The Political Jury
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The decision by a particular society to use the jury as the arbiter of guilt or lack of guilt is a political one. There is nothing inevitable about this: many countries across the world vest such questions exclusively in the hands of professional or amateur judges. And although one can see the jury as one of the earliest assertions of a form of democracy in the post-classical world its arrival at that position came after a long and haphazard journey. The earliest juries in England seem to have constituted a body of men of the locality who were engaged in fact finding as well as applying their own knowledge of the facts relating to the crime. So, there was no real differentiation between what we would today think of as the distinct roles of juror and witness.

It was only gradually that the jury became understood to be a body of men – and until the twentieth century it was exclusively men - who had no personal involvement in the facts of the case and who were invited simply to bring to bear their supposed collective wisdom to decide on the outcome of a prosecution by reference solely to the evidence presented to them. Since the jury arrived at that status writers from all perspectives have tended to become rather misty eyed about juries. Probably the most famous words ever written about a jury were those of Lord Devlin, one of the greatest judges of last century, and not a noted sentimentalist, who referred to the jury as a “little parliament” and “as the lamp that shows that freedom lives.”

Since then, the jury has been a contested terrain, which is hardly surprising given the potential significance of the verdict they are entrusted to arrive at. For centuries governments tried to ensure that juries were composed of placemen who would deliver the desired verdict of guilty in state trials; and judges were not backward in instructing juries in strong terms as to the verdict they should arrive at. And, although a good deal of romance surrounds the institution of the jury, it cannot be denied that many juries did indeed prove to be compliant to the will of the executive and the judiciary.

The trials of the regicides will give you a flavour. In the trial of John Cooke, who I discussed in my first lecture, the judge, Orlando Bridgeman directed the jury, based on the evidence the court had heard: “If these be not overt acts of compassing and imagining the death of the king I do not know what they are”, before adding by way of after-thought: “It must be left to you, members of the jury”; though he suggested “I think you need not go from the bench.” Having understood what they were required to do the jury duly convicted and the foreman of the jury then left the jurybox to go to the seats reserved for prosecution witnesses: he was to be a crown witness against the next defendant being tried for regicide. That juror was shortly ennobled for his services to the Crown.

Still, one of the standard heroic narratives of English history is the story, chequered and fragmented though it is, of the refusal of jurors to be cowed into subservience by establishment forces and its development into a freestanding institution unaccountable to the state or the judiciary. In part that development came as a result of multiple individual acts of bravery and defiance.

You may think it an established principle that a juror cannot be held accountable for the verdict he or she arrives at. You would be right; but you might find it extraordinary that for centuries jurors were

at risk of criminal prosecution if they returned verdicts which were supposedly “contrary to the evidence.”

There is in the main hall of the Old Bailey a plaque to the jurors who sat in the trial of William Penn and William Mead, two Quakers who were charged with unlawful assembly in 1670, after three hundred of their co-religionists gathered to worship in the open air. After the trial the jury produced rather equivocal verdicts which did not satisfy the judges presiding, who issued this threat: “Gentlemen, You shall not be dismissed till we have a verdict that the court will accept; and you shall be locked up, without meat, drink, fire, and tobacco; you shall not think thus to abuse the court; we will have a verdict, by the help of God, or you shall starve for it.’

The jury duly became less equivocal; but instead of the guilty verdict the judges had demanded of them the jurors declared the defendants to be not guilty. The infuriated judge promptly fined them for contempt of court and ordered their imprisonment until the fine was paid. Their alleged misdemeanour? To have delivered a verdict which the judges thought to be contrary to the evidence presented.

It was no doubt the danger of finding yourself at risk of criminal liability that had traditionally encouraged juries to take the view that discretion was the better part of valour and that to do the judge’s bidding was generally the wise course. However, one of the jurors, Edward Bushel, refused to pay the fine and petitioned a higher court for a writ of habeas corpus, seeking his release. The case came before the Chief Justice who ordered Bushel to be set free, on the grounds that a jury was entitled to arrive at their own verdict on the evidence in accordance with their collective conscience, even if that verdict was contrary to the direction of the judge, or the judge’s perception of the evidence.

