Do We Need Juries?

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In this lecture, I am going to pose a simple question, "Do we need juries?"

For my whole career, I have practised law in England and Wales and in other Commonwealth jurisdictions which use the English common law. Juries are often thought of as a quintessential institution of English law, just as the investigating magistrate is a quintessential institution of French law. Jury trials are a constant presence in our literature, film and television. Most members of the public, even those who have never come into contact with the legal system, have a basic idea of what a jury is. And the institution of the jury has often been romanticised as part of our national mythos. The right to trial by a "jury of one's peers", "twelve good men and true", has historically been held up as a safeguard of the Englishman's liberty. Many defenders of jury trial quote the famous words of clause 39 of Magna Carta:

> "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land."

In fact, however, the use of jury trials in England and Wales today is rather limited. Juries today are principally used in criminal cases. But juries only decide a small proportion of criminal cases. Defendants charged with minor offences, which we call "summary offences", are dealt with in the magistrates' courts, which do not have juries. Defendants charged with serious offences, which we call "indictable offences", have the right to trial by jury in the Crown Court. But even then, a large number of indictable offences are not in fact dealt with by a jury, for example because the defendant pleads guilty prior to trial. In short, thousands of people every year are arrested, charged and convicted without ever seeing a jury.

Although juries were historically used in civil trials in England, the use of civil juries today is extremely limited. Many English civil lawyers go their entire careers without ever appearing before a jury. However, as a large proportion of my practice has involved actions against the police, I have more experience of civil jury trials than most lawyers do.

Coroners in England and Wales can also summon juries for inquests. Most inquests take place without a jury, but a jury is required in certain cases, such as deaths in custody and deaths caused by the police.[1] The task of a coroner's jury is of course very different from the task of a jury in a criminal or civil trial, and in many ways even more challenging. I talked about coroners' juries in my previous lecture series, and we aren't going to be looking at coroners today.

I should mention at this stage that the Scottish legal system also uses juries, although there are numerous important differences between Scottish and English practice. In this lecture we will be concentrating on the English system.

When we look beyond the UK to other parts of the Commonwealth, we see that the use of jury trials is inconsistent. Some Commonwealth jurisdictions, such as India, Singapore and South Africa, have abolished juries altogether. Others, such as Hong Kong, only use them in a very limited number of cases. However, in the Commonwealth Caribbean, where I practice, trial by jury continues to be used for serious criminal cases.

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[1] Coroners and Justice Act 2009, section 7

The country most associated with jury trials today is the United States, where jury trials are used for both criminal and civil cases, and in both federal and state courts. The United States has retained a much wider use of jury trials than England, although practices vary by state. Importantly, American jury trials differ from English and Welsh jury trials in significant ways, and we will be exploring some of those differences later in the lecture.

Finally, I should acknowledge that some civilian jurisdictions, such as France, have a form of trial by jury. But as an English lawyer, I am going to concentrate on common law juries.

Jury trials are a controversial subject. Many people are deeply attached to them as a safeguard of liberty and a bulwark against state power. However, others are sceptical. In recent decades, much of the criticism of juries has concerned questions of bias. Many people are understandably concerned that when guilt or innocence are decided by twelve members of the public, who bring their own prejudices to the table, they will treat some defendants less favourably than others. For example, you might reasonably assume that an all-White jury might harbour some biases against a Black defendant.

In fact, however, as we will see, the evidence paints a mixed picture as to whether jury verdicts are racially biased or not. There is some evidence that they are not, and this was a key point in David Lammy's review of ethnic minorities in the criminal justice system. But the point is debated. Later in the lecture we'll be getting into the evidence that Lammy relied on, and the criticisms that others have made of it.

But when it comes to the merits of jury trial, bias is not the whole story. We don't just want to know whether juries are biased against particular groups. We also want to know whether they're getting it right; for instance, in criminal cases, whether they're convicting the guilty and acquitting the innocent. After all, a legal system that decided guilt or innocence by tossing a coin would also show no racial bias, but that doesn't mean that it would be getting the right answers.

And this is a much more difficult question to answer. We can measure empirically whether juries are more likely to convict members of particular groups. But we can't measure empirically whether juries are making the right decisions. To state the obvious, we don't have any objective measure of whether the people they are convicting are actually guilty, or whether the people they are acquitting are actually innocent. And unlike judges, juries don't give reasons for their decisions, so we can't assess the quality of their reasoning.

