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Jury Reform: of Myths and Moral Panics

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Introduction

It is now commonplace to assert that the jury performs an important ideological or symbolic role in the criminal justice process. Indeed, it is often argued that this function is more significant than the impact the jury has in practice (see Mungham & Bankowski 1976; Duff & Findlay 1982; Findlay & Duff 1988: 1–7; Darbyshire 1991). Certainly it is true that, in virtually every jurisdiction where the jury exists, only a very small proportion of alleged offenders have their cases heard before a jury. In England and Wales, for example, just over 1% of defendants proceeded against in the criminal courts have their fate determined in this way (see Sanders & Young 1994: 349) and in Scotland the equivalent figure is just under 1% (Scottish Office 1994*b*: 28). There are two principal reasons for this. First, the vast majority of those charged with criminal offences simply plead guilty. Second, the great majority of those who assert their innocence are tried in the lower courts where the jury has no place or has long since been removed through the encroachment of summary jurisdiction or the expansion of 'judge-alone' trial. Consequently, the proportion of cases heard before a jury is astonishingly low given the significance with which the institution is usually vested and the community confidence which it generates.

Why, then, is such importance attached to the institution of trial by jury? McBarnett, in a study of the routine operation of criminal courts, claims that there are two tiers of justice: "One, the higher courts, is for public consumption, the arena where the ideology of justice is put on display". She argues that, despite the fact that only a tiny proportion of cases are heard in the higher courts, they "alone feed into the public image of what the law does and how it operates. …(T)he working of law come to be typified not by its routine nature, but by its atypical, indeed exceptional,

High Court form' (1979: 153). When the average member of the public thinks of a criminal trial, it is trial by jury that immediately springs to mind. This assumption is reinforced by the treatment of the criminal justice process in the media. Whether one is watching a television series about lawyers, reading a court-room thriller, or scanning the press for the latest news of the O.J. Simpson case, the impression given is that trial by jury is the norm. Even in the U.S.A., where jury trial remains more prevalent, it cannot be considered the normal outcome of criminal proceedings.

In brief, it is not what the jury does in practice that is important; it is what it achieves in the realm of ideology (see Mungham & Bankowski 1976). Juries represent to the public an adherence by the state to a melange of aims and ideals which buttress, in particular, the legitimacy of the criminal justice system and, in general, the democratic system of government (see Darbyshire 1991). The jury acts primarily as a symbol of justice: it symbolizes impartial and independent decision making in the criminal justice process; and, in the broader context, it symbolizes community representation and participation in the processes of government. Through advancing a selective ideology, the jury helps to obscure the reality of the criminal justice system, which primarily involves the routine processing of large numbers of guilty pleas through the lower courts. In essence, therefore, the jury is primarily a flagship or showpiece for the criminal justice system, which may only occasionally require the incantations provided by jury ideology. As Lacey (1994: 5) observes:

> …the power wielded within the criminal process always has to be concerned with its own legitimation. Particularly in a society marked by persistent, patterned inequalities which are reproduced and exaggerated by state punishment, criminal justice is constantly at risk of being seen as cruel or oppressive, with consequent risks to the background support and compliance on which its stability and effectiveness depend. While criminal justice power is ultimately coercive, its exercise depends at almost every level on many forms of cooperation and consensus.

It is abundantly clear that the jury — or, more accurately, the popular image of the jury — makes a major contribution to this process of legitimizing criminal justice.

Despite the jury's general popularity, the institution has suffered fairly heavy criticism in many jurisdictions over the last 25 years (see Findlay & Duff 1988). It is comparatively rare for such attacks directly to challenge the existence of trial by jury. The high regard in which the institution is generally, and very publicly, held would tend to repulse such head-on attacks. Instead, the jury's critics have tended to focus on particular aspects of trial by jury — for instance, jurors' ability to deal with complex

commercial fraud or defence counsels' use of the peremptory challenge — and to suggest reform in those areas. Most such proposals have been vigorously challenged but changes have nevertheless taken place in many jurisidictions (Freeman 1981; Duff & Findlay 1988). In addition, critics of the jury have co-opted and colonized common ideological ground shared with its advocates (Findlay & Duff 1988: introduction). Criticism of the jury has been constructed in reformist discourse, the debate revolving around how best to achieve undisputed ideological goals.

Upon closer examination of the debates generated by various suggestions for jury reform, it soon becomes apparent that the claims and counter-claims of the protagonists are largely based upon their own preconceptions. Arguments are supported with unfounded assertions rather than methodically gathered data (see Harding 1988). The debate is characterized by unsubstantiated opinion, anecdotal evidence, sweeping generalizations and rhetorical political claims. In short, it often seems that the arguments for and against various reforms of the jury are founded upon no more than the uninformed prejudices or political predispositions of the disputants.

It is fair to say that the lack of empirical information is, to some extent, unavoidable. In most jurisdictions, detailed examination of the jury, and its role as a decision-maker in particular, is regarded with extreme suspicion by the judiciary (Kalvin & Zeisel 1966; Baldwin & McConville 1979; Duff *et al*. 1992). More particularly, access to the jury-room is very often controlled by stringent laws of contempt (McHugh 1988; Findlay 1996). On the other hand, in most jurisdictions, it is usually permissible to question jurors in general terms about their experiences and impressions of the trial process and feelings about the value of the jury and its contribution to the criminal justice process. For instance, in the U.K., section 8 of the Contempt of Court Act makes it an offence to "obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations" (see Enright 1989). Nevertheless, in a study carried out for the recent Royal Commission on Criminal Justice in England and Wales, Zander & Henderson (1993) were able, through the medium of a questionnaire, to ask over 8000 jurors no less than 81 separate questions about their experiences without breaching the laws of contempt.

