses	13	3.5	57	15.9
Other offenses	24	6.5	27	7.6
	370	100.0	358	100.0

Where a respondent identified more than one factor, he was asked to say which one he thought dominant. The list included legal factors (such as that prosecution witnesses had failed to come up to proof or that a credible explanation had been offered by the defendant) and extra-legal factors (that sympathy had been shown towards the defendant, that the offense itself had been trivial, or the like). An equivalent set of factors was put to all respondents in respect to cases that ended in

Table 2. The Most Important Factor Identified in Jury Acquittals in Birmingham by Different Respondents

	Judge		Defense solicitor		Prosecuting solicitor		Police	
	N	(%)	N	(%)	N	(%)	N	(%)
Some weakness in prosecution case	29	25.7	49	49.5	21	19.1	32	28.9
Strength of the defense case	35	31.0	36	36.4	37	33.6	30	27.0
Jury mistrust of the type of prosecution evidence	7	6.2	7	7.1	4	3.6	9	8.1
Jury swayed by sympathy with defendant or antipathy to victim	28	24.8	4	4.0	41	37.3	29	26.1
Other factors	5	4.4	2	2.0	6	5.5	9	8.1
No factor identified as relevant	9	7.9	1	1.0	1	0.9	2	1.8
No response	1	—	15	—	4	—	3	—
	114	100.0	114	100.0	114	100.0	114	100.0

https://doi.org/10.2307/3053148 Published online by Cambridge University Press

Table 3. The Most Important Factor Identified in Jury Convictions in Birmingham by Different Respondents

	Judge		Defense solicitor		Prosecuting solicitor		Police	
	N	(%)	N	(%)	N	(%)	N	(%)
Strength of prosecution case	180	73.5	96	45.1	205	84.0	192	76.5
General weakness of defense case	27	11.0	49	23.0	18	7.4	21	8.4
Absence of defense witnesses	6	2.4	10	4.7	1	0.4	3	1.2
Unreliability of defense witnesses	7	2.9	8	3.7	3	1.2	7	2.8
Jury swayed by bad impression created by defendant	20	8.2	30	14.1	14	5.8	20	7.9
Other factor	5	2.0	20	9.4	3	1.2	8	3.2
No response	11	—	43	—	12	—	5	—
	256	100.0	256	100.0	256	100.0	256	100.0

conviction. The importance attached by respondents to the above factors is indicated in Tables 2 and 3, which give the broad outline of the results.

As Tables 2 and 3 show, respondents differed in the sort of factors they saw as relevant to a particular outcome and likely to have influenced the jury's decision. In some ways, certain differences are of little importance. For instance, some respondents, in cases that end as convictions, might identify weaknesses on the defense side, whereas other respondents in the same case might see the prosecution side as being strong. Little turns upon such differences, since a particular verdict may be based on the relative merits of the prosecution and defense cases; and often the sides are finely balanced. Perhaps the most striking difference in Tables 2 and 3 is that defense solicitors identified extra-legal factors as affecting the verdict with frequencies different from all other groups.

In addition to identifying the sort of factors that respondents saw as being relevant in particular cases, we also wanted to find out whether they thought the verdict was broadly justified in terms of the evidence presented in court. It was not always possible to know for certain whether respondents agreed

or disagreed with individual verdicts, and we classified responses as critical of a jury's verdict only when this point had been explicitly made by a respondent. Surprise or uncertainty were not taken as disagreement, and, when in doubt, we assumed that the respondent had no fundamental disagreement with the verdict returned. Since a subjective element is necessarily involved in this classification, there is no guarantee that others would have categorized responses in exactly the way we did ourselves. We do believe, nevertheless, that, if anything, our results overstate the degree of correspondence between the juries we examined and our respondents.

The results indicated a surprising amount of criticism of the verdicts returned. Table 4 shows, for cases that ended as acquittals in Birmingham, that a high proportion were regarded as questionable by respondents.

Table 4. Views of Different Groups of Respondents about Jury Acquittals in Birmingham

	Judge		Defense solicitor		Prosecuting solicitor		Police	
	N	(%)	N	(%)	N	(%)	N	(%)
No strong view expressed that the acquittal was not justified	70	61.9	82	82.8	71	64.5	53	47.8
Some doubts expressed about whether the acquittal was justified	7	6.2	7	7.1	10	9.1	9	8.1
Serious doubts expressed about the acquittal	36	31.9	10	10.1	29	26.4	49	44.1
No response	1	—	15	—	4	—	3	—
	114	100.0	114	100.0	114	100.0	114	100.0

These results were entirely unexpected because judges have, as was noted earlier, rarely made public utterances critical of juries. Though there were, not surprisingly, differences of opinion among respondents about particular verdicts, there was a reasonably high degree of consensus on whether verdicts were doubtful. The level of consensus has already been indicated in Tables 2 and 3, and Table 5 shows the extent to which different groups of respondents were in agreement that acquittals were or were not justified.

According to strict criteria, then, only about a third of jury acquittals in Birmingham were seen as clearly justified by all respondents, and a further quarter were doubted by at least

Table 5. The Proportion of Acquittals Thought Doubtful—Overall Views of Judges, Police Officers, Defense and Prosecuting Solicitors for Jury Acquittals in Birmingham

	N	(%)
No strong view that the acquittal was not justified	38	33.9
Acquittal seen as doubtful by one respondent	30	26.8
Acquittal seen as doubtful by two respondents	16	14.3
Acquittal seen as doubtful by three or more respondents	28	25.0
Two or fewer views available on outcome	2	—
	114	100.0

three groups. Some unexpected findings emerge when comparisons are made with the information collected in London. The obvious limitation of the London exercise is that we sought the views of only one group of respondents, and, according to Table 4, the particular group was the one most critical of jury acquittals. We claim no more for the London exercise than that it provides limited comparative material which sheds some light on the workings of juries in London. Given that qualification, some purpose is served in making comparisons between the comments of police officers in London and those of other respondents in Birmingham. Somewhat surprisingly, police officers in London appeared to be on the whole more satisfied with the outcome of the 171 jury acquittals in London than were police officers (and indeed most other respondents) with the Birmingham acquittals. Indeed, virtually two-thirds of acquittals were seen as broadly justified. In other words, despite the fact that London juries have been most often criticized over the years,[15] these results show that there is considerably more dissatisfaction with jury acquittals in Birmingham than in London, even when the police view alone serves as a guide.