As so often in the English law the bravery of one person taking a stand caused a gear shift towards a more enlightened future. In this case the principle that a jury was a separate institution, placed at arms-length from and independent of, the judge. So that by the eighteenth century the jury was being extolled in legal writings as a bulwark of liberty against the dangers of corrupt and partial judges willing to do the bidding of the executive. In 1760 the lawyer Blackstone could describe the English jury in the following glowing terms:

> “trial by jury…ever has been, and I trust ever will be, looked upon as the glory of English law…The liberties of England cannot but subsist so long as this palladium remains sacred and inviolable.”

These were the days when the limits of executive power were being tested in the courts. And of course, judges were still attempting to influence jury verdicts. In one of the trials of the satirist William Hone, in 1817 for blasphemy and seditious libel, Lord Ellenborough told the jury that the publication which was in issue “was a most impious and profane libel.” He continued: “Believing and hoping that they were Christians, I have not any doubt that you would be of the same opinion.” Whereupon the jury found Hone not guilty, and it is said that there was rejoicing in the streets of London at the verdict; and that Ellenborough’s chagrin at the jury’s act of defiance hastened his own death.

It was a short step between a jury holding out against judicial bullying to deliver a verdict according to their honest perception of the evidence and a jury deciding that, even though it might have been proved beyond reasonable doubt that a crime had been committed, nonetheless the defendant deserved exoneration, whether because the prosecution was oppressive or the defendant was morally blameless, or for some other reason.

And so, developed the concept of the so-called “perverse verdict.” The word perverse has a pejorative association here and of course one can readily imagine verdicts either of guilt or acquittal

which are perverse in the sense of plainly wrong. But the phrase also developed a wider, more beneficent, meaning. It is in the ability of the jury to deliver a verdict which is plainly at odds with the evidence or the law that its capacity to act politically rather than quasi-judicially is most evident.

Before we look more closely at this, let's remember the traditional division between judge and jury in a criminal trial, as explained by an English judge, Lord Oaksey, in the 1950s.

> "It is a general principle of British law that on a trial by jury it is for the judge to direct the jury on the law and in so far as he thinks necessary on the facts, but the jury, whilst they must take the law from the judge, are the sole judges on the facts.
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> The jury is one of the great protectors of the citizen because it is composed of twelve persons who collectively express the common sense of the community. But the jury members are not expert in the law, and for that reason they must be guided by the judge on questions of law."[1]

Now what does this word "must" mean? Usually in law if you "must" do something then if you fail to do it you are at risk of a sanction. But here lies one of the great anomalies of the English jury system. A judge will always include in his summing up to the jury words to the effect that whilst the facts are solely for them, they must accept the law as the judge lays it down. Take this simple example: two men get involved in a brawl outside a pub. One punches the other and the other falls to the ground and dies. The judge will tell the jury that the crime of murder is made out if the defendant kills a person either with intent to kill him or with intent to cause him grievous bodily harm. But the jury, if they wish, can privately take the view that although they accept the evidence demonstrates irrefutably that the defendant did indeed intend to kill the victim, nonetheless they choose to find him not guilty, let's say because the victim deserved everything he got. And if the jury takes that view there is absolutely nothing that anyone can do about it. A verdict of not guilty, however it is reached, however overwhelming the evidence, is incapable of review or appeal. It is, subject to a very narrow exception involving the discovery of "new and compelling" evidence[2], final.

