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Jury Vetting: The Jury under Attack

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Introduction

The English jury has recently been undergoing various alterations. These changes have their roots in assumptions, often not clearly identified, about the nature and purpose of the jury within the criminal justice system. Once the purpose and ideals of the jury system are identified, and there may be arguments about what they are,[1] it becomes apparent that there may be a conflict about how they should be put into practice. The state and its agencies may take one view whilst others may differ. An example of one such conflict is the controversy over the newly discovered practice of 'jury vetting'.

The discovery of jury vetting

In October 1978, the Attorney General disclosed that since 1975 checks had been made (as authorised by the Director of Public Prosecutions) on the records of potential jurors in 25 'important and exceptional trials'[2]. This statement was in response to criticism of the screening of potential jurors in the initial trial of two journalists and a former soldier, under the Official Secrets Act.

The Attorney General stated that prior to 1974 the practice 'had grown up' at the Central Criminal Courts of prosecutors asking police for 'certain information' on jurors in 'certain cases'. This was done only in a 'small number of important cases directed to producing an unbiased jury not likely to be subject to outside pressures'[3]. The prosecution would deal with undesirable jurors by asking them to stand aside for the crown. The Attorney General likened this to the exercise by the defence of its right to peremptory challenge[4].

The statement declared that this practice had come to the Government's attention following a trial of IRA activists in 1974. The then Home Secretary and the DPP with the Attorney General, reviewed the practice and decided that it should continue only subject to 'guide-

1. For a discussion of this point see G. Marshall 'The Judgement of One's Peers' in *The British Jury System,* Cropwood Conference (Institute of Criminology, Cambridge, 1975) pp. 1–9 and P. Duff and M. Findlay 'The Jury in England: Practice and Ideology' (1982) 10 IJSL pp. 253–265.
2. The types of trial were – Terrorists (IRA) 12, Official Secrets 2, Murder 4, Armed Robbery 5, International Fraud 2. See New Society, 19 October 1978, p. 127.
3. The Times, 11 October 1978.
4. At present the accused has three. S. 43 Criminal Law Act 1977.

lines'[5]. These were brought to the attention of all police forces, but not made public, and comprised the following:

1. Two principles were to be generally observed:
   (i) the random selection of the jury from the panel,
   (ii) prospective jurors were only to be disqualified in terms of the Juries Act 1974.

2. Parliament has provided safeguards against corrupt or biased jurors by introducing the possibility of majority verdicts.

3. There are certain exceptional cases 'where these safeguards may not be sufficient to ensure the proper administration of justice and where the principles set out in paragraph 1 may properly be departed from in the interests both of justice and of the public'.

4. These classes of case cannot be defined but 'broadly speaking' they include:
   (a) serious offences with strong political motives (e.g. terrorist or Official Secrets Act prosecutions);
   (b) serious offences perpetrated by gangs of 'professional criminals'[6].

5. A juror may be susceptible to pressure or have 'extreme political beliefs' and therefore be biased. In cases involving the Official Secrets Act some evidence may be heard *in camera* and a juror may make improper use of such information.

6. To decide whether these 'factors might seriously influence a potential juror's impartial performance' it may be proper practice to have a limited investigation of all members of the jury panel from these record sources;
   (a) criminal records;
   (b) Special Branch;
   (c) local CID files.

No enquiries beyond a check of police records should be made.

7. To carry out such an investigation it would be necessary to have the personal authority of the DPP or his deputy, who should notify the Attorney General.

8. No right of stand by should be exercised because of certain information, unless there is strong reason to believe that a juror might be unfairly influenced or biased.

9. Where a juror is asked to stand by for the Crown, there is no duty on the prosecution to disclose to the defence the information on which the request was based.

10. If it turns out that a juror might be biased against the accused, the defence should be given an indication of why that potential juror may be detrimental to their interests. 'The principle of equality of information should be observed, wherever possible'.

5. These guidelines and the Attorney General's statement were published in The Times, 11 October 1978.

6. It is interesting to note that fear of pressure from 'professional criminals' was one of the central supports in the argument of those in Parliament who successfully promoted the introduction of the majority verdict in England and Wales.

As is obvious, the scope of these guidelines is very broad and discretionary.