In answering this question, however, we also have to look at the alternatives to jury trial. Even if juries are getting it wrong, it doesn't necessarily follow that professional judges or lay magistrates, who also have their own biases, prejudices and failings, would be more likely to get it right.

In today's lecture we're going to tackle these questions head-on. This lecture will be divided into three parts. In the first part, we'll dive into how the jury system works in England and Wales. In the second part, we'll examine the best available evidence about jury bias, and compare and contrast it with the evidence about judicial bias. And in the third part, we'll tackle the really difficult question: are juries getting the right answers?

Juries in England and Wales

As most people know, juries in England and Wales are an ancient tradition. We don't have time to cover the history of the English jury, which is a vast and complex subject. The role of the jury has changed substantially over the centuries. Historically, juries were used in both criminal and civil cases. In criminal cases there was a distinction between the grand jury, which decided whether an accused should be indicted, and the petit jury, which actually tried the accused.

A landmark early case on the constitutional independence of the jury was *Bushell's Case* (1670) 1 Freeman 1. There a jury had refused to convict two Quakers, William Penn (who went on to found Pennsylvania) and William Mead, for addressing an illegal religious assembly. The trial judge fined the jury for contempt of court. The juror William Bushell challenged his fine before the Court of Common Pleas, which held that jurors were not fineable for returning a verdict contrary to the evidence. This case is often cited as an early example of "jury nullification", where jurors protest an unjust law by acquitting a defendant. While jury nullification has always been a controversial subject, it remains the case today that a judge cannot direct a jury to convict a defendant, and that jurors cannot be punished for deciding to acquit a defendant.

The twentieth century saw a significant erosion of the right to jury trial. The general right to a civil jury trial was removed in the early twentieth century, except for some specific torts.[2] The list has been further eroded over time, so that today there is only a right to jury trial in claims involving allegations of fraud and claims for malicious prosecution or false imprisonment.[3] Meanwhile, in criminal cases, the grand jury has long since been abolished.[4]

The Sex Disqualification (Removal) Act 1919 allowed women to serve on juries for the first time. However, there were still property qualifications which meant that people with insufficient property could not serve on juries. The property qualifications were finally abolished by the Juries Act 1974. And majority verdicts were allowed for the first time by the Criminal Justice Act 1967, departing from the ancient rule that the verdict of the jury has to be unanimous.

And so we come to the position today. Today, the vast majority of English and Welsh juries sit in criminal trials. As such, the focus of this lecture is principally on criminal trials. An English and Welsh criminal jury consists of 12 people who are selected from the electoral register. We're going to look at the process of jury selection later in the lecture, and how it differs from its better-known American counterpart.

So what does the jury actually do? In England and Wales, the role of the jury in a criminal trial is simply to find the defendant guilty or not guilty. An English or Welsh jury has no role in sentencing, which is entirely the province of the judge. The judge also exerts control over the proceedings in a number of different ways. The judge decides whether evidence is admissible, and therefore whether it should be put before the jury. The judge gives the jury directions on the law, and also sums up the evidence before they retire to reach their verdict. And jurors are subject to punishment for contempt of court if they act improperly, for example by discussing the case on social media or researching information about the case on the internet. It remains the case, however, that the judge cannot compel the jury to convict the defendant against their wishes. It is the jury, not the judge, which decides upon guilt.

And finally, we need to understand the available alternatives to jury trials. Most civil trials in England today are decided by a professional judge sitting alone, or occasionally by a professional judge sitting with expert assessors. Most criminal trials in the magistrates' courts are decided by a bench of lay magistrates, who are volunteers from the local community and are not legally qualified, although they are advised by a legally qualified clerk. A minority of magistrates' court trials are decided by a professional district judge, previously known as a stipendiary magistrate.

Are Juries Biased?

Now that we understand the role of English and Welsh juries, and the available alternatives to them, let's turn to our first key question: are juries biased? For this question I'm going to focus on racial bias, not because it's the only form of bias, but because it's the one that has been most studied.

The first thing we want to look at is racial bias in jury selection. In this regard, it's interesting to contrast the systems in England and Wales with the very different systems in the United States.

The practice of allowing peremptory challenges to jurors, where either party can reject a certain number of jurors without providing cause, was abolished in England and Wales by the Criminal Justice Act 1988. This contrasts with the United States, where peremptory challenges to jurors are still allowed in the federal courts and in the courts of most states.