Every juror has to take an oath: "I swear by almighty God/I solemnly declare and affirm that I will faithfully try the defendant(s) and give (a) true verdict(s) according to the evidence." If he or she breaches that oath, there can be no consequences. It may be that those words create a sense of moral honesty, but it can do no more. As Lord Devlin said in a celebrated case "It is the conscience of the jury and not the power of the judge that provides the constitutional safeguard against perverse acquittal."[3]

You may think that my example is a ludicrously unlikely one. (In fact, it is not unprecedented: in 1922 a jury in Berlin acquitted a man who had assassinated one of the Ottoman architects of the Armenian genocide, who did not deny that he had done so; but said that he was justified in doing so[4]). But convert the two men outside a pub to a doctor giving his patient a fatal dose of morphine or potassium chloride to ease his suffering in his last weeks of life and you may think we are not too far removed from a scenario that occurs from time to time. I have no doubt that doctors charged with murder in this situation have been acquitted by juries who believed that the defendant had committed the crime of murder (and murder can be committed for the best as well as the worst of motives), but thought the doctor was entirely justified in doing so. So, this word "must" which I used earlier denotes aspiration rather than obligation.

To quote from the judgment of Lord Mansfield in another political trial of the 18th century: "It is the duty of the Judge, in all cases of general justice, to tell the jury how to do right, though they have it

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1 *Joshua v The Queen* [1955] AC 121 (PC).
2 See part 10 of the Criminal Justice Act 2003
3 *Chandler v Director of Public Prosecutions* [1964] AC 763.
4 Soghomon Tehlirian assassinated Talat Pasha on 15 March 1921. Tehlirian is treated as a national hero in Armenia.

in their power to do wrong, which is a matter entirely between God and their own consciences."[5] Of course "doing right" and "doing wrong" in this sentence can mean different things to different people. The jury who acquits the mercy-killing doctor may be doing wrong in one sense and doing right in another.

There are various well-known instances in recent history of juries delivering perverse verdicts in that wider, non-pejorative sense. I would like to mention three examples.

In 1965 Kempton Bunton was prosecuted for the theft of Goya's painting of The Duke of Westminster. Bunton, who had a passionate belief that old age pensioners should not be required to pay the television licence fee, removed the portrait from the National Gallery in a spectacular act of English derring-do and then purported to "hold it ransom" against his demands being met. He eventually returned the painting and was prosecuted. He was acquitted of theft of the painting on the grounds, as argued by his counsel, that he was merely borrowing the painting. We can account for the acquittal as a jury's response to a caper that seems to have been dreamt up in the Ealing Studios. Here was an amiable eccentric who had added to the gaiety of life and the jury took the view that the prosecution was oppressive and unnecessary.

More notable was the prosecution of Clive Ponting in 1983. Ponting, as many of you will recall, was a civil servant who worked in the Ministry of Defence during the Falkands War. He discovered facts that contradicted the official government account concerning the circumstances of the sinking of the *General Belgrano*, which he disclosed to the Labour MP Tam Dalyell. He was subsequently prosecuted under the Official Secrets Act. His defence was that what he did was in the interests of the state, which would constitute a defence to the charge. The judge, who happens to have been my father-in-law, told the jury that, as a matter of law, the "interests of the state" were synonymous with the policy of the government of the day. He therefore told the jury that it was no defence for Mr Ponting to say that he honestly believed that it was his moral duty in the interest of the state to make the disclosure. The jury disregarded the law and acquitted.

The final instance is perhaps the most remarkable of all. Two weeks ago, the death of the spy George Blake dominated the headlines. His extraordinary life and the magnitude of his crimes were recounted in his obituaries. You will recall that Blake was sentenced to 42 years in prison in 1961 – at that time the longest sentence ever imposed by an English court - and then staged a dramatic escape from Wormwood Scrubs in 1966, assisted by two idealist young peace campaigners. 25 years later those campaigners found themselves being prosecuted at the Old Bailey for their part in the escape. They put forward a defence which was patently inapt to the facts of the case – "necessity of conscience" – i.e., that they had been obliged to act to act to prevent the psychological harm Blake's long sentence would cause him, and that aiding his escape was therefore justified. Nonetheless throughout the trial they lost no opportunity to explain to the jury that they had acted out of principle and that the prosecution, brought 25 years after the event was oppressive and abusive. Quoting Bertrand Russell, they said 'Remember your humanity and forget the rest'. Again the jury agreed. To the barely concealed disgust of the judge – who had told them that they had to "loyally honour my ruling on the law" - they acquitted both defendants of crimes they admitted they had committed.