In August 1980, the newly appointed Attorney General, Sir Michael Havers, reviewed the existing guidelines on jury vetting[7]. He recognised that with the existence of the majority verdict and the specific provisions under the Juries Act for the disqualification of certain classes of persons, Parliament had provided safeguards against corrupt or biased jurors. In addition, he envisaged, as did his predecessor, that criminal record checks by the police might be necessary 'as part of their usual function of preventing the commission of offences', (i.e. sitting on a jury while disqualified). Further, it might be necessary to supplement the normal safeguards in 'certain exceptional types of case of public importance' where there was a 'possibility of bias', and go beyond the checking of criminal records. These exceptional cases would broadly be those involving issues of national security and terrorist cases. The extra precautions would be necessary because of the danger that a 'juror's political beliefs are so biased as to go beyond normally reflecting the broad spectrum of views and interests in the community . . . to a degree which might interfere with his fair assessment of the facts of the case or lead him to exert improper pressure on his fellow jurors'.

The additional information on jurors should be sought from Special Branch, but beyond that check no further steps should be taken. The Special Branch records should not be checked without the DPP having applied to the Attorney General for his personal authority. No right of standby should be exercised unless the information affords a strong reason to believe there is a risk of bias or a security problem.

An addition to the earlier guidelines is that the Attorney General should keep records of all incidents of 'vetting' for monitoring purposes.

Jury vetting under attack

Following the Attorney General's disclosure in 1978 of the existence of jury vetting a great deal of publicity was given to this topic. At this time the original trial under the Official Secrets Act, at which the use of the practice had emerged, was still in progress. Shortly afterwards there followed a trial of anarchists on charges of conspiracy to rob and illegal possession of firearms and explosives. The trial was before Judge King-Hamilton and again vetting of the jury took place[8].

There was some disquiet about the fact that the guidelines had been drawn up in 1975, jury vetting had taken place, and yet its operation had remained more or less secret. Considerable opposition to the practice was expressed, notably by the National Council for Civil Liberties and E. P. Thompson the social historian. Support for the practice was also forthcoming.

Criticisms of jury vetting appear to have been launched on two separate levels; what we might call the practical level and the ideological level.

7. The Times, 2 August 1980.
8. See M. Kettle 'Note on Jury Vetting' New Society, 27 September 1979.

Practical arguments

The practical argument is directed against the possibility of properly regulating and monitoring the practice of jury vetting. There has also been more general criticism of the manner in which the practice has evolved.

E. P. Thompson[9] attacked jury vetting as a practice which originated in the prosecutions camp and was fostered secretly with the assistance of the police to a point where the Attorney General accepted it as the natural state of affairs. After this practice 'came to light' the Government accepted its continuance 'in the interests of justice' and 'moved to establish firm safeguards'[10].

'Guidelines' were 'set out' and 'brought to the attention' of the police. Thompson continued rhetorically asking the Attorney General:

'. . . What is a guideline? Is it a rule of law or is it a nudge-nudge-be-careful-how-you-go? What officers have you appointed to see that these guidelines are observed. What sanctions have you imposed against transgression? How are we to know if a case be of an 'exceptional type' or not? What rule at law may hang upon the phrase (as appears in the latest guidelines) "it is impossible to define precisely" the cases to which it might refer? If law is now to rest on such nice terms as "broadly speaking", who is to speak or how broad may that speech be.'[11]

The weakness of the guidelines approach was well evidenced by the subsequent disclosure of the practice of the Northamptonshire Constabulary. In a letter disclosed by the recipient the prosecuting solicitor of Northamptonshire revealed that all potential jurors were scrutinised to ensure that they had no legal disqualifications. However, the letter went on:

'If it should appear from such scrutiny that the character and antecedents of any prospective juror is (sic) such that it makes it undesirable for a prospective juror to sit generally or in a more particular case, this information is supplied to prosecuting counsel.'[12]

So much for the Attorney General's guidelines! Some days later the Attorney General expressed his disapproval of the Northamptonshire practice and reiterated that there was not supposed to be any jury vetting without the Attorney General's permission or outside his guidelines[13]. Early the following month the Home Secretary announced that he had written to the Chief Constable of Northamptonshire seeking assurances that his police would conform to the guidelines relating to checks on jury panels. The Chief Constable confirmed that they would so conform.