We have already discussed the argument that technically dubious verdicts may be defensible if they arise as a result of broader equitable considerations, when, as it were, it may be desirable in the interest of justice for juries to turn a blind eye to the strict application of the law in a particular case. Thus, the argument runs, it may be better to acquit a technically guilty defendant than to convict him. The alternative possibility, often overlooked by those who most strongly advocate this kind of flexibility—that juries may exercise their discretion to

[15] Sir Robert Mark, who has in recent years conducted the most sustained attack on weaknesses in the system of trial by jury (particularly in *Minority Verdict*, the 1973 Dimbleby Lecture, B.B.C. Publications, 1973), was Metropolitan Police Commissioner at the time we conducted our research in London. Indeed, he was instrumental in facilitating the fieldwork that we carried out.

convict a defendant on the basis of, say, prejudice, folly, or sheer bad judgment—must be regarded as quite indefensible. Yet, if the results of the present inquiry are to be taken seriously, the possibility of wrongful conviction is one that certainly exists. Though we cannot talk about innocent people being convicted (if only because the evidence of our study is merely opinion), we nevertheless believe that there was among both the Birmingham and London cases a small number of convictions (about 5 percent) which must be regarded as questionable because they were gravely disturbing to our respondents.

On a more personal level, we have been disturbed to witness, in some of these cases, convincing displays of sincerity when we encountered the defendants concerned for the first time in an interview. This said, we do stress that our conclusions must be treated as tentative.[16] As before, it was only in those cases in which respondents made their misgivings explicit that we classified their responses as raising doubts about a particular verdict. Two or more respondents raised such doubts in relation to 15 of the 256 jury convictions in Birmingham (5.9 percent)[17] and in relation to 10 of the 187 convictions in London (5.3 percent). Before discussing these cases, it is important first to examine those in which the defendant was acquitted by verdict of the jury.

II. ACQUITTALS BY JURY

What moves juries to acquit defendants in criminal trials has until recently been largely a matter of speculation. The need for speculation, however, has been to some extent lessened by recent empirical evidence. This evidence tends to show that, in the vast majority of cases in which the accused has been acquitted, the jury's verdict is likely to have been reasonable and discerning. In the United States, Kalven and Zeisel (1966) found that the trial judge was in broad agreement with the verdict of the jury in about three-quarters of the cases studied. Although in most cases in which there was disagreement the judge said that the jury should have convicted rather

[16] The study of wrongful conviction is not one that lends itself to empirical inquiry, and it is well established that proving miscarriage of justice is an exceptionally difficult undertaking. There has been only one systematic study of the phenomenon in England, that of Brandon and Davies (1973).

[17] We adopted a less exacting standard in classifying questionable convictions than that used in relation to questionable acquittals, because in law a defendant is entitled to an acquittal if there is any reasonable doubt, whereas he or she cannot be convicted unless there is proof beyond reasonable doubt.

than acquitted, there generally was a reasonable explanation for the jury's view. As Kalven and Zeisel themselves put it:

> The jury, in the guise of resolving doubts about the issues of fact, gives rein to its sense of values. It will not often be doing this consciously; as the equities of the case press, the jury may, as one judge put it, 'hunt for doubts.' Its war with the law is thus both modest and subtle. The upshot is that when the jury reaches a different conclusion from the judge on the same evidence, it does so not because it is a sloppy or inaccurate finder of facts, but because it gives recognition to values which fall outside the official rules (1966: 495).

These "values" include a distaste for certain laws, a dislike of improper police or prosecution practices, a feeling that the defendant has been punished enough, and a general insistence on the "equities" of the case. The broad conclusions of Kalven and Zeisel were paralleled in England by the findings of McCabe and Purves (1972) and of Zander (1974). In the former study, the researchers attributed the vast majority of acquittals to the prosecution's failure to produce sufficient evidence to convince the jury of the defendant's guilt,[18] and Zander concluded that all save a handful of the acquittals in his sample were at least "understandable."

The findings of these researchers were to a degree reflected in our own study. The questions that we put to respondents provided for many of the explanations that previous investigations had advanced—failure of prosecution witnesses to come up to proof, credible explanation offered by the defendant, sympathy with the defendant, and so on. Thus, in some cases it was clear that what appeared a strong prosecution case on paper proved flimsy in court when the main prosecution witnesses failed to give their evidence in a convincing fashion or at all. The two following cases[19] illustrate the way apparently strong prosecution cases collapsed at trial.

Case 111 [A charge of indecent assault in which all respondents agreed that the failure of the prosecution witness to come up to proof gave rise to the acquittal]

Defense solicitor:

> The prosecution witness so lacked credibility that at one stage she admitted that only half her statement given to the police was true. The defendant on the other hand was not caught out once in his evidence by prosecuting counsel during a long cross-examination, and this obviously impressed the jury.

---

[18] Even in their category of "wayward" or "perverse" verdicts (representing 13 percent of all jury acquittals), only one case was found to go beyond mere sympathy or mercy and constituted "perversity of a truly serious degree" (McCabe and Purves, 1972: 37).

[19] In all cases cited in this article, minor details have been altered in order to preserve the anonymity of defendants and respondents.

Police officer:

> The victim was the worst witness I have ever seen. She was terrible; that's the only way you could describe her. She was so appalling it was ridiculous.

Case 245 (London) [Police officer commenting on a case in which the defendant was acquitted on four counts of theft]

> On the evidence, the way it came out at the trial, he was rightly acquitted. There were two complainants, the first of whom died before the trial got under way. The other complainant was an absolutely appalling witness. The evidence in his statement to the police differed from the evidence he gave in the witness box: the dates were wrong, the times were wrong. Everything he said differed from his statement. Another reason why his evidence was so bad was that it was given through an interpreter, and the interpreter, believe it or not, couldn't speak English at all. It was absolutely unbelievable.