I wonder how many of you would approve of each of those acquittals. You might doubt the rightness of the verdict while accepting that the jury system necessarily carries with it the right on the part of the jury to deliver a verdict which is, in the sense I have articulated, perverse. Depending on your point of view the occasional perverse verdict may be seen as the triumph, or the inevitable price, of the jury system.

[5] *R. v. Shipley* (1784), 4 Dougl. 73, 99 E.R. 774, at p. 824.

There have been various responses to the jury's power to deliver a perverse verdict. Judges might be expected to take a dim view of a jury which ignores their direction on the law or delivers a verdict at variance with the evidence. Yet some have celebrated that power: Lord Birkett, a great twentieth century judge, said in the 1950s that "a jury can do justice where a judge, who has to follow the law, sometimes may not." This might be thought to be a refreshing recognition that sometimes law and justice may diverge: a jury is free to follow the path of justice, but the judge will always be bound to follow the path of law, which is a good reason why the final decision on guilt or not is best left to a jury. Others might respond that the notion that a jury can, at its discretion, set up its own conception of justice above the collective wisdom constituted by the law makes mockery of the notion that a person is entitled to be judged according to the rule of law.

Another conundrum is as follows: is it proper for counsel, acting on behalf of a defendant, to tell the jury that it has the power to disregard the facts and the law, to in effect disregard their oath? The issue arose in the Canadian case of *R v Morgentaler*.[6] Some of you may remember Dr Morgentaler, who was a doctor who ran an abortion clinic in Toronto in defiance of the law as it then stood. He believed that a woman had "an unfettered right to choose whether or not an abortion is appropriate in her individual circumstances." He was prosecuted for conspiracy to perform illegal abortions and he was undoubtedly guilty if one assumed that the statute as it stood was not unconstitutional (as it was subsequently found to be by the Supreme Court of Canada). Nonetheless his counsel, in his closing address to the jury said the following:

> "The judge will tell you what the law is. He will tell you about the ingredients of the offence, what the Crown has to prove, what the defences may be or may not be, and you must take the law from him. But I submit to you that it is up to you and you alone to apply the law to this evidence and you have a right to say it shouldn't be applied."

In effect counsel was saying to the jury: "don't apply this law if you think, as I submit, that this is a bad law. Send a signal to the Parliament that it should change the law. Act politically."

The Chief Justice of Canada agreed that the law was unconstitutional. But he also castigated counsel for his submission. He said this:

> "The contrary principle contended for by [counsel for Dr Morgentaler], that a jury may be encouraged to ignore a law it does not like, could lead to gross inequities. One accused could be convicted by a jury who supported the existing law, while another person indicted for the same offence could be acquitted by a jury who, with reformist zeal, wished to express disapproval of the same law. Moreover, a jury could decide that although the law pointed to a conviction, the jury would simply refuse to apply the law to an accused for whom it had sympathy. Alternatively, a jury who feels antipathy towards an accused might convict despite a law which points to acquittal. To give a harsh but I think telling example, a jury fuelled by the passions of racism could be told that they need not apply the law against murder to a white man who had killed a black man. Such a possibility need only be stated to reveal the potentially frightening implications of [counsel's] assertions."

So far as I am aware that exactly reflects the English law. It would be professionally improper for an English barrister to invite the jury to ignore the judge's direction on the law or to disregard the evidence. And that is no doubt why Michael Randall and Pat Pottle made the wise decision to dispense with their counsel for their trial. As litigants in person, they were free to say things to the jury which no professional advocate could say.