Legal restrictions aside, there is a further reason why arguments about jury reform tend to be conducted in an information vacuum. It is simply that, as far as the jury is concerned, perception matters more than reality. The fact that the jury plays a primarily symbolic role in the criminal justice process means that it is the impression people have of the institution which is significant rather than what it actually does in practice. Consequently, trial by jury is particularly vulnerable as a focus of periodic public anxiety.

The process by which social concern over an issue becomes aroused, particularly in the area of crime, has been much discussed by sociologists. In his classic study of the 'Mods and Rockers' phenomenon, Cohen (1980: 9–10) observes that 'societies appear to be subject, every now and then to periods of moral panic' through which 'a condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests'. Whatever the nature of the 'folk devil', the threat to society tends to be 'presented in a stylized and stereotypical fashion by the mass media'. In the modern world, the latter obviously play a crucial role in the process:

> The media have long operated as agents of moral indignation in their own right: even if they are not self-consciously engaged in crusading or muck-raking, their very reporting of certain 'facts' can be sufficient to generate concern, anxiety, indignation or panic (Cohen 1980:16).

Thus, concern about the jury can be manufactured quickly and easily without much in the way of firm evidence to suggest that there is indeed a genuine problem, and it is difficult to defuse the fears aroused. In short, the jury inhabits mainly the realms of myth and ideology and thus attacks upon it tend also to stem from this dimension.

Further, as a result of the powerful symbolic position occupied by the jury within the criminal justice system, concerns about the form of justice it represents tend to spread to the wider processes and institutions of criminal justice. In particular, the jury sometimes serves as a focus for broader fears about 'law and order'. Police, prosecutors, politicians and the media are not slow to capitalize on the opportunities this offers. By expressing concern about the operation of trial by jury and suggesting remedial action, they are able to shift a measure of blame for 'law and order' problems onto the jury — which cannot defend itself — and also to demonstrate that they are taking the public's fears seriously and are intent upon meaningful action. The institution of trial by jury provides a theatre in which there can be played out wider debates about criminal justice and broader political dramas and power struggles (Duff & Findlay 1988).

Various allegations have recently sparked debate over the jury — sometimes leading to reform — and these illustrate the largely mythical nature of the 'problems' supposedly besetting jury trial. Some of the more obvious examples include:

(1) the 'nobbling' of juries by professional criminals, which led to the introduction of the majority verdict in England and Wales;

(2) the ‘inability’ of jurors to understand complex evidence which resulted in changes to the procedures for trying cases of complicated commercial fraud in England and Wales, and Hong Kong;
(3) the ‘manufacture’ of ‘biased’ juries by defence counsels’ cynical use of the peremptory challenge which led to its gradual decline and eventual abolition in Scotland, in England and Wales, and its limitation in New South Wales and the U.S.A.;
(4) the ‘danger’ posed by jurors with ‘extreme’ views which resulted in the ‘vetting’ of the panel in England and Wales.

In each of these instances, the reality of the supposed problem was hotly contested and, where firm evidence was available, it tended to support the view that concern was largely unfounded. Nevertheless, the strength of these ‘moral panics’ was sufficient to ensure that the alleged problem was given serious consideration. (For an account of these changes to the jury and full references, see Freeman 1981; Blake 1988; Duff & Findlay 1988.)

The main purpose of this paper is to illustrate the problematic connections between jury ideology, ‘moral panics’ about the jury, and calls for jury reform. By examining some recent examples of ‘reform’ initiatives in various jurisdictions, the pressures for change and their connection with ‘moral panics’ will be revealed. To a large extent, the illustrations chosen are serendipitous in that they simply reflect jurisdictions in which we have recently carried out research into the jury. There is no reason, however, to think that they are atypical; the list in the preceding paragraph indicates that such ‘moral panics’ are common in both the place of the modern jury’s birth, England, and its ultimate apotheosis, the U.S.A. One incidental benefit of our choice of examples is that it covers jurisdictions where the jury has attracted much less in the way of academic attention and includes an indigenous jury (Scotland), one which was imposed as a result of colonialism (Hong Kong) and a jury which was transplanted into an existing legal system (Russia). The fact that such calls for reform are heard in most jurisdictions in which the jury operates confirms the commonality of the connection between myth and reform and illustrates the fragile and contradictory nature of the ideology which the jury purports to represent.