9. E. Thompson 'The State versus its "Enemies"' New Society, 19 October 1978.
10. The quoted terminology emanates either from the Attorney General's statement or from circulars from the DPP.
11. *Op. cit.*
12. The Times, 22 February 1980.
13. The Times, 26 February 1980.

However, the two disturbing features of this example are first that this general checking practice had gone on for so long, in spite of the issue of guidelines over five years before and the general publicity which they had so recently received, and second that the Attorney General had no power beyond the good offices of the Home Secretary to require compliance with his guidelines. The Attorney General not only was ignorant of the abuse prior to the disclosure of the letter, but still remains unable actually to monitor jury vetting practice throughout police forces in England and Wales or to ensure compliance with the guidelines.

The NCCL called for legislation to enforce the Attorney General's guidelines because they had no confidence that they would be followed[14]. They pointed out that without any sanction for their breach the guidelines were unenforceable. This fear was borne out when the lack of legal standing of the guidelines was made very clear in *R v Mason*[15] which we will turn to shortly.

Concern has also been expressed about the type of information relating to jurors which might come to light through the vetting process. How will their privacy be affected?

For example in the anarchists' trial 93 potential jurors were vetted within the guidelines because the accused were acting from political motives. Criminal records, local CID files and Special Branch records were consulted and the defence were furnished with the information arising out of the first two sources alone. This is odd and rather unfair because the reason for vetting was in case any potential jurors had extreme political beliefs, so the defence was being denied the most important information. Nevertheless, information disclosed to the defence referred to a woman who had been a victim of a crime, people whose children had been prosecuted, and a person whose address was believed to be a 'squat'. This accumulation of irrelevant data caused some concern[16].

The NCCL point out that the privacy of the jurors may be in danger from the defence also. Private detectives could be used to vet the jury panel. *In R v Sheffield Crown Court, ex p Brownlow*[17] which we will examine later, it was the defence which requested the vetting process.

Ideological arguments

Not only are the mechanics by which jury vetting operates open to attack, but the premises upon which it is based are illogical and unsound. They are inconsistent with the ideals of the jury and its function in the criminal justice system. Vetting undermines some of the central pillars on which public confidence in the jury rests. These central pillars are the jury's independence, impartiality and representativeness, obtained through the use of random lay participation. On occasion these

14. The Times, 11 March 1980.
15. [1980] 3 WLR 617.
16. Kettle *op. cit.*
17. [1980] 2 WLR 892.

aims may come into conflict and historically they may have altered but that is not our concern here[18].

Independence is seen as important because it enables the jury to reach a fair, just and impartial verdict. It is argued that the judge might be seen to be too closely involved with the state, the legal system and the police, always to be totally impartial. He might be thought to be accountable to politicians which would render his judgement suspect in cases with political overtones. Additionally, he might be seen unthinkingly to represent his class interests.

The jury suffers from none of these disadvantages. The jury gives its verdict with complete impunity. It is not accountable to anyone. Futhermore it is seen as representing the community interest. Additionally it gives no reasons for its decisions so its reasoning process cannot be attacked. The particular merits of each case can be taken into account regardless of the strict letter of the law[19].

Following from this is the idea that the jury will refuse to enforce repugnant laws. It will not convict where the facts point clearly in that direction if the law is oppressive or the punishment disproportionate to the offence. Thus the jury is seen as the 'bulwark of liberty'. Lord Devlin says of the jury:

'. . . no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen . . . it is the lamp that shows that freedom lives.'[20]

There is some historical evidence for these claims, although they may be exaggerated on occasion[21].

In short the jury is seen as an institution which in the last resort will act as a defender of the liberty of the people. If the state encroaches too far on the freedom of the individual the jury, representing the country, will resist. The independence and impartiality of the jury guarantee that it can exercise this function if necessary. In order for the jury to be independent and impartial, it is felt that it should be representative of the community at large. In this way bias or influence brought into the jury room by any one of the jurors will be countered, and the fusion of all the jurors' opinions and prejudices will create a neutral disinterested whole.