You may well think this is an anomalous situation: a jury has the power to "do wrong", to use Lord Mansfield's expression, but it cannot be told of that power by the lawyers acting for any of the parties

[6] [1988] 1 SCR 30.

or even by the judge. It must be kept entirely ignorant of one of its fundamental attributes. Lord Devlin went so far as to say that "it is the so-called perversity of juries that justifies their existence."[7] But, according to the English law, they must divine that foundational power for themselves.

Another response to the jury's power to deliver a perverse verdict was proposed by an English judge, Sir Robin Auld, when he carried out his wide-ranging *Review of the Criminal Courts of England and Wales* in 2001. When addressing the issue of "perverse juries" Auld noted that when the jury in *R v Randle and Pottle* brought in a verdict of not guilty they had acted contrary to the oath they had to swear, "faithfully [to] try the defendant and give a true verdict according to the evidence." He proposed that the law should "be declared, by statute if need be, that juries have no right to acquit defendants in defiance of the law or in disregard of the evidence, and that judges and advocates should conduct criminal cases accordingly." This view was quickly denounced by Michael Zander QC, Emeritus Professor of Law at the LSE in resounding terms:

> "I regard this proposal as wholly unacceptable - a serious misreading of the function of the jury. The right to return a perverse verdict in defiance of the law or the evidence is an important safeguard against unjust laws, oppressive prosecutions or harsh sentences."[8]

Auld's proposal has never been brought into effect.

In fact, the arc of the jury's development has been in broad terms to entrench its independence from the judge and the parties, and its freedom of decision making, and to make it more representative of the nation from which it is drawn. Let me give four instances of this:

First, I earlier mentioned Lord Devlin's little parliament. Well, just as the franchise has widened over the centuries, so has the composition of the jury. Jurors can sit until the age of 75, five years after the age of compulsory retirement of most judges. Women began to sit in juries in the 1920s; in the early 1970s property qualifications were removed; in the 2000s lawyers and clergymen, long exempted from jury service, were included. So, the mini parliament has become more representative.

Secondly, even if the evidence is overwhelming and uncontested in substance by the defendant the judge cannot trespass on the jury's province and direct them to convict. So, the House of Lords in John Stonehouse's case in 1978 said this:

> "If the judge is satisfied that, on the evidence, the jury would not be justified in acquitting the accused and indeed that it would be perverse of them to do so, he has no power to pre-empt the jury's verdict by directing them to convict. The jury alone have the right to decide that the accused is guilty. In an appropriate case…the judge may sum up in such a way as to make it plain that he considers that the accused is guilty and should be convicted. I doubt however whether the most effective way of doing so would be for the judge to tell the jury that it would be perverse for them to acquit. Such a course might well be counter-productive."[9]

In a later decision of the House of Lords Lord Bingham justified this rule on the rather charming basis that, however clear cut the case might look to the judge the evidence might have given rise to nuances not recognised by the judicial mind, i.e. the jury might have been able to bring to bear some demotic insight which evaded the cynical judge[10].

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[7] *The Judge* (OUP, 1979), p.131.
[8] *Lord Justice Auld's Review of the Criminal Courts: A Response*, p.22.
[9] *Director of Public Prosecutions v Stonehouse* [1978] AC 55, at 79
[10] *R v Wang* [2005] 1 WLR 661, at [17].

Thirdly, in 1988 the right of the parties to challenge a juror without cause was abolished. When I asked an old member of the Bar why he would exercise that right he would say that it was often purely on instinct and hunch: “he does not look like the kind of man who will be sympathetic to my client.”