Although the Crown retains a traditional right to "stand by" a juror, the Attorney-General's guidelines on the use of the stand-by power make clear that it is to be used only exceptionally, and only in national security or terrorism cases. So in practice the use of this power is rare.

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[2] The Juries Act 1918 retained the right to jury trial only for libel and slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage. The Administration of Justice Act 1920 added fraud to the list

[3] The torts of seduction and breach of promise of marriage have been abolished, and the right to jury trial for libel and slander was removed by the Defamation Act 2013. For the current position, see Senior Courts Act 1981, section 69, and County Courts Act 1984, section 66.

[4] Grand juries were abolished with exceptions by the Administration of Justice (Miscellaneous Provisions) Act 1933. The last vestiges of grand juries were removed by the Criminal Justice Act 1948.

So the parties in an English or Welsh jury trial have less ability to influence the composition of the jury than those in an American jury trial. However, both the prosecution and the defendant do have the ability to challenge jurors for cause, and the judge does have discretion to stand down a juror (for example, because there is an appearance of bias or because they are not competent to serve).

Up until the late 1980s, English judges did occasionally use their discretion to discharge jurors in such a way as to ensure that juries were multi-racial. However, the Court of Appeal held in 1989 that a judge has no power to do this.[5] So a defendant of colour has no right to be tried by a racially representative jury.

So let's look at bias in jury selection. In the United States this is a familiar subject. In its 2021 report "Race and the Jury: Illegal Discrimination in Jury Selection", the Equal Justice Initiative highlights data from a range of American federal and state courts showing evidence of racial disparities at all stages of jury selection.[6] Many American jury pools under-represent people of colour. And both peremptory challenges and challenges for cause are often used disproportionately to exclude Black jurors and jurors of colour. Although racial discrimination in jury selection is theoretically illegal, the Equal Justice Initiative argues that the legal tests laid down by the appellate courts have made it difficult to prove racial bias, and there continues to be a massive race disparity at every stage of the process. It also reviews evidence from American studies suggesting that all-White juries are biased against Black defendants.[7]

But as we have seen, we can't just read those findings across to England and Wales and assume that they apply here, because our juries are very different.

So let's turn to the English data. We're going to start with Cheryl Thomas' 2007 study, "Diversity and Fairness in the Jury System".[8] For the purposes of discussing this study, I'm going to adopt Thomas' own terminology when discussing race, including the use of the umbrella term "Black and Minority Ethnic", in order to accurately represent what the study shows. I should say that this is not necessarily the language that I would have chosen myself.

This study approached jury diversity and fairness in a number of ways. It has a number of interesting findings, which I can't cover comprehensively in this lecture. But I'm just going to highlight a few headline points that are important for our purposes.

Thomas studied all stages of the jury selection process. In her survey of 84 Crown Courts, in all but two courts there was no statistically significant difference between the proportion of Black and Minority Ethnic jurors summoned and the Black and Minority Ethnic population in the court catchment area.[9] There was also no evidence of disparity when broken down by ethnic group.

However, she did highlight that for the majority of Crown Courts in the country, the Black and Minority Ethnic population in the court catchment area is below 10%, which means in practice that there is little likelihood of Black or Minority Ethnic jurors serving on a jury at these courts. In other words, all-white juries tend to happen at these courts not because the selection process is biased, but simply because of the demographics of the local population.[10]

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[5] R v Ford [1989] QB 868

[6] Equal Justice Initiative, "Race and the Jury: Illegal Discrimination in Jury Selection," 2021 https://eji.org/wp-content/uploads/2005/11/race-and-the-jury-digital.pdf

[7] Ibid., pp 57-60. This included statistical evidence from two Florida counties that juries drawn from all-White jury pools convict Black defendants significantly more often than White defendants Anwar, S, Bayer, P and Hjalmarsson, R (2012) "The Impact of Jury Race in Criminal Trials," The Quarterly Journal of Economics 127(2), 1017-1055 https://academic.oup.com/qje/article/127/2/1017/1826107 It also included experimental evidence suggesting that more diverse juries have higher-quality deliberations and are fairer to Black defendants: Peter-Hagene, L (2019) "Jurors' cognitive depletion and performance during jury deliberation as a function of jury diversity and defendant race," Law and Human Behaviour 43(3), 232-249 https://northerndistrictpracticeprogram.org/wp-content/uploads/2021/06/Peter-Hagene-Jurors-Cognitive-Depletion-and-Performance.pdf Sommers, S R (2006) "On racial diversity and group decision making: Identifying multiple effects of racial composition on jury deliberations," Journal of Personality and Social Psychology, 90(4), 597–612 https://www.apa.org/pubs/journals/releases/psp-904597.pdf