In other cases, it appeared that the jury, in acquitting the defendant, had taken a merciful view of the facts. There seemed little doubt in such cases that, on the evidence brought forward, the defendant was at least technically guilty of the offense charged. The jury, however, having looked at the surrounding circumstances of the incident, appeared to feel that a strict application of the law would produce an inequitable result. Acting upon its own conception of fairness (which was shared, or at least understood, by our respondents), the jury therefore acquitted. The following cases are illustrative of this:

Case 28 (London) [Police officer's statement]

> The defendant was charged with assaulting his son-in-law. The father disapproved of the way his daughter was being treated in the marriage and told his son-in-law so. The father lost his temper, and a row started which developed into a fight. The father said that the son-in-law attacked him, and the son-in-law said it was he who was attacked. The daughter's evidence did not sway in either direction. The defendant was a very good witness; a sober character, upstanding and hardworking. In what was really a domestic dispute, the acquittal was a good and fair result. It was the sort of dispute with which the jury could readily identify.

Case 413 (London) [Police officer commenting on a case where the defendant was acquitted of causing death by dangerous driving]

> A motorist was caught in a sudden band of fog. Instead of slowing down, he accelerated, ran off the road and mounted the pavement, killing a pedestrian. Many of the witnesses to the accident were motorists, and they were reluctant to speak against the defendant. The jury were 100 per cent in sympathy with him—everyone is a motorist nowadays. We presented a case which, in the absence of the sympathy element, would have been a conviction. In such charges, however, the case has to be absolutely shocking for the jury to convict.

One factor which appeared to contribute to other acquittals was the ability of some defendants to advance credible explanations for their conduct. Often there was no obvious weakness in the prosecution case, but the prosecution's interpretation of what happened was undermined by the equally plausible interpretation advanced by the defendant. One example of this will suffice.

Case 215 [Police officer discussing a case of shoplifting in which the defendant openly walked out of a shop with a dressing gown over his arm]

> He made no attempt to conceal it once he had taken it from the counter. The jury had to decide if he had forgotten it was in his hand—which he maintained—or if he had deliberately taken it. He always maintained, from the time he was arrested, that he had simply forgotten. There is no doubt about it, he was very absentminded: he even looked it, a bit sort of dopey. It was a fair verdict considering the evidence.

It is clear, therefore, that many of the explanations offered by respondents to account for the acquittal of defendants were comparable to those unearthed by previous researchers. For a substantial minority of cases, however, the opinions expressed about the jury's verdict by the respondents we contacted were such as to raise serious doubts whether a justifiable determination had been reached. These cases, which we classified "questionable acquittals," are in many ways similar to those described by other researchers as "perverse."[20] For Birmingham cases, a verdict was classified as questionable only where it was strongly doubted by the trial judge and at least one other respondent. This measure produced 41 questionable acquittals, of which two-thirds were doubted by at least three of the four respondents. There was, in our view, a sufficient degree of consensus among the respondents to raise serious doubts about the jury's verdict. We set out below some examples of the opinions respondents expressed about the outcome of such cases:

Case 68 [A case of theft]

Police officer:

> I was astonished that he was acquitted. Everyone was—you could read the judge's face.

Defense solicitor:

> Whilst counsel and I found the accused's explanation hard to swallow, the jury apparently accepted it. The accused gave his evidence,

[20] We have avoided using the term "perverse" because it is not free from ambiguity. It is used sometimes to describe a verdict that is contrary to the weight of the evidence, but it has also been used to describe verdicts that are not supportable on any grounds, legal or nonlegal. Some have argued that there can never be a perverse verdict because juries have the right to acquit on any ground they see fit; others that juries have an unenforceable duty to follow the law and to reach a verdict according to the evidence.

badly needing to explain away a statement of admission. Despite giving his evidence badly, presumably the jury swallowed at least some of it. The verdict seemed a little perverse and against the weight of the prosecution evidence.

Case 84 [The defendant was acquitted of a serious assault on a police officer]

Judge:

This verdict was wholly perverse . . . no real defense was advanced.

Defense solicitor:

Personally I cannot determine any reasonable explanation for his acquittal.

Police officer:

It was the worst verdict I have ever been involved with—there was no way in which the jury should have found him not guilty.

Case 95 [A charge of theft]

Prosecuting solicitor:

I can see no logical reason why the accused was acquitted.

Judge:

The acquittal was wrong having regard to the evidence.

Case 175 [A defendant acquitted of a mugging charge]

Judge:

Perverse verdict.

Defense solicitor:

There is no factor which explains this acquittal, and it may be said it was due to the jury.

Police officer:

The verdict was shocking to everyone in court.

Case 193 [A charge of handling stolen goods]

Judge:

There was no explanation for the verdict.

Police officer:

I was flabbergasted by the verdict, and I think that even defense counsel was. In my opinion, it was a miscarriage of justice.

Cases 274-77 [Four men acquitted of armed robbery]

Prosecuting solicitor:

The police evidence was so strong that a conviction seemed the only option open to the jury. The jury chose to believe liars [the defendants] in the witness box.

Defense solicitor for one defendant:

This was a real "Sweeney" type case. The defendants threw some mud on civilian defense witnesses. This let in the character of the three co-accused, so that they knew who they were dealing with and could hardly have thought our client a "rose" between thorns!! I was *most* surprised by the verdict, to say the least.

Police officer:

In twelve years, this is the only really genuinely perverse verdict I have had.

Case 477 [A case of theft from a cloakroom]

Judge:

My comment would be that the verdict was perverse.

Police officer:

> It was an open-and-shut case. There was no doubt that we had proved the theft. It was a perverse verdict. There was no justification for it.

Since we had chosen the opinion of the trial judge as the baseline of our classification, it was important to look closely at those judges who had expressed strong disagreement with the verdicts of the jury. It was possible that the judges who questioned the acquittals were generally those out of sympathy with juries or with little experience seeing juries at work. We found no evidence to support either of these possibilities. In all, 12 different judges raised doubts about acquittals, and there was no evidence that they were in general unsympathetic to trial by jury: together the 12 judges concerned completed over three-quarters of all questionnaires returned by members of the judiciary and, for most cases over which they had presided, they did not voice any disagreement with the verdict of the jury. Moreover, about four-fifths of the cases in our questionable acquittal group had been presided over by very experienced judges. So far as we were able to tell, therefore, our classification of questionable acquittals was based upon the views of seasoned judges giving their views in a detached and dispassionate manner.

Much the same might be said about the views of most other respondents. This is not to say that views on particular cases were never colored by general prejudices about trial by jury. As noted above, there was a tendency for police officers to be more critical than other respondents of jury verdicts and a corresponding tendency on the part of defense solicitors to be less so. But our method of classification, based as it was on the view of more than a single respondent, had the effect of reducing, to some extent at least, the bias that any such tendencies might occasion. Looking at the responses as a whole and at the degree of consensus among respondents, we would argue that there were serious doubts about the verdict of the jury in at least one-third of the acquittals in the Birmingham sample.