Fourthly, the law has been clarified to make it a contempt of court, and now a criminal offence, to inquire into or disclose the deliberations of the jury. In 1979 Jeremy Thorpe was tried for conspiracy to murder. Despite the notoriously pro-defence summing up of the judge, his acquittal nonetheless came as a surprise given the weight of the evidence. Afterwards two *New Statesman* journalists interviewed one of the members of the jury as to what had passed between them in the privacy of their deliberating room and published an article recording the revelations. The jury had apparently been convinced that Thorpe had been guilty of a criminal conspiracy of some sort and were frustrated that only a conspiracy to murder had been charged, so that felt that they had to return a not guilty verdict. They were also appalled at the contract which one of the prosecution witnesses had entered into with a Sunday newspaper under which his fee would double in the event of a conviction.

The juror who spoke out was not motivated by money. Rather he wanted to protest against what he perceived as the failures of the criminal justice system. But that juror had, in the eyes of many, committed an unpardonable sin. He had violated the secrets of the jury deliberation room. When 60 years earlier one of the jurors in the trial of the poisoner Armstrong had spoken to the press the Lord Chief Justice protested vigorously:

> “In the opinion of this court nothing could be more improper, deplorable and dangerous. It may be that some jurymen are not aware that the inestimable value of their verdict is created only by its unanimity, and does not depend upon the process by which they believe that they arrived at it. It follows that every juryman ought to observe the obligation of secrecy which is comprised in and imposed by the oath of the grand juror. If one juryman might communicate with the public upon the evidence and the verdict so might his colleagues also, and if they all took this dangerous course differences of individual opinion might be made manifest which, at the least, could not fail to diminish the confidence that the public rightly has in the general propriety of criminal verdicts. Whatever the composition of a British jury may be, experience shows that its unanimous verdict is entitled to respect. That respect, with all that it involves, is not lightly to be thrown away, and it is a matter of supreme importance that no newspaper and no juryman should again commit the blunder, to use no harsher word, which has disfigured some of the reports relating to matters connected with the trial of this case."[11]

The Attorney-General in the then newly elected government led by Mrs Thatcher decided to act. He applied to commit the New Statesman for contempt of court for its temerity in publishing to the world the inner thoughts and workings of the Thorpe jury. The court considered the authorities and, notwithstanding those lapidary words which I have quoted, declined to hold that the journalists had behaved in a way which was criminally wrong.

This outcome caused a great stir and led to the hasty enactment of section 8 of the Contempt of Court Act 1981, which provided that “it is a contempt of court 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 in any legal proceedings.”[12] Just pause to consider how widely cast this prohibition is. At a stroke it prohibited any form of academic research or bona fide journalistic enquiry into jury decision making.

[11] *Rex v. Armstrong* [1922] 2 K.B. 555, 568-569

[12] Section 8 has now been replaced by section 20D of the Juries Act 1974, introduced by way of amendment in 2005.

You might ask, why is this all-encompassing protective veil cast over the deliberations of the jury? I think that most people tacitly accept that a principal reason for it is because if the veil was not so cast the reality of what in fact takes place in the jury retiring room might not be an entirely edifying. As I have mentioned earlier legal writers like to glorify the jury as an aggregation of the supposed collective wisdom of the citizenry. The process by which the jury applies that wisdom and arrives at its verdict can be the subject of eulogy provided it is not the subject of empirical investigation. Similarly, in order to maintain the illusion of some numinous process of truth-divination the jury, unlike every other decision maker in the legal sphere, gives no reasons. It merely utters the words "guilty" or "not guilty". A judge who delivered a judgment without reasons would be the subject of criticism and his decision would be bound to be set aside on appeal. But the jury is placed in a separate category. Not only is it not obliged to give reasons; it is positively prohibited from doing so. Again, I suspect that one reason for this is that a jury's written rationalisation of its decision-making process might not be an entirely comprehensible read.