The ‘Not Proven’ Verdict in Scotland

By way of introduction, it should be explained that the Scottish criminal justice system is unique in that it allows the jury in criminal trials a choice of three verdicts: guilty, not proven, and not guilty (see Willock 1966) [1]. The verdicts of guilty and not guilty are self-explanatory, but the

intermediate verdict of not proven requires elucidation. In brief, it has exactly the same effect as a not-guilty verdict; it counts as an acquittal. Despite the fact that it has been part of the Scottish criminal justice system for around 300 years, there is no common law or statutory definition of the verdict nor of the difference between it and the not-guilty verdict. What is even more surprising is that, after a number of appeals resulting from attempted explanations by judges to juries of the difference between the two acquittal verdicts, the Appeal Court discouraged judges from making such attempts (*McDonald* v. *HMA* 1989 SLT 298). Consequently, at the time of the recent controversy over the not-proven verdict, jurors received no guidance whatsoever on the consequences of this verdict. (It is fair to say that this problem has since been addressed: see Scottish Office 1994*a*: 19.) As is so often the case, while the institution of trial by jury is continually extolled in the rhetoric of those responsible for the criminal justice system, little practical help is given to jurors in what is often their first contact with the criminal justice process and potential problems are simply ignored. Broadly speaking, however, the not-guilty verdict is taken to mean that the accused definitely did not commit the crime, whereas the not-proven verdict is thought to imply simply that the accused's guilt has not been conclusively demonstrated (see Scottish Office 1994*a*: 29). For this reason, it is often suggested that the not-proven verdict amounts to a 'second class' acquittal (see e.g. Thomson Committee 1975: 195).

The recent debate over the not-proven verdict was sparked by the result of a much-publicized trial in November 1992 of a young man for the brutal killing of a female student (see Bonnington 1993; Gow 1995; Duff 1996). To the astonishment of most observers, the charge of murder was found 'not proven' by the jury. The media strongly hinted that the accused had indeed committed the crime and the police gave the impression that as far as they were concerned the matter was closed. Within weeks, the victims' parents were organizing a petition which demanded the abolition of the not-proven verdict and this attracted much media attention (*Scotsman*: 22 January 1993). Two other similar cases became associated with the campaign (*Scotsman*: 9 March 1993). The victims' parents also enlisted the help of George Robertson, their MP and a member of Labour's shadow ministerial team, and he soon announced he would introduce a Private Member's Bill to abolish the not-proven verdict (*Scotsman*: 22 April 1993). Implicit in much of the criticism of the not-proven verdict was the belief that were it not available, the juries in these cases would have returned guilty verdicts. It is, of course, impossible to tell what the juries would have done in such circumstances, but it seems equally likely that they might have returned verdicts of not guilty (see BBC 1993; Scottish Office 1994*b*: 32).

In March, the Lord Advocate (the senior law officer in Scotland), in an extensive interview with a Sunday newspaper (*Scotland on Sunday*: 21 March

1993), revealed that he felt some 'unease' over the not-proven verdict. Nevertheless, he confirmed that neither he nor the Scottish Office was persuaded that there was enough dissatisfaction to justify scrutiny of the verdict. However, the campaign to abolish the not-proven verdict continued to gather momentum and, on 13 May, the British Broadcasting Commission (BBC) Scotland devoted their flagship documentary, Focal Point, to the issue, entitling the programme 'Not Proven: 'That Bastard Verdict" (the latter phrase being a description by Sir Walter Scott). Supporters of the verdict were given an opportunity to put their point of view but the thrust of an emotive programme was essentially hostile to the retention of the three-verdict system. Further, the BBC had commissioned a public opinion poll especially for the programme. This produced the devastating finding that the majority of the Scottish public — including those who had served as jurors — simply did not understand the not-proven verdict or its implications (see BBC 1993; Bonnington 1993; Scottish Office 1994*b*: 31; but *cf*. McCluskey 1994: 70; and the Solicitor General's comments in the *Scotsman*: 28 June 1994).

Following the programme, the political pressure to do something about the not-proven verdict continued to build. At this time, by pure coincidence the Scottish Office was beginning a major review of various aspects of the criminal justice process. It was clear from the subjects chosen — for instance, last-minute changes of plea to guilty; the cost and effectiveness of criminal legal aid; and the efficiency of the sentencing and appeal process — that the primary motive was the cutting of costs and increasing of efficiency (see Scottish Office 1994*a*: 1). The Secretary of State announced this review the day after the victims' parents had submitted their petition (now containing 60,000 names) supporting the abolition of the not-proven verdict and he made a 'surprise pledge' that the review would include an examination of the not-proven verdict along with various other aspects of trial by jury (*Scotsman*: 26 May 1993). Such was the interest in the jury — and the case in question — that this decision was the lead story in both Scotland's quality papers. The headline on the front page of the (Glasgow) *Herald* was 'Not Proven to go on Trial' and the issue was also the subject of the lead editorial comment. Thereafter, the fate of the not-proven verdict over-shadowed all the other issues under scrutiny, despite the fact that it was tangential to the main thrust of the review of criminal justice. The media coverage of the review illustrated the significant regard paid to the jury as a central feature of criminal justice. There followed several consultation papers, including one on juries (Scottish Office 1994*b*). It raised several issues, including the selection of jurors, various aspects of disqualification and excusal, the peremptory challenge, the size of the jury, the simple majority verdict, and the three-verdict system. The bulk of the paper was devoted to the latter topic, but

the Government expressed no opinion on the future of the not-proven verdict; it simply canvassed the arguments and invited the submission of views.

In June 1994, the Government published 'Firm and Fair: Improving the Delivery of Justice in Scotland', a White Paper setting out the Government's plans for change following the consultation process (Scottish Office 1994*a*). There were around 70 proposals but the abolition of the not-proven verdict was not one of these. Despite the significance of some of the proposals — for example, compulsory intermediate court hearings to reduce the number of last-minute guilty pleas; the weeding out of hopeless appeals — the banner headline on the front page of the *Herald* (28 June 1994) was 'Justice Review Clears the Not Proven Verdict'. The *Scotsman* reacted similarly. In other words, the retention of the three-verdict system was deemed more newsworthy than any of the many proposals for change. Yet again, this illustrates the importance which is attached to the jury as an issue for community concern; it is regarded as an exemplar of the entire criminal justice process and therefore a necessary focus for reform. The White Paper itself observed that, as regards the not-proven verdict, the consultation exercise did not 'reveal a consensus for change', either among the legal profession or the public (Scottish Office 1994*a*: 19). In the absence of 'a considerable weight of informed opinion against the verdict', the Government thought it should be retained.