Our information on the outcome of cases within the London sample was restricted to that derived from interviews with police officers, and this provides no more than limited comparative material on the workings of London juries. Given that general qualification, some comparisons are instructive. Although the rate of acquittal by jury was much higher in London (47.8 percent) than the corresponding rate in Birmingham (30.8 percent), police officers in London appeared to be more satisfied with the verdicts than were officers with the

Birmingham acquittals. In London, no serious complaints were raised about two-thirds of the acquittals in the sample and, based on the nature and strength of the disapproval expressed, only 39 (25.5 percent) of the acquittals were classified as questionable. The following examples are typical of those cases in which officers expressed serious doubts about the jury's verdict.

Case 29 (London) [A case of robbery from a young man]

I was very surprised at the verdict. It was perverse. When the judge heard the verdict, he merely shook his head, rose, and went out of court without thanking the jury. He couldn't believe it.

Case 390 (London) [A charge of supplying dangerous drugs]

Everyone, including defense counsel, thought he would be found guilty. I was absolutely astounded that he was acquitted. This is the most astonishing acquittal I've ever had.

How far the questionable acquittals in Birmingham and London could be attributed to equitable considerations is very much a matter of opinion. For a few cases, it is possible that the jury was sympathetic to the defendant as, for example, when the sum involved in the charge was small or, in an assault case, when the victim's behavior may have been regarded as provocative. Thus, in the following case, it is possible that the jury was sympathetic to the defendant where the police officer was not.

Case 83 (London) [A woman charged with handling stolen property]

I could see no reason for the verdict. There was no discrepancy whatsoever in the prosecution evidence. The only thing was her ability to create an air of innocence, but I would have thought that anyone with common sense would have ignored it. As a rule, any acquittal I've had has been expected and usually due to the weakness in the case rather than anything with the jury. In this sense, this case was exceptional.

However one views this particular outcome, it was clear to us that relatively few of the questionable acquittal cases were of this kind. In Birmingham, none of the questionable acquittals involved matters traditionally regarded as most likely to give rise to equity verdicts (motoring offenses, public morality cases, and the like); all involved relatively straightforward property, violent, or sexual offenses.[21] In London, on the other hand, only slightly more than half of the questionable acquittals related to offenses of these kinds, and a few of the other

[21] In Kalven and Zeisel's study, there was evidence to suggest that the jury acquitted some defendants because they did not like certain laws (particularly gambling, game, and liquor violations), but the authors concluded that "the historic role of the jury as a bulwark against grave official tyranny is at best only dimly evident . . ." (1966: 296). There was no evidence from our study that the jury was in revolt against any particular law.

cases (e.g. motoring offenses) may have brought about equity verdicts. In the vast majority of cases, however, it did not appear to us that the verdicts could possibly be explained in these terms; and there were no obvious or clear-cut patterns according to the offenses charged or the defendants tried. In short, we found little justification for the view that juries, in acquitting defendants against the weight of the evidence, were exercising a general equitable jurisdiction. Taking all acquittal cases together, it appeared rather that the unexpected benefits of jury trial fell more or less randomly. Indeed, it became clear that the jury was a relatively crude tribunal for evaluating the evidence. When we came to examine cases in which the jury had convicted the defendant, our misgivings on these points were by no means allayed.

III. DOUBTFUL CONVICTIONS

We noted earlier that a small proportion of cases (slightly more than five percent) in which the jury had convicted were regarded as questionable by two respondents or more. These raise the most disquieting and fundamental questions about jury trial as a method of determining guilt or innocence. Researchers in England have been preoccupied with the likelihood of juries acquitting those whom they should convict; almost all commentators have ignored the opposite, and more disturbing, possibility that they may convict the innocent. Even in the United States, where there has been a greater awareness of the problem, the question of wrongful conviction awaits systematic inquiry.

There are several reasons why the present findings are disquieting. In the first place, any classification of questionable cases is based upon doubts being volunteered by respondents unambiguously and explicitly, and then only when two or more respondents concurred. There may well have been other cases in which respondents entertained doubts but chose not to commit them to paper. Second, there were several other cases in the sample—some of which were gravely disturbing to us personally—in which very strong doubts were expressed by one respondent only, even though others may have been uncertain or uneasy about the same conviction. Given our strict method of classification and our wish not to risk overstating the seriousness of the problem, such cases were categorized as justified convictions. It might be reasonable to suppose that our figures underestimate the problem rather than the reverse. The final and most compelling reason for taking these results

seriously lies, we believe, in the sources of criticism. No fewer than 13 of the 15 questionable convictions in Birmingham, and all 10 in London, were doubted by police officers,[22] who are temperamentally and professionally unlikely to adopt this position without good reason.

We thought it important to examine these cases in the light of comments we had collected (and of other information that was at hand) to determine whether any characteristic patterns emerged. Various observations and speculations have been made in a fairly sizable body of literature about the sorts of case most likely to give rise to difficulty when tried by jury. For example, writers have drawn attention to the dangers that identification evidence may present, or to the difficulties inherent in complex trials, particularly where multiple defendants are involved, or else to unsatisfactory or fabricated police testimony.[23] It was somewhat surprising to note that factors of this nature rarely seemed relevant to the outcome of this group of cases. Some were on occasion mentioned by respondents, but other factors were more important. Two in particular stood out: *first*, the difficulties that juries confront in appreciating the high standard of proof required in criminal cases, and *second*, the lack of comprehension that respondents thought the juries had shown in some of the cases. It is worth discussing each of these in some detail.

Turning to the first factor, it is important to note that the problems inherent in the concept of "proof beyond reasonable doubt" are well known to researchers. Indeed, there now exists a body of research evidence which amply demonstrates the considerable complexities that the concept invariably offers to a jury.[24] Simon and Mahan (1971: 325), for example, write that:

> [For juries], the difference between the criminal (beyond a reasonable doubt) and civil (by a preponderance of the evidence) standards are much less than they are for the judges. The judges make a much sharper distinction between the criminal and civil standards.

Some of the respondents in our study questioned whether, in particular cases, the jury had grasped the subtleties of what was meant by a reasonable doubt. Several expressed the view

---

[22] Of the other respondents in Birmingham, 8 of the 15 cases were doubted by judges, 12 by defense solicitors, and 7 by prosecuting solicitors.