[8] Thomas, C, "Diversity and Fairness in the Jury System," Ministry of Justice Research Series 02/07, 2007 https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/diversity-fairness-in-the-jury-system.pdf

[9] Ibid., p 57

[10] Ibid., p 65

She also highlighted, however, that some courts with an overall low population of Black and Minority Ethnic people did have high concentrations of ethnic minorities in some parts of their catchment area. So in these areas a person of colour might well end up being tried by an all-White jury, not because the summoning process was biased but because of the overall demographics of the court catchment area.[11]

Among those who didn't respond to jury summonses, she didn't find evidence that courts with a higher Black and Minority Ethnic population had a higher non-response rate.[12] So there was no evidence that people of colour were any less likely to respond to a jury summons.

She also looked at those who were actually selected to serve on a jury, as opposed to being disqualified or excused. She found that in most of the 84 Crown Courts, the proportion of Black and Minority Ethnic people serving on juries was generally consistent with the proportion of Black and Minority Ethnic people in the court catchment area. There were only three Crown Courts where Black and Minority Ethnic people were significantly under-represented on juries.[13]

In addition to analysing the jury selection process, she also carried out a case simulation study using real jurors summoned to Blackfriars Crown Court, selected in the same manner that a real jury would be selected. The case, which was based on a real case, involved a male defendant accused of punching a male victim in the face after a confrontation outside a bar. The case was one which in real life had resulted in a hung jury. The facts of the case were kept the same in each simulation, but the race of the defendant and the victim was varied to Black, White or Asian. In some simulations the defendant was charged simply with assault occasioning actual bodily harm, while in others he was charged with racially aggravated actual bodily harm.[14]

Thomas found that in the 54 separate jury decisions in the study, outcomes for the defendants were remarkably similar regardless of race. Whether Asian, Black or White, the defendants were almost always either found not guilty by a majority verdict, or the outcome was a hung jury.[15] There were some racial disparities that emerged in relation to how individual jurors voted, but these did not result in any racial disparities in the overall jury verdict.[16]

Thomas carried out a second study in 2010, "Are juries fair?"[17] In this study, Thomas ran the same case simulation, but this time at two courts with a mostly White catchment area, Nottingham and Winchester. She found that the all-White juries in this study were not more likely to convict a Black or Minority Ethnic defendant than a White defendant. This held true for both Black and Asian defendants.[18] Interestingly, she also found that in Nottingham, a relatively more racially diverse area, jurors had more difficulty reaching a verdict when the case involved a Black or Minority Ethnic defendant or victim, as opposed to when it involved only White participants. But the same was not true in Winchester, a less diverse area.[19] Another interesting finding was that jurors in Nottingham were significantly more likely to convict the White defendant when he was accused of assaulting a Black or Minority Ethnic victim than when he was accused of assaulting a White victim. But again, no similar pattern was seen in Winchester.[20]

Pausing here, this methodology has two obvious limitations. Firstly, it's possible that jurors who know that they are participating in a study might be less inclined to display racial bias than jurors in a real case, whose deliberations are secret. Secondly, Thomas' case simulation concerned a case that resulted in a hung jury in real life, meaning that it may not be representative of most cases that come before the courts.

That said, Thomas' 2010 study also carried out a large-scale analysis of jury verdicts. She looked at all cases in all Crown Courts in England and Wales from 1 October 2006 to 31 March 2008, including over half a million charges. This data showed that White and Asian defendants both had a 63% jury conviction rate,

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[11] Ibid., pp 66-69
[12] Ibid., pp 73-74
[13] Ibid., p 89
[14] Ibid., p 159
[15] Ibid., p 162
[16] Ibid., pp 164-168
[17] Thomas, C, "Are juries fair?" Ministry of Justice Research Series 1/10, 2010
https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf
[18] Ibid., p 15
[19] Ibid., p 16
[20] Ibid., p 17

while Black defendants had a 67% jury conviction rate.[21] Thomas described this as a small difference, although it is notable that Black defendants were slightly more likely to be convicted.