In conclusion, the recent debate over the not-proven verdict was ignited by one controversial verdict given by a jury in a case with a high profile. Before this, little attention had been paid to the three-verdict system since its examination 20 years earlier in the last major review of Scottish criminal procedure by the Thomson Committee (1975), which had favoured its retention. On the basis of this and two other similar cases, substantial political pressure was generated for the abolition of the not-proven verdict. Because the jury was involved, the issue aroused the interest of the public and was conducted largely in the media. The latter found it comparatively easy to generate considerable controversy and emotion; and to term the resulting furore a 'debate' perhaps overstates its analytical potential. Both sides of the argument based their case primarily upon anecdote, opinion, assumption and prejudice; there was little hard evidence available, far less any attempt actually to collect any reliable data. Throughout the debate, the combatants ignored the fact that substantial use is made of this verdict by judges sitting alone. Admittedly, juries make relatively more use of the verdict, returning it in just over one-third of all acquittals, whereas the equivalent proportion in non-jury trials is around one-fifth. Nevertheless, almost nine-tenths of not-proven verdicts are returned in non-jury trials as a result of the far greater number of such trials (see Scottish Office 1994*b*: 27–28). This was simply not addressed in the debate. Finally, the

controversy over the not-proven verdict and the attention focused upon the jury obscured potentially far-reaching proposals for alteration to various other aspects of the criminal justice process. The moral panic over a justice icon, involving 'folk devils' (Cohen 1980) — such as 'murder', 'fear', 'leniency' and 'getting away with murder' (literally) — served to limit the opportunity to debate otherwise important criminal justice reforms.

Limitation on Peremptory Challenge in New South Wales

The peremptory challenge is a challenge made without explanation to a prospective juror during the courtroom balloting process and automatically excludes that person from participating as a juror. Currently, in New South Wales under s.42 of the Jury Act, both the defence and the prosecution (the Crown) have the right to exercise three peremptory challenges, regardless of the charge, unless each party agrees that both should have a greater number of challenges. Until 1987, the number of peremptory challenges allowed to each party was 20 where the offence charged was murder and eight in any other case. The Jury Act was amended, however, following a report by the New South Wales Law Reform Commission (NSWLRC), which had examined criminal procedure and the role of the jury 2 years previously. It recommended the present number of three challenges as a compromise in the face of conflicting interpretations of what made up a representative and unbiased jury (NSWLRC 1985: 90). This provides an interesting example of the way in which reform policy responds to opposing arguments which are directed towards the preservation and perfection of a commonly ascribed ideology. The solution is not based on superior logic or better information advanced from either side of the debate, but simply represents a compromise.

The history of the peremptory challenge is long. Some form of peremptory challenge has been in use in the English trial system since the earliest days of jury trial, with the Crown ostensibly employing its right to 'stand aside' jurors in a manner similar to the peremptory challenge of the defence (see McEldowney 1979). Peremptory challenges have generally assumed a significant place in the selection process, particularly in jurisdictions where challenge for cause is rare as a result of stringent limitations on either side obtaining information about or from prospective jurors. This tendency might not be so marked in jurisdictions in the U.S.A. where extensive *voire dire* procedures form part of the selection process, resulting in challenge for cause predominating (see Findlay 1994: Apps. 7 & 8).

The justifications for peremptory challenge relate to the need for unbiased and representative juries, as well as a desire for a selection process

in which the accused may participate and have confidence. The NSWLRC Report stated (1985: 20) that the peremptory challenge 'is a mechanism designed to ensure the existence of an impartial jury in a particular trial' and that such challenges 'are intended to be used to ensure that no person who is biased serves on the jury' (ibid.: 57). In particular, it was argued that 'the peremptory challenge is the only effective tool with which the accused can eliminate suspected bias from the fact finding tribunal and attempt to secure a jury of his or her peers' (ibid.: 92).

Each of these justifications relies on the following assumptions:

(1) that some logic underpins the exercise of the peremptory challenge;
(2) that this logic informs in some consistent fashion the decisions of the accused and his/her counsel;
(3) that this logic can be applied in favour of a particular ideological outcome.

In England and Wales, the peremptory challenge was abolished by the Criminal Justice Act 1988, s.118 and Scotland it was abolished by the Criminal Justice (Scotland) Act 1995, s.8. The arguments which led to these developments were also founded upon the necessity of securing representative and unbiased juries. In fact it was the 'moral panic' created by the fear that juries were being 'stacked' or 'nobbled' by defendants who were professional criminals or terrorists which resulted in the complete abolition of the challenge.

Even the Law Reform Commission in NSW admitted that the peremptory challenge might work against representative juries just as well as it might ensure them. Peremptory challenge can narrow or distort the representation of certain groups on the jury, perhaps not in the same way as challenge for cause might, but through interfering with random selection nonetheless. Again, the critics of the peremptory challenge assume a similar process of logic underpinning the exercise of peremptory challenge, employed as it may be for distinctly different intentions.