The *sine qua non* of representativeness is seen as being random selection from the community[22]. Any positive selection procedure will tilt the balance of the jury away from the 'community conscience' in a direction dependent on the criteria used for selection. It was the desire for a more truly representative jury which led to the abolition of the property qualification in the Criminal Justice Act 1972, following the

18. See G. Marshall *op. cit.*; P. Duff and M. Findlay *op. cit.*

19. See H. Kalven and H. Zeisel *The American Jury* (Little, Brown & Co, Boston, 1966).

20. P. Devlin *Trial by Jury* (Stevens, London, 1966) p. 164.

21. For an account of the jury's role as 'the bulwark of liberty' see W. Cornish *The Jury* (Allen Lane, London, 1968) Ch. 5.

22. This is distorted to an extent by each accused's three peremptory challenges and the exemptions and disqualifications under the Juries Act 1974.

recommendation of the Morris Committee in 1965[23]. Without this reform the legitimacy of the jury would have been open to question in an increasingly egalitarian society. A jury consisting mainly of male, middle class householders might no longer have been seen as fulfilling the aim of impartiality.

Its proponents argue that jury vetting is necessary top reserve these virtues of independence, impartially and representativeness. Yet this argument does not stand up to close scrutiny.

It is worth making a preliminary point. If the state is so concerned that a partial juror may 'exert improper pressures on his fellow jurors'[24], this shows little faith in the jurors' powers of independent reason and ability to do their job. What is the point of having juries at all, if the combined reason of the majority of jurors, judge and counsel cannot prevail over the influence of the biased few?

More telling, however, if two jurors in England are biased or intractable, this situation is overcome by the acceptability of a 10/2 majority verdict. It is only when three or more jurors are 'biased' or hold 'extreme political views' that their prejudice may have an effect on the verdict. Yet would it not be difficult to dismiss the view of at least 25 per cent of any randomly selected group from the community at large as biased? How could the representatives of one quarter of the population be an 'extremist minority'? Is it not a central aspect of the jury system that the whole populace have a voice in the trial of their peers? Does that not entail a truthful verdict being distilled from many different minds? If the state gradually excludes large groups of the population, this aspect is destroyed.

Additionally the value of the jury as a possible defender of the people's liberty against the all-powerful state is lessened, if not lost altogether. If the state is able to choose the members of the jury the independence of the jury is lost. It is precisely in 'political' cases that the state wants to do this. Obviously jurors likely to hold against the state will be excluded. By handpicking suitable jurors the state can secure the result it desires, a conviction, no matter how oppressive the law is or misguided the prosecution may be. The jury ceases to be 'the lamp that shows freedom lives'.

In short, is it not illogical to suggest that by restricting and controlling the selection procedure a more impartial and independent jury is the result?

In relation to the trial of the anarchists Judge King-Hamilton expressed approval of jury vetting in the following terms:

'One has heard of criticism of "jury vetting" as amounting to the abandonment of random selection of juries. What nonsense! It widens the random selection instead of being limited to the first 12.'[25]

Such manifest illogicality hardly requires comment. Suffice it to say, that to select the twelve jurors you want, from the whole panel, does

23. Cmnd. 2627 (HMSO, London, 1965).
24. Sir Michael Havers justifying vetting; The Times, 2 August 1980.
25. The Times, 7 December 1979.

not widen random selection. It does precisely the opposite!

The key question in weeding out 'partial' or 'biased' jurors is how and by whom impartiality is determined. The logical conclusion may be that anyone who disagrees with the state is *ipso facto* so partial and biased as to be unsuitable for jury service. In other words the danger is that impartiality comes to be determined by the agencies of the state. It then may mean agreement with the state.

Examples of this type of thinking emerged in a television debate, some three months after the anarchists trial. Judge King-Hamilton expanded his views on what type of juror would best be 'objective and impartial'. He should be over 25 years of age because:

'Young people – particularly students are inclined to be rebellious and mutinous . . . if they are on a jury, one way of demonstrating it is by returning a verdict against the establishment, that is a verdict of not guilty, no matter how strong the evidence, the other way.'[26]

Lord Denning, perhaps surprisingly after his statements in *Brownlow*[27], now thinks that the jury selection procedure should be refined to ensure that a jury is composed of only 'sensible and responsible members of the community'[28]. The problem, of course, is who is to be deemed 'sensible and responsible' and by whom.