For the Lammy Review, Thomas' research was updated, with analysis of over 390,000 jury decisions between 2006 and 2014. Again, this found very similar conviction rates across ethnic group. White, Black, Asian and mixed race defendants were all convicted at rates of between 66% and 68%.[22] David Lammy was very enthusiastic about this. His report called juries a "success story of our justice system".[23]

The Lammy review contrasted juries with judges and magistrates. Lammy cited a 2016 study by Hopkins et al which looked at racial disparities in Crown Court judges' sentencing decisions.[24] Hopkins et al found that under similar criminal circumstances the odds of imprisonment for Black, Asian, and Chinese or other offenders were higher than for White offenders. The disparity varied a lot between different offence types. It was particularly high for drugs offences, where Black and Minority Ethnic offenders were 240% more likely to be sent to prison than White offenders. Although the data was limited, the Lammy Review also found some racial disparities in magistrates' courts verdicts. In particular, Black and Minority Ethnic women were more likely to be found guilty than White women.[25]

So Lammy's conclusions about jury trial were overwhelmingly positive. However, his approach to this issue has been criticised. One powerful criticism is this. We know that there is massive racial disproportionality in terms of who ends up in the criminal justice system to start with. Black people are therefore more likely to end up before a jury than White people. As Thomas herself highlighted in her 2007 study, Black people from 2006-08 made up 14% of all jury verdicts, compared with 3% of the population.[26] We could reasonably infer from this that Black people are more likely to be falsely accused of crimes than White people, and therefore we might expect a genuinely fair trial process to have a lower than average conviction rate for Black defendants, rather than a slightly higher one. Lee Bridges argues that the Lammy Review's approach *"carries an implication that those making decisions at later stages in the process have no role or responsibility for seeking to redress unfair treatment of particular groups at earlier stages."*[27]

There is also evidence that Black and Minority Ethnic defendants are more likely to plead not guilty than white defendants, and area also more likely to be committed to the Crown Court for trial if charged with an offence triable either way.[28] This, again, complicates the picture, because arguably Thomas and Lammy are not comparing like with like.

So more research is needed on this subject. At this stage, we can't be certain to what extent racial bias affects jury verdicts. However, we can probably at least say that there is more evidence of racial bias on the part of judges and magistrates than on the part of juries. And it's also important to note that racial bias isn't the only kind of bias. For example, it's often been alleged that juries' gender biases affect the outcomes of rape trials. In her 2010 study Thomas argued that there were misconceptions in this area, pointing to the fact that other serious offences have lower jury conviction rates than rape.[29] But her study certainly isn't conclusive on this question. Nor do we know to what extent juries are biased against LGBT people: for instance, we don't know how the current wave of hostility towards transgender people in the UK might affect

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[21] Ibid, pp 20-22
[22] The Lammy Review, 2017, pp 31-32 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf
[23] Ibid., p 31
[24] Hopkins, K, Uhrig, N and Colahan, M, "Associations between ethnic background and being sentenced to prison in the Crown Court in England and Wales in 2015," Ministry of Justice, 2016 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/568896/associations-between-ethnic-background-being-sentenced-to-prison-in-the-crown-court-in-england-and-wales-2015.pdf
[25] The Lammy Review, p 32
[26] Thomas, C, "Diversity and Fairness in the Jury System," Ministry of Justice Research Series 02/07, 2007, p 22
[27] Bridges, L (2017), "The Lammy Review: Will It Change Outcomes in the Criminal Justice System?" *Race & Class* 59.3, 80—90 https://irr.org.uk/article/the-lammy-review-will-it-change-outcomes-in-the-criminal-justice-system/
[28] Uhrig, N, "Black, Asian and Minority Ethnic disproportionality in the Criminal Justice System in England and Wales," Ministry of Justice Analytical Services, 2016 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639261/bame-disproportionality-in-the-cjs.pdf
[29] Thomas, C, "Are juries fair?" Ministry of Justice Research Series 1/10, 2010, p 47

jury behaviour in cases with transgender defendants or victims. But again, we shouldn't assume without evidence that professional judges are any less biased than juries.

Are Juries Getting the Right Answers?