[23] In their study of cases of wrongful imprisonment, Brandon and Davies (1973: 21) concluded: "Patterns which emerged frequently . . . were: unsatisfactory identification, particularly by confrontation between the accused and the witness; confessions made by the feebleminded and the inadequate; evidence favorable to the defense withheld by the prosecution; certain joint trials; perjury, especially in cases involving sexual or quasi-sexual offenses; badly-conducted defense; criminals as witnesses."

[24] Among the more important studies in this context are Hoffman and Brodley (1952), Arens *et al.* (1965), Simon (1970), and Simon and Mahan (1971).

that a defendant might well have been entitled to the benefit of the doubt in a finely balanced case. (Indeed, in cases which are described as "finely balanced," it can be said that there *is* a reasonable doubt and that there ought to be an acquittal.) Other respondents contended that the jury had misapplied the concept or even failed to follow the instructions about it that the judge had given. The three following examples illustrate the sort of criticism directed toward juries in this regard.

Case 65 [The view of a police officer in a case of shoplifting in which the defense solicitor described the verdict as "perverse," and the judge said that on the evidence the defendant could have been acquitted]

> It was a toss-up for the jury. I'd love to know what the judge thought. It was all an absolute mountain out of a molehill, but since he was protesting his innocence, he had to go to trial. I was by no means convinced that he was guilty, and it had cost him over £1000 of his own money to try to establish his innocence. This is the one case—to be quite honest—in my service where I am just so uncertain. It's the most awful case I've had to deal with. I wish it hadn't gone this far. It's probably broken him.

Case 361 [The view of a police officer in a murder case in which the victim's conduct was certainly provocative]

> [The defendant] merely said he was defending himself. The deceased was a six-foot man, young and fit, with a reputation for being able to handle himself. The accused was a little man in poor health. Self-defense was on the cards. I was most surprised by the result. We were all fairly sure at the end he'd be acquitted.

Case 396 (London) [The view of a police officer about a handbag snatching]

> It was virtually my evidence—which was not very strong—against his, and he was very plausible. He didn't dispute my story basically; he agreed with what I said. I don't know how they convicted, really. On the evidence, he was entitled to an acquittal; there was more than a doubt about it even in my mind.

The examples raise at least a possibility that in certain cases juries may be too easily convinced of a defendant's guilt, even if this is not their general inclination. Indeed, we can state with some certainty that it is not. As far as we can tell from our results, the opposite tendency is more apparent. But it seems likely that the legal standard of proof is an exceptionally difficult one for laymen (or anyone else, for that matter) to apply. If that be so, it is to be expected that different juries will interpret the standard in different ways. McBarnet (1976: 173-174), in the following passage, argues persuasively that it involves an artificial distinction which simply cannot be applied uniformly:

> There is no place in strict legal categories for the ambiguities which dog real life . . . . Conviction . . . depends on a legal concept of proof, not on commonsense or scientific criteria which might well conclude

> the truth to be unknowable, not just in a philosophical sense but because of the circumstances and methods involved . . . . The verdict is . . . a compoundly subjective construction of reality after the event—yet it is also a clearcut decision that the offense and the offender have or have not been proved beyond reasonable doubt. It is unambiguously black or white.

The other factor that seemed to us relevant in explaining certain of the questionable convictions was the apparent failure on the part of the jury to comprehend the issues involved. This problem is best illustrated by those cases in which the trial judge summed up strongly on the evidence for an acquittal, as he had a perfect right to do.[25] In a few cases, respondents believed that the jury had, for some reason, ignored cues in the judge's summing up, or else had failed to grasp other critical issues. A few examples will illustrate this.

Case 27 [A defense solicitor's view of a burglary case]

> Another matter which troubles me a little—the jury returned to ask a question. Neither the question nor the answer to it could have had the slightest bearing on the verdict. Within seconds of receiving the answer to that question, they arrived at a unanimous verdict of "guilty." What on earth had they been discussing? Surely not the evidence! . . . I have no doubt in my mind that this defendant was innocent of the charge.

Case 74 [A police officer's view of the outcome of a trial involving rape]

> The judge really summed up for an acquittal; it was obvious. It was brought out at the trial that she had lied, and they still found him guilty. . . . I don't think the jury believed him because he was colored. . . . I think the jury were totally wrong. They got the whole case virtually wrong. It was pretty obvious, and we had all virtually agreed that there were so many lies, you couldn't find him guilty.

Case 402 [A charge of making an untrue declaration]

Judge:

> This was a case which could have gone either way. It was not a particularly strong case for the prosecution. I, for my part, would have acquitted, but it was perfectly open to the jury to decide as they did.

Defense solicitor:

> Idiotic jury didn't do what the judge directed. The summing up indicated that the prosecution had not proved the essential element of knowledge. The judge expressed his view of the decision by a conditional discharge.

Police:

> I was expecting a not-guilty verdict—not because the prosecution case was thin, but because the offense required guilty knowledge. The defendant was a very busy man working under pressure and hadn't taken sufficient care when signing the form. The judge in his summing up more or less said that guilty knowledge hadn't been proved.

---

[25] The trial judge may well take the view that it is his duty to ensure that the jury does not convict a defendant whom he believes to be innocent.

Although difficulty with the standard of proof and a failure to understand the issues appeared to us likely to explain the jury's behavior in many of those cases, we could not dismiss a third possible factor. This was that the jury may have been prejudiced against the defendant on racial grounds in some of the cases. In the doubtful conviction group, eight of the 15 defendants (53.3 percent) were black, whereas the overall proportion of black defendants in the convicted group was only 34.9 percent. The importance of this should not be overstated, however, since the differences are not statistically significant. This said, it is worth noting that there were only seven black defendants in the 41 cases of questionable acquittals (17.1 percent) and that six of the eight black defendants within the questionable conviction group were convicted of those offenses (violence and sexual assault) identified by others as most likely to arouse antipathy and prejudice.[26]

The disquiet expressed by respondents in cases of questionable conviction is more disturbing because of the nature of cases involved. Although the defense in seven cases was an admission of the *actus reus* and denial of the *mens rea*, in eight cases the defense was a complete denial of any involvement whatever in the offense charged. Why the jury felt able to reject strong evidence that the defendant had not taken any part in the commission of the offense is not easy to understand. Moreover, the cases involved were, by almost any standard, serious. There were, for example, two murders, a rape, and three other offenses involving violence. The gravity of the offenses is reflected in the sentences imposed. No fewer than nine of the defendants were given terms of immediate imprisonment (exceeding three years in five instances), and one other received a suspended prison sentence. For the defendants concerned, the social consequences of trial, conviction, and sentence were especially grave, because seven of them had no previous convictions and 12 had never before been to prison.