In an effort to test the 'logic' which is assumed to inform the exercise of peremptory challenge, and finding no assistance in the evidence cited by either side of the argument, a research team attempted an empirical evaluation of the challenge process (see Findlay, 1994). It observed the selection process which preceded the empaneling of a number of juries in NSW criminal courts. An observation matrix was employed to impose upon the study what limited empirical rigor was possible (see Findlay 1994: 49–53, Apps 4 & 5). In addition, prosecution and defence counsel were interviewed in order to ascertain their rationales for employing the

peremptory challenge in different trial situations. Despite these investigations, the researchers could not discern any obvious or appreciable logic underlying the actual exercise of the peremptory challenge (Findlay 1994: 49–50):

> (M)ost obviously it became apparent that the peremptory challenge is sometimes used in a partisan manner — not to secure impartiality, but to manufacture a jury favourable to the interests of one side of the case…it was very difficult to see any logic behind many challenges made during the selection of juries. The overall impression was that the peremptory challenge was used by both Crown and defence counsel in a casual or even arbitrary fashion…in many cases counsel could challenge a prospective juror apparently on the basis of some characteristic of appearance and then fail to challenge another whose appearance was even more extreme in relation to that characteristic…categories of social stereotyping were used which were crude, and with some justification might be seen as frivolous…the peremptory challenge did not allow the accused much input in the selection of the jury in an attempt to secure a jury of his or her peers.

The evidence obtained from the study seemed of little assistance to either the supporters or the critics of the peremptory challenge. Having made that point, it could be said, with some confidence, that peremptory challenges were more likely to retard rather than advance the ideals of representatives and objectivity:

> The overall impression was that, even where the peremptory challenge was used with some identifiable motive, it was an extremely imprecise tool, relying on questionable and crude stereotypes. And even where 'bias' might have reasonably been suspected on the basis of a juror's appearance or name, there was no real sense that the jury was more impartial, or was more composed of the accused's peers, after the challenge process had taken place. The gender, ethnicity, and age of the jury seemed very often to be only minimally altered after the peremptory challenge process had run its course. As for the jurors themselves they seemed either intimidated or puzzled by the experience (Findlay 1994: 50–51).

Like the arguments for and against the peremptory challenge, the process itself 'is inaccurate and arbitrary to the point of being apparently without use' (Findlay 1994: 51). Even so, suggestions that it should be abolished in NSW generated the sort of political heat which surrounded its abolition in England and Wales in 1987. While in the latter jurisdiction it was the belief that the challenge could destroy an impartial or representative jury that led to its abolition, in NSW its retention was demanded as an article of faith and the justification of logic was dispensed with:

> If logic and reason were the only motivations for reform in the administration of jury service then we might be inclined to follow recent English practice and recommend the abolition of peremptory challenge…The possibility that peremptory challenge may provide some guarantee against bias in random selection is all the more significant in a system where other formal procedures for rectifying bias are either not possible or not politically unpalatable. (Findlay 1994: 176).

Therefore, the retention of the political compromise [2] on peremptory challenge in NSW required no more logic than was expected of the process it was intended to protect and endorse. The New South Wales Law Commission were content to rest their case upon the mythology surrounding the jury rather than on any hard facts or reasoned argument.

Experimenting with Juries in Russia

Jury trial existed in Russia prior to the Bolshevik revolution and the emergence of Soviet justice. Tsarist Russian juries were not much like those operating today throughout the common law world, but their existence as a part of court procedure in the mid-1800s was crucial to the atmosphere of judicial reform in Russia at that time (see Thaman 1995). It is significant that once again the jury has been employed as a symbol of reform, this time within the new Russian Federation. In a paper entitled 'Concept of Judicial Reform in the RSFSR' the Parliamentary Sub-committee on Legal Reform wrote:

> The return of our country back to world civilisation requires not only political and economic reform, but also reform of the legal system. Ceasing to be an instrument of violence in the hands of a totalitarian regime, the legal system is undergoing a process of democratisation in order to finally commit the courageous act of self-negation and to transform a political state into a rule-of-law state (1991: 3).

Essential to the sub-committee's notion of the rule of law and the ideology of democratic justice was the opportunity for jury trial:

> The elimination of folly from the organisation of justice and interrelation of its organs is not a sufficient guarantee of the creation of democratic ideals. A well constructed machine becomes only a shell if it is not imbued with spirit. Therefore 'highbrow' scientific ideas must be joined with inquiries in humanitarian policy and everyday common sense…a jury is an indicator of the feeling for law and order and preparedness for far-reaching reform, where a 'limit can't be

> crossed' by bureaucrats, for whom an emancipation of justice has just begun (ibid: 4).

Besides its symbolic significance for democratization and communitarianism, the jury was expected to bring to Russian criminal justice:

- for punishment and justice an everyday healthy sense of the national feeling for law and order;
- the stimulation of the process of controversy;
- the ability to experience the correctness of laws as applied to specific situations (ibid: 3).

While there were those in government and judicial circles who argued that jury trials were too expensive or too scientific and complicated for Russian jurors, or that legal professionals would suffer a loss of public confidence as a result, the pro-jury reformers won the day and provisions for jury trial were included in the final drafts of the new Russian Criminal Procedure Code. Articles 421–424 of the 1992 draft provided for jury trial (along with judge-alone trial) at the petition of the accused, when charged with an offence the sentence for which was more than 10 years in prison, or death. In July 1993, legislation was introduced into the Russian Parliament to re-establish jury trial in certain courts with criminal jurisdiction. Initially nine regions / territories within the Russian Federation were selected to offer jury trial and operate under the new alternative provisions of the Criminal Procedure Code.