The recommendations of the Association of Chief Police Officers are enlightening as well. They wanted checking of criminal records of jurors done where there was any reason to suspect a potential juror was disqualified, or that in a previous abortive trial there had been an attempt to interfere with jurors or in any other cases where it was 'important' that no disqualified juror was involved. These checks might be made without applying for the Attorney General's authority. However, more controversially, the broadest proposal was that when information is obtained that does not disqualify a juror, but makes him 'unsuitable', the police or the DPP may pass it to prosecution counsel[29].

In the television debate with Judge King-Hamilton, the Chief Constable of Kent spoke in favour of vetting saying:

'There is no means of ensuring that the defendant will get an objective and impartial trial . . . we have got to do something to stop criminals having their own way. One of the areas where they can be stopped is by having objective and impartial juries.'[30]

There is of course the traditional means of ensuring an objective and impartial jury, namely random selection from the panel. However it seems that this is no longer enough, and the further step of dispensing with 'unsuitable' jurors needs to be taken.

Thus proponents of jury vetting believe it ensures 'objective' and 'impartial' juries. The problem is that not everyone would accept the

26. Reported in The Times, 15 March 1980.
27. See *post.*
28. Lord Denning *What Next in the Law?* (Butterworths, London, 1982) p. 77.
29. The Times, 2 September 1980.
30. The Times, 15 March 1980.

notions of objectivity and impartiality as being accurately or properly defined by Judge King-Hamilton or Lord Denning or the Chief Constable or for that matter any agency of the state.

Recent decisions

Following the controversy raised by the Official Secrets trial, the publication of the guidelines and the anarchists trial, two cases, the subject matter of which was jury vetting, came to the Court of Appeal.

1. *Brownlow*

In *R v Sheffield Crown Court, ex p Brownlow*[31], the court considered to what, if any, extent jury vetting could be generally countenanced. This case involved two police officers, charged with assault, who applied at their trial for a direction from the judge to the prosecution, to inform their counsel whether any members of the jury panel had any criminal convictions. In this case it was the defence which desired the vetting. The judge ordered the Chief Constable of South Yorkshire to furnish the defence and the prosecution with full details of any criminal convictions recorded against any member of the jury panel. The Chief Constable in turn applied for an order of *certiorari* to quash the judge's order. The application was dismissed because the Divisional Court held that it had no jurisdiction in the matter and the Chief Constable appealed.

The case turned on an issue of statutory interpretation[32], and the court (Lord Denning dissenting) followed the Divisional Court in holding that it had no jurisdiction to consider the original order of the trial judge.

However, because the trial judge asked for some guidance on a matter of public concern both Shaw LJ and Lord Denning commented at length, *obiter dicta*, on the practice of jury vetting.

Lord Denning outlined two rival philosophies of jury selection. One says that parties to a dispute ought to know all about the jurors to ensure their suitability to try the case. That philosphy prevails in the USA. The other is that the jury is selected randomly, in order to represent a cross-section of the people, and the parties to the dispute must take the jurors as they come. This prevails in England. So well established is the principle of random selection in England that Lord Denning could not recall in his career a single 'challenge' or 'stand by' for the Crown. Additionally he pointed out that Lord Devlin in *Trial by Jury* (1956) stated that the Crown's right of challenge is obsolescent.

Lord Denning went on to outline the recent disclosures of jury vetting and expressed his own view that the practice was 'unconstitutional'[33]. He indicated that he was concerned about the privacy of jurors and pointed out that in the event of an unsuitable juror sitting, the likelihood of his influencing the result is minimal, particularly now

31. *Supra* n. 17.
32. Re the Courts Act 1971, s. 10(1), (5).
33. *Op. cit.* p. 900.

when there is a majority verdict. This latter practical critisism is particularly interesting coming from such a strong opponent of the introduction of the majority verdict.

Shaw LJ started by stating his agreement with Lord Denning:

'that any order or direction of a court designed to facilitate the selection of a jury by methods not directly provided for in the Juries Act 1974 or recognised by the common law is unconstitutional'[34].

He thought that if the prosecution used the knowledge about jurors available to it this would be 'contrary to the spirit and principle of jury service'[35]. He did envisage 'very special cases' where in the public interest such knowledge ought to be used, but only with the sanction of the Attorney General. However it would be impermissible to allow jury vetting merely because it might strengthen a prosecution by excluding from a jury someone who might be well disposed to criminals or anti-authority.