The standard response to such cases is to point to current appeals procedures as providing the necessary corrective, and it is worth discussing these in some detail. In England there is a well-developed system of appeal. The Criminal Appeal Act (1968) provides that a person convicted by jury may appeal to

[26] Cornish (1968: 141), for example, found that the jurors he had interviewed generally appeared to have done their best to be fair in cases in which black defendants were involved, but added: "none of them had been concerned with cases which are most likely to raise deep prejudice, such as homicide, sexual assault or some form of mob violence." Similarly, Kalven and Zeisel (1966: 210-213) reported that members of certain minority groups were regarded as less credible because they were viewed as "unattractive" by juries. See also Broeder (1965).

the Court of Appeal against his conviction on any ground which appears sufficient to the Court of Appeal, whether or not it involves a question of law or of fact. The Court under the same Act (as amended by the Criminal Law Act, 1977) will allow an appeal if it thinks that, under all the circumstances of the case, a conviction is unsatisfactory, or if there has been a wrong decision on a point of law, or if there has been a material irregularity in the course of the trial. This is qualified by the so-called proviso which allows the Court of Appeal to dismiss an appeal on the grounds that no miscarriage of justice has actually occurred even if it thinks the point raised in the appeal might be decided in the appellant's favor. While these rights of appeal may appear to be extensive and the powers of the Court of Appeal sweeping, closer examination demonstrates that these procedures are not in themselves adequate to deal with the problems that convictions by jury may raise. Such an examination necessitates consideration of court policy, procedural practice, and the way in which the Court of Appeal interprets its function.

Although it cannot be said that court policy is actually to discourage appeals, there is a public and formal disincentive to appeals where they are based on what the Court of Appeal considers to be insubstantial grounds. This follows from a rule of practice laid down in 1970 by the then Lord Chief Justice. After consulting with other Appeal Court Judges, Lord Parker issued a Practice Direction in 1970 in which it was pointed out that there had been a rapid rise in the number of appeals and that the delays caused by this rise had "become unacceptable." He indicated that in future "unarguable" applications might be punished by ordering that some of the time during which the prisoner was in custody pending the outcome of appeal would not count towards sentence. It is not known whether this new rule had the effect of sifting out only "unarguable" applications, but its impact was immediate and dramatic. The rate of applications for leave to appeal fell from about 12,000 to 6,000 a year, and has continued at this lower level ever since. Court policy is, therefore, an important factor in understanding the way in which the English appeal system operates, intentionally or otherwise, to discourage appeals.

Another factor of considerable importance is the way that the system is administered in practice. From a survey conducted by Zander (1972), it was apparent that some defendants who had applied for leave to appeal had received no assistance with the drafting of their grounds for appeal. Indeed, many had

been given no legal advice at all. As a result of this survey, a new procedure (see Zander, 1975) was introduced, designed to ensure that counsel's advice about appeal be in writing and that the defendant be told of counsel's opinion. In spite of this development, there have been complaints that this procedure is sometimes not followed and that some defendants do not receive proper advice. But yet more fundamental problems exist. There are two ways in which an application for leave to appeal may be heard: it may be placed before a single judge, or it may go directly before the full Court of Appeal. In the former, the judge is merely presented with the papers from the court of trial. The papers contain all the relevant information about the case, and as a rule, this means that the single judge will be given the trial transcript. The single judge makes his decision whether to grant leave on the basis of these papers alone and does not hear oral argument by counsel. Where an application goes directly before the Court of Appeal, counsel appears in person and can reinforce his written opinion (and deal with any other points raised) in the course of argument. Not unexpectedly, the success rate of applications is higher where the latter procedure is used; yet the choice of procedure is determined, not on the merits of the application, but by the applicant's representation. If the applicant is state-aided, his application will normally be placed before a single judge; and, in practical terms, an adverse decision will end the matter, as state aid will not thereafter be continued. If, however, the applicant has retained counsel, the Criminal Appeal Office, aware that an adverse decision from a single judge does not prevent another application to the full Court and knowing that the appellant has the means to pursue the appeal, will generally place the application directly before the full Court.

A final consideration relates to the way in which the Court of Appeal interprets its function on appeals. The whole point of the appeals procedure in England is to enable the Court of Appeal—sitting without a jury and not rehearing the witnesses—to review the case and not to retry it. Appeals are limited to questions of law and misdirection (where the Court of Appeal can consider whether the jury was misled), with the exception that the conviction can be quashed if it is considered "unsafe or unsatisfactory." It is this last category that shows most clearly the difficulties of having an appeal from the verdict of a jury, because the Court of Appeal is not prepared to usurp the function of the jury. Thus, in order to establish that a verdict is unsafe or unsatisfactory, it will not generally be sufficient to show

that the trial judge entertained doubts about the verdict (*R.* v. *Chalk*, Crim. L.R. 326, 1961), or that the case against the appellant was weak (*R.* v. *McNair*, 25 T.L.R. 228, 1909), or that the verdict was contrary to the weight of the evidence (*Aladesuru* v. *R.*, A.C. 49, 1956). It was, therefore, no exaggeration for Lord du Parcq (1948) to say that the verdict of a jury, properly directed on the law and not having heard inadmissible evidence, is in practice "almost unassailable," and that if "there is something more than a scintilla of evidence to support it, it will stand."

The upshot of this review is that the English appeals procedure is not nearly as far-ranging as the mere recitation of the statutory provisions might suggest. Although many defendants take preliminary steps to appeal, there is a high level of abandonment and of refusal. In 1977, 1,493 defendants in England and Wales applied for leave to appeal against conviction and, of these, 232 were abandoned and 906 were refused leave (*Criminal Statistics*, 1977). In our own sample of cases, a similar pattern emerged. Of the 256 defendants convicted by jury in Birmingham, 42 applied for leave to appeal against conviction, and leave to appeal was granted in only two cases. In the two cases where leave was granted, the Court of Appeal quashed the convictions. In both the successful appeals, the point of the appeal was that the trial judge had misdirected the jury. Neither case in fact fell within our questionable conviction category, because only the defense solicitor had raised doubts about the verdicts returned. As to the group of questionable convictions, there were two applications for leave to appeal against conviction, and both were refused.