Decision making in all walks of life is increasingly an expert enterprise. We would hope that the diagnosis of illness would be left in the hands of a suitably qualified doctor rather than a quack. We would also hope that the examiner who decides the grades for our childrens' GCSEs had expertise in the relevant field and the capacity to distinguish a good from a poor student. But when it comes to the ascertainment of guilt, we are content to leave the decision to twelve randomly chosen individuals, "a bunch of amateurs" as somebody once called them, without regard to their level of education or skills in the ascertainment of truth.

Many writers over the years have considered the institution of the jury from a more contrarian viewpoint to that espoused by Lords Devlin and Birkett. The late Sir Louis Blom-Cooper's last book, published in 2018, was an extended critique of the jury system.[13] He drew attention to the fact that the jury in civil trials has now been abolished, without overt dissent or noticeable harm to justice; to the practical impossibility of a jury understanding the mass of complex evidence in long fraud trials; to the success of the Diplock courts in Northern Ireland, where judges sat alone because of the danger of jury intimidation in terrorist cases; and to the fact that for all our romanticisation of the jury trial in fact only about 1% of crimes charged in fact end up being tried before a jury.

Yet there is no prospect in any foreseeable future of the system changing in a fundamental way and I certainly do not advocate it. Why? The answer takes me back to the starting point and title of my lecture. Not only can the jury act politically, in its ability to deliver a perverse verdict, but it is as an institution inherently political. It is part of the organisational structure of our society and an accommodation of competing social demands. I do not believe that it exists because it is perceived to be the best mechanism yet devised for the ascertainment of truth. It exists because in order for a justice system to work it has to command the confidence and respect of the populace. I suspect that most of us would prefer to be tried by 12 random people like us rather than a judge, who rightly or wrongly (and probably wrongly) we perceive as not "like us"; and a verdict of guilty delivered by a jury carries with it a stamp of legitimacy which the verdict of a single judge might not. It is not justice being imposed from "on high"; it is justice being delivered in a way democratically.

Very few people quarrel with a jury verdict of guilty; its anonymity and lack of reasons actually invest it with authority. A guilty verdict provided by a judge would have be a reasoned one. And once reasons are forthcoming, however well-argued they might be, they can be unpicked and disputed. I can well imagine such a verdict being contested – not necessarily in the sense of being challenged by the appeal court - but in the sense of not commanding community support. In circumstances where the magistracy and the judiciary is overwhelmingly white this matters. David Lammy's 2017 report on inequality in criminal justice found that the jury was the one part of the system with adequate ethnic diversity.

[13] *Unreasoned Verdict: The Jury's Out* (Hart, 2018).

If the system we have means that some people are acquitted who should have been convicted, because a jury was baffled by the evidence or bamboozled by the advocacy of defence counsel, then so be it. The alternative is infinitely worse.

The politics of the jury trial came back into focus last year as the pandemic closed the courts and created a conundrum for the court service: how to clear the huge backlog of crown court trials in circumstances where it was difficult to bring back the jury. The justice secretary put forward various proposals which would have temporarily abrogated the right to jury trial in various categories of offence, to replace it with judge only trials. The result was uproar. Apparently 93% of the members of the criminal bar opposed the idea even though it would have been economically advantageous for them to promote it. Francis FitzGibbon QC, a former chair of the Criminal Bar Association, wrote a piece in the London Review of Books this summer. He concluded as follows:

‘A good jury turns into a little community,’ Baroness Hale has said, ‘working together in the interests of justice.’ As a jury advocate for over thirty years, I have always been impressed, and often humbled, by the care and dedication they give to their work. Academic research supports the experience of criminal lawyers that juries are fair and do their utmost to bring in the right result. In every case, it isn’t just the defendant on trial: the state itself is on trial, too, in public, before its citizens. Can it prove its case to the high standard the law requires? Has it used its coercive powers wisely and lawfully? Have its operatives in the courtroom – the judge and the lawyers – conducted themselves properly?

The proposal was not pursued. Instead, across the country Perspex screens are being erected in courtrooms and juries are returning to carry out their civic responsibility.