However, victory for supporters of the jury is far from complete. The operation of jury trial within Russian criminal courts is presently 'experimental', and is only available in a very limited number of locations, for a very limited range of offences (see Thaman 1995: 80–82). Such trials occur far less frequently than adjudications by judges sitting alone (ibid: 87). Obviously the procedures governing trial by jury differ markedly from those for non-jury trial and this, as much as expectations about the result of the trial and the terms of the penalty, may explain to some extent the relative popularity of either form.

As a result of the differences in procedure between the modes of trial currently on offer in Russia, one might assume that the attitudes of legal professionals to their new responsibilities in jury trials [3] would have an important impact on the operation and recognition of jury trial in Russia. With this in mind, a research team recently surveyed judges, procurators and defence advocates, with experience both of jury and non-jury trial (see Findlay & Reynolds 1995*b*). As one might anticipate, the procurators were least enthusiastic about the jury system, while defence advocates supported the experiment, as did judges [4]. Perhaps more interesting in light of the

political justification for the introduction of jury trial into the Russian Federation, the prevailing view from all those defenders and judges interviewed was that the existence of jury trial in Russia would increase public confidence in the operation of the criminal justice system.

In attempting to assess whether juries in Russia have enhanced the standing of the criminal justice process in the community, a crucial element is the views of jurors themselves. Consequently, a range of questions was put to jurors who had just completed their deliberations regarding their attitudes to the jury both prior to and following their service (see Findlay & Reynolds 1995*a*). Well over half of those surveyed indicated that they did not understand the jury's function before they were called to serve. Consistent with our findings in other jurisdictions (see Duff *et al.* 1992), ignorance of the jury's functions does not seem to affect the level of confidence in the jury system expressed by prospective jurors and the community at large. Amongst the respondents in this survey, almost all (134 compared with 10) expressed confidence 'as members of the community' in the system of jury trial.

The experience of jury service either confirmed or substantially improved the pre-existing attitudes of respondents towards jury service. Only three respondents indicated the experience had diminished their confidence in the jury. Interestingly, when asked about their confidence in other methods of trial, less than one-third of respondents supported trial by judge alone, whereas the great majority expressed no confidence in this mode of trial. The general view of respondents was that the form of trial most likely to bring about a just result was a judge sitting with a jury. As regards their overall confidence in the system of criminal justice in Russia, more than two-thirds of jurors stated that it was increased as a result of their experience, while only four said that their confidence had decreased. An overwhelming number of serving jurors supported the suggested introduction of jury trial throughout Russia.

It would appear from the data available that the majority of participants with experience of the jury in Russian criminal trials believe that the jury's potential to increase public confidence in the trial process is significant. It is obviously dangerous to assume that the views of trial participants are in accord with public opinion, but it is fair to say that jurors, who are supposed either to represent or recognize the community conscience, are strongly persuaded that the jury has achieved its task of legitimating criminal trials.

In this regard the symbolic significance of the jury is revealed as a legitimator both of a style of justice and of a political dogma from which it is advanced. Contrasted with the tiny practical impact which jury trial presently has on the operation of justice throughout Russia, the jury's inflated potential to justify and endorse radical judicial reform and

revolutionary political change is both impressive and mysterious. In addition, it is impossible to justify or deny the belief that the jury provides some sort of answer to the crisis in confidence in a largely discredited and dismantled justice system, and some guarantee of the justice of the new system.

Complex Commercial Crime in Hong Kong

In Hong Kong, as elsewhere, anxiety about the trial of complex commercial crime began to manifest itself in the 1980s (see Duff *et al.* 1992: 43–51). As was the case in other jurisdictions, there was particular concern about the suitability of the jury to try this type of case. Various factors were commonly cited as justifying this disquiet (see e.g. Roskill Committee 1986). First, there is the tendency for trials of complex commercial crime to involve a number of defendants and multiple charges. Second, there is the complicated and technical nature of much of the evidence. Third, there is the sheer length of many such trials. Fourth, and often most important, there are the allegedly high acquittal rates. One further factor, perceived to be particular to Hong Kong, was the high incidence of such cases in the jurisdiction (see the DPP quoted in the *South China Morning Post*: 3 July 1985). As elsewhere, the concern glossed over the difficulties involved in attempting to identify what makes a trial 'complex' and therefore difficult to comprehend. Yet despite this uncertainty, the 'moral panic' about juries and complex commercial crime evolved, unencumbered by empirical examination of the particular obstacles which allegedly confounded the understanding of jurors.

In Hong Kong, the examplar of the trial of complex commercial crime was the infamous Carrian case which began in 1986 (see Litton 1988; Morrow 1988). Before it had even started, the law was changed to permit the judge to empanel an extra two jurors in case any of the jury had to drop out as the trial progressed (see Duff *et al.* 1988: 38, 44–45). The case turned into a marathon. There were six accused facing conspiracy and fraud charges. The trial lasted for 19 months and the court sat for 280 days. The jury was out of court for 115 days. Evidence for the Crown was given by a total of 104 witnesses, flown in from all over the world. Eventually, the judge stopped the trial at the end of the prosecution case. By this time, the trial had cost almost 100 million Hong Kong dollars. The case and, more particularly, the decision of the judge aroused a furore in government and legal circles and received enormous media attention. To those pushing for the reform of the trial of complex commercial crime, the Carrian fiasco provided a perfect opportunity to voice their opinions.