Shaw LJ was also worried about the privacy of the jurors and the fact that enquiries might 'harass or intimidate' them, which would prevent them discharging their function 'fearlessly and impartially'.

The only comment Brandon LJ made was:

'I have serious doubt whether there should be any jury vetting at all, either by the prosecution or the defence'[36]

Therefore Lord Denning certainly, and perhaps Brandon LJ, rejected the concept of jury vetting outright. Shaw LJ, while disapproving generally of the practice, left the door open to its use in 'very special cases'. The arguments used by the judges were primarily on the 'ideological' level, although some concern was expressed on the 'practical' ground of the danger to jurors' privacy. Lord Denning was worried that, if vetting was allowed in a case involving a minor assault charge, then jury vetting would be permissible in every case. 'We shall have "jury vetting" introduced into this country beyond recall unless parliament in two or three years takes a hand'[37].

2. *Mason*

Only two months after Brownlow, a different bench of the Court of Appeal expressed some remarkably different views concerning jury vetting. In *R v Mason*[38] the court was faced with a situation where, before the applicant's trial, the police had checked the local criminal records and, unknown to the defence, they had supplied counsel for the prosectuion with the names of those called for jury service who had been convicted of criminal offences. This had occurred in Northampton before

34. *Op. cit.* p. 902.
35. *Op. cit.* p. 903.
36. *Op. cit.* p. 904.
37. *Op. cit.* p. 895.
38. *Supra*, n. 15.

the routine use of vetting had come to light and the Chief Constable had agreed to stop these checks.

When the jury were being empanelled, counsel had asked four members of the panel to stand by for the Crown. The applicant sought leave to appeal against conviction on the ground that this was a material irregularity in the course of the trial. In this instance the issue as regards jury vetting was more specific than that canvassed in *Brownlow's* case. Disregarding the opinion of the court in that case, the court in *Mason* refused the application for leave to appeal and did not criticise this instance of jury vetting.

Counsel for the applicant submitted that the information supplied by the police to prosecuting counsel could only be used in certain circumstances. He argued that a standby could only be requested on the basis of such information where it seemed likely that cause could be shown. To show cause it would be necessary to satisfy the court that the potential juror was in fact biased. The fact of a previous conviction by itself does not prove bias. Additionally, counsel submitted that the Juries Act 1974 should be construed as envisaging that everyone qualified to serve as a juror should be allowed to do so unless specifically disqualified, excused or rendered ineligible under Schedule 1 of the Act.

The court rejected the latter argument, which was one that the court in *Brownlow* had appeared to favour. Instead the court took the view that

'prosecuting counsel for centuries have had the right to ask that a member of the Panel should stand by for the Crown *and* to show cause why someone should not serve on a jury'[39]

The Juries Act does not alter this. Where the right of stand by is exercised, the court thought that cause does not have to be shown until and unless the panel is exhausted.

The court justified this right with a rather unlikely example involving the trial of a poacher for unlawfully wounding a gamekeeper. The court stated that someone with poaching convictions in the same area would be unsuited for jury service although not disqualified. The strength of this argument to justify the crown's use of the right to stand by is negligible. As counsel for the applicant pointed out, in such a case there would be reasonable grounds for thinking that there might be bias and therefore the crown could show cause to challenge the juror.

The further justification of jury vetting the court used is the need to prevent crime. It is a criminal offence to serve on a jury while disqualified. Therefore the police are doing no more than their normal duty of crime prevention in scrutinising jury panels.

'In the course of looking at criminal records convictions are likely to be revealed which do not amount to disqualifications. We can see no reason why information about such convictions should not be passed on to prosecuting counsel.'[40]

39. *Op. cit.* p. 622.
40. *Op. cit.* p. 625.

Nevertheless there is an illogical step in the above argument. It may well be that it is permissible for the police to check that there is no 'disqualified' person on the panel, who would be committing an offence under the Juries Act 1974 were he to sit. But, if someone is not disqualified under the Act, what reason is there for taking further action? How can the need to prevent disqualified jurors sitting justify the passing of information about qualified people by the police to prosecuting counsel?