The precise explanation for the small number of appeals from this group of defendants, and the lack of success of the two appeals entered, is to some extent a matter of conjecture. The threat of loss of time may have acted as a disincentive, and the placing of the two appeals (by state-aided appellants) before a single judge rather than before the full Court may have diminished the prospect of success. The defendants did not, however, appear to have suffered from lack of legal advice: in our interviews with the defendants, and in the questionnaires completed by defense lawyers, it was clear that almost all were actively pursuing the possibilities of appeal. The basic problem, it seemed to us, was that none of the defendants could point to any procedural irregularity or misdirection: there had been no error of law or breach of the rules of evidence; the

summing up had been balanced and fair—in some cases, indeed, clearly weighted in favor of the defense—and in eight of the cases the trial judge had himself expressed doubts privately to us about the conviction. Defendants who wished to appeal were, therefore, limited to one ground: that in all the circumstances the conviction was unsafe and unsatisfactory. But, as has been argued above, the reluctance of the Court of Appeal to interfere with verdicts on this basis makes an adverse opinion by counsel on whether to appeal understandable. It seems likely that the explanation for the lack of appeals in this group of questionable convictions is a realistic assessment by counsel of the likely prospects of an appeal based upon dissatisfaction with the verdict of the jury rather than a fair appraisal of the substantive issue of the defendant's guilt.

IV. CONCLUSIONS

From our analysis of cases, we draw the conclusion that the reverence judges have traditionally accorded the verdicts of juries is excessive. The very form of an appeal—a consideration of the transcript, with or without argument from counsel and without rehearing of witnesses—itself inhibits any adequate reassessment of the basic question of guilt or innocence, and the fact that juries do not give reasoned verdicts makes it difficult for the Court of Appeal to adopt a more critical stance. We would argue, however, that the cases of questionable conviction we encountered are sufficiently numerous to raise questions about the very basis of jury trial. The question is whether we are prepared to grant to a verdict of conviction—which may on occasion spring from misunderstanding, ignorance, or prejudice—a degree of sanctity which effectively pre-empts any review.

It is clear that juries in both Birmingham and London were thought by respondents to have reached questionable decisions with a surprising frequency. Where respondents expressed doubts about the verdict, we found little evidence that might justify the course taken by the jury. In some of the questionable acquittals, the jury may well have acted out of sympathy with the defendant or upon other equitable grounds, and opposite sentiments may account for some of the questionable convictions. But by and large, the principle that it is better to acquit those who are probably guilty than to convict any who are possibly innocent seemed to be operating rather crudely. Instead, the jury appeared on occasion over-ready to acquit those who were probably guilty and insufficiently prepared to

protect those who were possibly innocent. And where the jury did reach a verdict of acquittal or conviction that only it could defend, the issue could not for practical purposes be reopened.

Such conclusions must nonetheless be viewed within a wider context, and it does not necessarily follow that the results of our inquiry indicate that the jury system is working badly. Whether the jury is working well or badly depends to a large extent upon the standard against which it is to be measured, and the choice of standard is not without severe difficulties. It is easy to assume or posit some "ideal" standard and test the jury's performance against this, but that is a false method of proceeding unless that standard is particularized, its values specified, and its characteristics delineated. Again, it would be possible to measure the jury against other forms of tribunal (judges or magistrates) or other systems of dispute resolution (such as plea negotiation); but the material for a comparative study of this kind is lacking, and our theoretical understanding of other systems imperfect. It can even be argued that there is no standard against which the jury can properly be measured. From this view, it is not possible to examine the jury independently of the larger system in which it operates—the trappings of the courtroom, the method of case presentation, the rules of evidence and procedure, and the formal devices for exercising control over the jury which, in England, includes the power of the trial judge to sum up the evidence and express his own view of it to the jury. To assume that the deliberation of the jury is the critical factor in resolving issues of guilt is, from this view, to ignore the crucial dimension of the trial itself. As Mungham and Bankowski (1976: 206) put it:

> [I]f the jury can be seen as a 'system,' or small group, it only functions as such within the ambit of a bigger and wider system, namely that of the structure and process of the courtroom and the trial itself. And it is this 'system' which provides the juror with his cues and his idea of what and what not to do in the trial.

The logic of this view is that the jury itself cannot be isolated from the context in which it operates, and that doubts about the competence of the jury may simply represent a challenge to the very basis of the adversary mode of trial. This is a plausible conclusion but not a necessary one, because it ignores the fact that the adversary system is in no small part the product of the existence of the jury (see Thayer, 1898; Nokes, 1956). To show, therefore, that the jury is incompetent *may* indicate not that the adversary system is defective but that no system can present evidence in a way that enables laymen to comprehend the issues involved. But assessing the competence of the jury drives us back to choosing a yardstick for

measurement, and this ultimately depends upon the role that we wish to assign to the jury.

In one view, the jury exists simply to give a true verdict according to the evidence, consonant with the prevailing legal rules. Although this view does not preclude the jury having a degree of flexibility, its central assumption is that for most cases the weight of evidence will require that the facts be found in a particular way and that, with a factual base established, the judgment inexorably follow the letter of the law. The jury is seen as little more than the right arm of the judge, and the effectiveness of the jury is measured by comparing its role performance with its role expectation. If the judge is of the opinion that a certain verdict must be returned, a contrary decision would be evidence of the jury's incompetence. On this basis, the results of Kalven and Zeisel's study (1966) provide evidence of jury incompetence on a much larger scale than Kalven and Zeisel were prepared to contemplate. They found the magnitude of disagreement between judge and jury to be on the order of 22 percent, but their explanation of the reasons for this disagreement exonerated the jury from any charge of incompetence. In over half the cases, for example, the reason for disagreement concerned evidentiary factors which suggested that, on the evidence presented, there was room for reasonable differences of view.[27] The results of our study, on the other hand, measured by this criterion, would be less favorable to the jury. Our findings of net disagreement between judge and jury (21.3 percent) were remarkably similar to Kalven and Zeisel's, but this was a residual category that could not be explained, in the view of respondents, in terms of reasonable differences of view.