In order to justify their complaints about the role of the jury in the trial of complex commercial crime, critics usually construct their arguments

around two inter-linked assertions (see Levi 1988). First, it is claimed that the jury is unable to understand adequately the complicated, technical and lengthy nature of the evidence frequently adduced in cases of this sort. The consequence of this, it is argued, is that the jury, confused and unsure of the facts, acquits a substantial proportion of defendants who are most probably guilty of the charges brought. It is rarely claimed that the jury wrongfully convicts. Second, it is alleged that prosecutors are reluctant to bring charges involving complex commercial crime before a jury because they think that even if they have a strong case, their chances of securing a conviction are not good.

In Hong Kong, concern about the jury's ability to try complex commercial crime led to various attempts to remove this type of crime from the jury's jurisdiction (see Duff *et al*. 1992: 43–51). The Attorney General first took up the issue in 1981 but the reception of his initiative was unenthusiastic. Nothing further happened until 1983 when the Hong Kong branch of Justice suggested that trials of complex commercial crime should be heard by either a judge sitting with assessors or a judge sitting alone. A consultation paper was distributed to various bodies such as the Law Society, the Bar Association, the judiciary and relevant government departments. At this stage, the proposal received a generally favourable response. For instance, the *South China Morning Post* (17 August, 1984) commented: "When juries first came into existence several hundred years ago, there was none of the complexity that prevails in some of today's commercial criminal charges. Justice has to move with the times and this seems a timely move".

Consequently, the government acted quickly. In 1984, it commenced drafting the Trial of Commercial Crimes Bill which provided that commercial crimes should be tried before a judge and commercial adjudicators. In a debate upon the Bill in the Legislative Council, the Attorney General argued:

> Most people recognise that the present state of affairs is unsatisfactory, if only because nearly all ordinary jurors and many lawyers who serve on the bench of judges lack the commercial experience and skill that is necessary to read, absorb and assess with confidence the kind of evidence involved in prosecuting the modern criminal fraudster… Criminals will sometimes go free simply because, as one High Court judge has pointed out, 'complication is a weapon for the defence' (Legislative Council of Hong Kong, 13 March 1985: 810–811).

The mood changed, however, and the Bill began to arouse opposition. In particular, there was a feeling among certain defence lawyers and civil rights advocates that the government was trying to rush its proposed legislation through without adequate debate and, eventually, the Bill was

shelved. Nevertheless, the matter was not completely abandoned and a Legislative Council Select Committee was given the task of considering the issue and proposing reforms. Ultimately, the Committee did not support the abolition of trial by jury for complex commercial crime and, instead, recommended a variety of measures designed to make such trials less complex and easier for the jury to follow (Legislative Council of Hong Kong 1986). The eventual legislation, the Complex Commercial Crimes Ordinance 1988, retained trial by jury and implemented many of the Committee's recommendations. It is interesting that the legislation did not even attempt to provide a satisfactory and comprehensive definition of 'complex'.

For the purposes of this article, what is interesting is that those proposing the abolition of trial by jury for complex commercial crime argued their case along the standard lines (and those advocating the preservation of the jury function often followed suit). It was frequently claimed that bewildered juries were regularly acquitting the guilty and, consequently, that prosecutors were discouraged from prosecuting such cases before juries. In fact, such firm evidence as emerged seemed to indicate that these concerns were unfounded.

First, during the Legislative Council debate over the Complex Commercial Crimes Ordinance, it was disclosed that, from 1984 until 1987, the Commercial Crime Unit had prosecuted 44 commercial crime cases before juries and that these trials had resulted in 83 persons being convicted and only three being acquitted. Similarly, in written evidence submitted to the Select Committee by the Bar Association, it was argued that it was 'facile' to suggest, as did the Attorney General, that complication was a weapon for the defence when there was a 100% conviction rate in the 19 commercial crime cases heard by juries between April 1984 and March 1985 (Legislative Council of Hong Kong 1986, volume 2: 439). Third, an analysis of the Judicial Statistics between 1970 and 1980 revealed that there were few acquittals in trials involving complex commercial crime during that rather earlier period (see Duff *et al.* 1992: 49–51). Finally, the total number of cases heard in the High Court, which is the only venue where a jury is involved, is very small: between 200 and 300 annually, representing less than 0.1% of cases which come before the criminal courts of Hong Kong. The vast bulk of these cases involve charges of murder, rape, robbery and drugs offences, while relatively few involve complex commercial crime (see Duff *et al.* 1992: 40–42, 50–51).

It is important to emphasize three points about the above debate. First, the dimension of the alleged problem clearly had to be much smaller than the jury's critics were suggesting. Second, and this relates to the first point, the proponents of reform might have argued that the reason why so few prosecutions of complex commercial crime were launched in the High

Court was because of concern about the likelihood of acquittal. This may or may not have been so, but it seems more likely that such cases were usually prosecuted in the District Court, where a judge sits alone, because the maximum sentence in that venue — 7 years — was generally thought to be adequate. Only rarely would a stiffer sentence for commercial crime be thought appropriate. Third, it should be re-emphasised that in the Carrian trial, around which so much of the controversy raged, it was actually the judge who acquitted the defendants at the close of the prosecution case. The jury was never asked to return a verdict (see Litton 1988; Morrow 1988). Those pushing for the reform of trials for complex commercial crime tended to play down this particular point.