If information about past convictions can be passed, what other information might there be 'no reason' not to pass? When one considers the type of information that seems to find its way on to police computers generally, and in particular the information disclosed to the defence in the anarchists trial, the problem is obvious.

The court was aware of the problem of jurors' privacy and thought that any information should be circulated to as few people as possible. Consequently it felt that the prosecution had no obligation to pass any information on to the defence!

The final factor which persuaded the court that jury vetting was permissible was legal precedent. After discussing the historical development of the Crown's right to ask a juror to stand by and the thesis that this right can be exercised without there being 'a provable valid objection', the court elected to follow the 19th-century case of *Mansell v R*[41]. In *Mansell* it was held there was no need to show cause until the panel was exhausted.

Throughout, the court equate the use of jury vetting with the traditional devices for qualifying random selection. These include challenges for cause, the peremptory challenge, the judge's intervention if the potential juror cannot read the words when taking the oath or hear what is being said, or the situation where the potential juror is ill or insane. The court ignores the fact that jury vetting, followed by the use of the right to stand by jurors with no need to show cause until the panel is exhausted, in effect, gives the Crown an almost unlimited number of peremptory challenges. This is obviously unfair. Indeed the unrestricted use of the peremptory challenge by the Crown was outlawed in 1305 by statute[42] and this was superceded by similar legislation in 1825[43]. The Crown revived this right 'by the back door' using the stand by instead of the challenge. This practice was accepted in *Mansell* on the basis of a somewhat controversial interpretation of these statutes. The court in *Mason* had an opportunity to reconsider this area of law but did not grasp it.

Nowhere does the court discuss the ramifications of this practice, for example, the effect on the notion of a randomly selected jury, or the danger of a public belief in packed juries. Unlike the court in *Brownlow* the judges do not appear to be aware of the wider issues, nor are they

41. (1857) 8 E & B 54. For a full discussion of the history of the Crown's right of stand by see J. McEldowney 'Stand by for the Crown – An Historical Analysis' (1979) Crim LR pp. 272–283.

42. 33 Edw I Stat 4.

43. Juries Act, s. 29.

worried by the possibility that the practice might spread. The court states that the Attorney General's guidelines to restrict vetting do not have the force of law, yet no concern is expressed about the consequent impossibility of enforcement[44].

The court appears to be perfectly happy to leave the exercise of the Crown's right to stand by in the hands of the prosecution, with no supervision. 'We would expect them to act responsibly and not to request a stand by unnecessarily'[45]. Yet how can we expect the prosecution to exercise this power in a neutral fashion? It is not fair to them or the accused. It is certainly not wise. In view of the type of information the prosecution may acquire, beyond a list of criminal convictions, it seems most unsatisfactory to subject them to this conflict of interests.

Thus the court focussed its attention on the 'practical' arguments against jury vetting, and found them without merit. It never really considered the 'ideological' arguments.

The state and the jury – conclusion

The state long ago tried to control or, at least, influence the decision of the jury, using methods like unlimited challenges, jailing jurors for verdicts of acquittal, 'packing' juries etc[46]. It has frequently tried to retain the legitimising effect the jury has on the criminal justice system while denying it true efficacy.

Since accusations of 'packing' juries 150 years ago the state has not made any real attempt to control the activity of the jury until recently. Indeed recent reforms have been in line with the traditional ideals of the jury and have served to strengthen it as an institution.

The debate which preceded the enactment of the majority verdict found common ground in the desire for an independent jury. The opposing camps differed simply on the best way of achieving this. The argument that carried the day was that by dispensing with the unanimous verdict the power of the corrupt or perverse juror would be neutralised.

'We want this clause in the Bill for two reasons. First by far the most important, to check the abuse of the jury system by the intimidation or corruption of jurors, or attempts to corrupt them. Secondly and admittedly far less important but still important, to reduce the frustration and waste which is caused when a jury is prevented from reaching agreement by the perversity of one or two jurors.'[47]

It is interesting to note that two separate arguments are advanced. In ideological terms arguments for change based on the need to safeguard the jury's independence are much more attractive than those based on reducing waste and frustration by make the jury more effi-

44. *Mason*, at 626.
45. *Ibid.* at 625.
46. For a full account see Cornish *op. cit.*
47. Lord Stonham, Joint Parliamentary Undersecretary of State for the Home Office. Parliamentary Debates (HL), Vol 283 p. 330.

cient. The latter arguments might appear merely expedient in placing 'efficiency' before 'justice'.