The assumption that the jury's function is faithfully to follow legal rules is not, however, one that proponents of the jury have been prepared to accept. Some reject this assumption, not merely from a functional standpoint but on ideological grounds—that the essence of the jury's function is actually to challenge and not to legitimate the notion that lawyers possess

[27] Others have disputed Kalven and Zeisel's interpretation on this point. For instance, they seemed unmoved by the possibility that in some cases the jury may have been unduly harsh on defendants. Their finding that trial judges would have acquitted entirely or convicted only on some lesser charge in three percent of their cases did not appear to lessen their faith in jury trial. Cornish (1968: 173), discussing this point, did not see it in this light. He wrote:

> If it were to be found by research in England that this difference occurred with equal frequency, it is to be hoped that the situation would not be accepted with equanimity, but that further investigation of the reasons why juries convict in such cases would be set in motion immediately.

a monopoly of the truth; others are merely content to see the jury as a free-wheeling institution that is allowed to incorporate notions of "equity" and "fairness" into the law. Whether ideologically based or whether founded on little more than sentiment or paternalism (the belief that the jury will do "equity" if it can), the tension between law and justice that such a view entails needs to be more carefully explored before it can attract theoretical respectability. There is evidence, in both Kalven and Zeisel's study and in the present research, that judges and other actors in the courtroom do attribute to the jury an equitable function and one that more often favors the defense than the prosecution. If juries sometimes operate in this way and, in consequence, reach verdicts that are opposed to those thought proper by judges, this is not (for those who support a free-wheeling approach) evidence of inefficiency or incompetence: it is the surest sign that the jury is fulfilling its proper function. There is, however, yet another way of defining the jury's role, and this is to see it as nakedly political, an institution deriving its authority from a popular mandate, designed to adjust legal relations between members of society. Based on this view, the notions of efficiency, competence and precision are not necessary or even desirable criteria for assessment: the test is rather the acceptability (to others) of the continued existence of the institution itself.

The conclusion to be drawn from this review can be simply stated. The primary limitation on jury research is theoretical and not methodological. The workings of the jury cannot be evaluated independently of its role definition. This definition is a political question, not one that can be determined by scientific endeavor.

REFERENCES

ARENS, Richard, Dom D. GRANFIELD and Jackwell SUSMAN (1965) "Jurors, Jury Charges and Insanity," 14 *Catholic University of America Law Review* 1.

BALDWIN, John and Michael McCONVILLE (1978) "The New Home Office Figures on Pleas and Acquittals—What sense do they make?" *Criminal Law Review* 196.

——— (1979a) *Jury Trials*. London: Oxford University Press.

——— (1979b) "The Legal Profession and the Politics of Research: A Case Study," in R. Luckham (ed.), *Law and Social Enquiry: Case Histories of Research*. New York: International Center for Law and Development, and Uppsala: Scandinavian Institute of African Studies.

BECKER, Howard S. (1967) "Whose side are we on?" 14 *Social Problems* 239.

BECKER, Theodore L. (1970) *Comparative Judicial Politics*. Chicago: Rand-McNally.

BOTTOMS, Anthony E. and Monica A. WALKER (1972) "The American Jury: A Critique," 67 *Journal of the American Statistical Association* 773.

BRANDON, Ruth and Christie DAVIES (1973) *Wrongful Imprisonment: Mistaken Convictions and their Consequences*. London: Allen and Unwin.
BROEDER, Dale W. (1965) "The Negro in Court," 19 *Duke Law Journal* 19.
BROOKS, W. Neil and Anthony N. DOOB (1975) "Justice and the Jury," 33 *Journal of Social Issues* 171.
COLUMBIA LAW REVIEW (1969) Note, "Trial By Jury in Criminal Cases," 69 *Columbia Law Review* 419.
CORNISH, William R. (1968) *The Jury*. London: Allen Lane.
DU PARCQ Lord (1948) *Aspects of Law*. Holdsworth Club Address presented at University of Birmingham, 1948.
ERLANGER, Howard S. (1970) "Jury Research in America," 4 *Law and Society Review* 345.
FORSYTH, William (1852) *History of Trial By Jury*. London.
FRANK, Jerome (1949) *Courts on Trial*. Princeton, N.J.: Princeton University Press.
HOFFMAN, Harold M. and Joseph BRODLEY (1952) "Jurors on Trial," 17 *Missouri Law Review* 235.
KALVEN, Harry and Hans ZEISEL (1966) *The American Jury*. Boston: Little, Brown.
McBARNET, Doreen J. (1976) "Pre-trial Procedures and the Construction of Conviction," in P. Carlen (ed.), *The Sociology of Law*. Keele: University of Keele Sociological Review Monograph.
McCABE, Sarah and Robert PURVES (1972) *The Jury at Work*. Oxford: Basil Blackwell.
———— (1974) *The Shadow Jury at Work*. Oxford: Basil Blackwell.
MUNGHAM, Geoff and Zenon BANKOWSKI (1976) "The Jury in the Legal System," in P. Carlen (ed.), *The Sociology of Law*. Keele: University of Keele Sociological Review Monograph.
NOKES, Gerald D. (1956) "The English Jury and the Law of Evidence," 31 *Tulane Law Review* 153.
SIMON, Rita J. (1970) "Beyond a Reasonable Doubt: An Experimental Attempt at Quantification," 6 *Journal of Applied Behavioral Science* 203.
SIMON, Rita J. and Linda MAHAN (1971) "Quantifying Burdens of Proof: A View from the Bench, the Jury, and the Classroom," 5 *Law and Society Review* 319.
SIMON, Rita J. and Prentice MARSHALL (1972) "The Jury System," in S.S. Nagel (ed.), *The Rights of The Accused*. Beverly Hills: Sage.
THAYER, James B. (1898) *A Preliminary Treatise on Evidence*. Boston: Little, Brown.
WALSH, Michael H. (1969) "The American Jury: A Reassessment," 79 *Yale Law Journal* 142.
ZANDER, Michael (1972) "Legal Advice and Criminal Appeals: A Survey of Prisoners, Prisons, and Lawyers," *Criminal Law Review* 132.
——— (1974) "Acquittal Rates and Not Guilty Pleas: What do the Statistics Mean?" *Criminal Law Review* 401.
——— (1975) "Legal Advice on Criminal Appeals: The New Machinery," *Criminal Law Review* 364.