Once again it is clear that this particular controversy revolved around a myth which was supported merely by anecdote and perception. Further, the nature of the moral panic created did not lend itself to analysis or challenge at the level of logic or reason. In addition, on closer examination, the suggestion that juries were failing to convict in trials involving complex commercial crime was completely without foundation. It may have been the case that jurors often failed to understand the evidence — we simply do not know — but if this were the case, jurors appeared to convict nevertheless [5]. Again, much of the debate took place in the media, revolved around a high-profile case and was essentially misconceived. Finally, opponents of the move to remove the jury from the trial of complex commercial crime tended to issue stirring cries and stale cliches about the importance of trial by jury and its role as the 'bulwark of liberty' or 'the lamp of freedom'. Such claims are somewhat ironic when the jury actually plays such a minor role in the criminal justice process of Hong Kong (see Duff *et al.* 1992: 40–42, 96–101).

Conclusion

The moral panics which have motivated the debates over jury reform described in this paper share some common themes:

(1) juries make wrong decisions;
(2) juries don't understand, and therefore make wrong decisions;
(3) juries are comprised of the wrong people and therefore make wrong decisions;
(4) and yet, the alternatives to juries instill even less community confidence in the criminal justice process.

It is this almost epidemic confidence in the jury, and the justice it symbolizes, which means that all participants in the debate — critics and proponents, reformers and conservatives alike — are talking the same

language and struggling towards the same goals (see Findlay & Duff 1988: introduction). In that case, why are these moral panics generated in the first place? And why are they so regularly directed against an institution which the public, and the protagonists, heartily support? There are many other institutions within the criminal justice system which are not so popular!

One important factor underlying this panic/reform nexus is revealed by the profoundly political character of the emergence of such debates, as well as by their regular recurrence and perpetuation in a variety of jurisdictions. Such controversies are not reliant on empirical justification or logic and, as we have seen, certain reform movements have positively eschewed such a context. The debate is usually fuelled by and heavily reliant upon the media. Protagonists do not need expertise in the area nor any appreciation of the technicalities. The agenda is never-ending and appears undirected, in that it seems equally comfortable to suggest the containment, consolidation or advancement of the jury. In addition, the panic/reform nexus is neither confined within a single jurisdictional setting, nor a particular culture of the jury, nor a constant stage in the development of jury justice. Therefore, it recognizes the utility of the jury and jury ideology for a wide range of political situations and agendas.

Most important, the panic/reform nexus which often surrounds the jury seems designed to endorse specific interests in struggles for power and authority in criminal justice. Whether such interests are narrowly located within the trial context itself or emerge more generally from institutional and operational authority of one kind or another, the ability to control the presence and development of such a powerful icon as the jury becomes in itself a manifestation of power. The reform scenarios examined in this paper further our impression that it is power over 'justice' and its symbols, rather than the existence of the jury, which is at stake. For instance, the moral panic in Scotland over the forms of verdict, while arising in unforeseen fashion, ultimately served to conceal or deflect attention from claims to the right to promote or prevent much wider revision and reinterpretation of criminal justice. And within the other debates — over the manufacture of the jury (New South Wales), the place of the jury in certain trials (Hong Kong), and the pre-eminence of the jury over a disgraced administration (Russia) — there existed a profound recognition of the political significance and public power of jury symbolism. To govern the jury, through a reform process based upon panic and manipulation, is to lay a strong claim to rule the hearts and minds of all those who believe in the jury. In other words, control over jury reform provides a substantial degree of control over community confidence and public belief in criminal justice.

Notes

1 Two other idiosyncratic features of the Scottish jury are that it comprises 15 persons and that its verdict is determined by a simple majority. These three aspects of the jury are generally regarded as related (see Sheehan 1990: 140–141, 158).

2 The NSW Law Reform Commission saw its recommendation, namely to reduce the number of peremptory challenges from eight (seen as 'too many') down to three, as a way of balancing the 'competing' aims of representativeness and impartiality (NSWLRC, 1995: 99).

3 For instance, in jury trials the judge is required to adopt a less inquisitorial stance, the procurator faces different responsibilities of proof, the relationship between the procurator and the judge is more distant, and the defence advocate should be far more active and interventionist. In addition, because of subscription to the presumption of innocence in jury trials, the accused is not required to open his/her case with a personal presentation of facts and assertions of innocence.

4 The majority of procurators were in favour of the jury's involvement in adjudication as the best method of ensuring a fair decision. However, two-thirds are not positively disposed to the present jury system, and the majority did not want the experiment with jury trial extended throughout Russia. Only one-third of the procurators surveyed agreed that the existence of jury trial was likely to increase public confidence in the criminal justice system. Two-thirds of defence advocates had a positive opinion of the experiment while the rest were ambivalent, and an overwhelming proportion of the judges were supportive. Majorities of judges and defenders wished to see the experiment extended throughout Russia and thought that the best form of adjudication in criminal trials was judges with juries.

5 Certainly, our study of the jury in Hong Kong demonstrated that it was not uncommon for jurors to admit to significant levels of misunderstanding, confusion or doubt, and yet to have participated in juries which convicted the accused (Duff *et al.* 1992).

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