Certainly the other recent reform, that of the franchise in 1972, was carried out in order that the jury could still be seen to be representative of the community and thus impartial and independent. This change strengthened the jury's legitimacy as we have already mentioned.

Jury vetting is a slightly different matter. The difficulty lies in seeing how the legitimacy of the practice can be based on the need to protect the traditional jury ideals. Proponents of vetting attempt to justify it in this way. Yet they fail in their arguments, as we have tried to demonstrate.

Why then is the state trying to control or influence the jury once more? Why, at this time, does it wish to weed out what it perceives to be the 'biased' or 'partial' juror? Why is there a new pressure to obtain more compliant juries?

The broadening of the jury franchise has undoubtedly had an effect in encouraging vetting. The average juror is no longer 'middle aged, middle class and middle minded' to use Lord Devlin's description[48]. He is therefore less likely automatically to be on the side of authority, less likely to uphold an oppressive law, less likely to agree with the state, less likely to accept the evidence of the police where there is a dispute, more likely to sympathise with, or, at least, understand the experiences of the defendant, and, therefore, one would guess, less likely to convict. The introduction of the majority verdict, shortly before the extension of the franchise, no doubt helped to mitigate these effects. One wonders if abandoning the requirement of unanimity was encouraged by the impending disposal of the property qualification.

Jury vetting is perhaps another attempt to lessen the impact of a truly representative jury. Having been forced to abolish the property qualification to maintain the jury's legitimacy, the state is then trying to exclude, in an underhand way, those whom it considers undesirable. Most would not have been eligible for service before the reform. True representativeness is seen to be dangerous. The state wants 'middle minded' jurors. In other words the state is trying to have its cake – increased legitimacy – and eat it – by excluding those it does not want.

Another pressure to vet is that the state is increasingly developing a criminal justice system operated by technicians and administered by professionals. Efficiency, cost and expedition are their concerns. Certain agencies within the system have responded enthusiastically to this development. The police, for example, have emphasised their expertise and exerted their growing power in pushing for 'modernisation' of the criminal justice system.

The attacks by the police (led by Sir Robert Mark) against the jury's control over the trial verdict are a prime example of this trend[49]. The jury is seen by the police and others as an impediment to greater efficiency in the 'crime control' model of justice[50]. The right to jury trial

48. P. Devlin *op. cit.* p. 20.

49. See e.g. Mark R., *The 1973 Dimbleby Lecture* (BBC Publication, London, 1973).

50. See H. Packer *The Limits of the Criminal Sanction* (Stanford University Press, Standford, 1968). Packer contrasts the 'crime control' model of justice with the 'due process' model.

has recently been curtailed by limiting the type of offence for which it can be demanded[51]. The obstacle the jury presents to the processing of people through the criminal justice system is further lessened by vetting the jurors. After all the police and prosecutors do not bring people to court unless they are almost certainly guilty[52]. There have been many complaints about the high acquittal rate in jury trials.

In reality those who support vetting appear to do so on the basis that through it the jury can be improved in terms of efficiency, predictability and compatibility with the state's notion of justice. Independence is not really seen as a virtue by the state. It is thought that the jury should be slotted more comfortably into the modern system of justice administration and in return the jury can function more efficiently if it is cognizant of the aims and purposes of the administrative system as a whole[53]. A 'wayward' jury can only disrupt the smooth running exercise of the state's responsibility to punish the wrongdoer. Now that the technology exists to scrutinise jurors, it is bound to be used. Nevertheless the state must be careful. The jury cannot continue to retain its legitimacy indefinitely if it is abused by the state. That is why jury 'packing' and the device of 'special' juries had to stop. It is the jury's independence, and its waywardness, when it holds firm against the all persuasive forces of the law and the state, which generate the jury's popularity and the faith which the public have in it.

51. Criminal Law Act 1977.
52. See H. Packer *op. cit.*, J. Skolnick *Justice Without Trial* (Wiley, New York, 1966).
53. See E. Thomson *op. cit.*