However, bias is not the only question we're interested in. As I said earlier, whether a tribunal is biased on the basis of race is not the same question as whether it is getting the answers right. The law reports reveal an instance in 1995 where a jury attempted to communicate with one of the victims of the offence by means of a Ouija board,[30] and another in 1736 where the jury decided their verdict by "hustling half-pence in a hat".[31] To state the obvious, neither of these methods is racist, but both of them are unreliable.

As I explained at the beginning of the lecture, there is no straightforward way to measure empirically whether juries are getting the right answers. We have data on how many people are acquitted and convicted. But, to state the obvious, we don't have data on how many people are actually guilty or actually innocent.

And unlike judges, juries don't give reasons for their decisions. They don't explain what they made of the evidence, or how they reached their conclusions. So when faced with a jury verdict, we don't know whether they understood the law or the evidence properly, or whether their reasons made sense, or whether they based their decision on false assumptions. Nor do we know whether they fully understood the judge's legal directions. Thomas' 2010 study, which we have looked at earlier, also investigated whether the jurors in her case simulations understood the legal directions they were given. She found that while most jurors thought the judge's legal instructions were easy to understand, a majority in fact did not completely understand them in the terms used by the judge in his instructions.[32]

For that matter, we don't know whether jurors based their decision on whose counsel they found more attractive, or whether they just wanted to get the deliberations over with and go to the pub. In her 2017 Blackstone lecture, Lady Justice Hallett recounted a 2003 fraud case at Southwark Crown Court where *"a female Juror sent to prosecuting counsel a bottle of champagne and an invitation to a dinner date with the question 'what does a lady need to do to attract your attention?'"*[33]

Another concern is whether juries are influenced by the unattractive facts of a particular case. For example, a jury might be thought to be more likely than a judge to be influenced by adverse publicity in a case involving a high-profile case or defendant. In a case involving graphic sexual abuse, the jurors' feelings of disgust may influence their decision-making. Or a jury might be unimpressed by a defendant who is relying on a technical defence to escape liability for acts of which the jury disapproves. All these arguments are raised by Penny Darbyshire, who in a 2014 article makes a powerful argument that defendants ought to be able to opt for a bench trial instead of a jury trial, as they can in some other common law jurisdictions.[34]

So there are some reasons to be concerned about the rigour of jury decision-making, and it is very difficult to investigate these concerns empirically. However, in this regard, we need to keep in mind that we're not comparing trial by jury with trial by oracle. We're not looking at whether juries are perfect. We're looking at whether they're better than the available alternatives – a professional judge, a professional judge sitting with expert assessors, or a bench of lay magistrates.

In many trials, the trier of fact, whether it's a jury, a judge or a bench of magistrates, has to assess the credibility of witnesses and decide between competing versions of events. Where witnesses give different accounts, the trier of fact has to decide who is mistaken, or who is lying. This is an inherently very difficult task. And the way that juries are currently expected to perform this task is not particularly effective.

For example, lawyers are trained to look for inconsistencies between a person's evidence in court and their previous statements, and to use those inconsistencies in cross-examination to show that the person is lying. The assumption is that an inconsistent account is more likely to be a lie.

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[30] *R v Young* [1995] QB 324
[31] *Langdell v Sutton* (1736) Barnes 32
[32] Thomas, C, "Are juries fair?" Ministry of Justice Research Series 1/10, 2010, pp 35-41
[33] Lady Justice Hallett, "Trial By Jury – Past and Present," 20 May 2017
[34] Darbyshire, P (2014) Jury reform in England and Wales - unfinished business. *In: The Third International Conference on Empirical Studies of Judicial Systems: Citizen Participation Around the World;* 5-6 Sep 2014, Taipei, Taiwan https://eprints.kingston.ac.uk/id/eprint/33453/3/Darbyshire-P-33453.pdf

But in fact, we know that this is not true. There is an excellent article by Hilary Evans Cameron, "Refugee Status Determinations and the Limits of Memory," which summarises a large amount of empirical research on this topic.[35] She shows that human memory for temporal information, such as the exact date something happened, how often it happened, the order it happened or how long it took, is extremely poor. For the most part, we reconstruct that kind of information by inference, estimation and guesswork, rather than actually remembering it.[36] Our memory for this kind of information is poor even for unusual personal events.[37] When we have experienced repeated similar events, we're bad at remembering each individual instance.[38] And internal inconsistencies are a normal feature of human memory. True stories are just as inconsistent as false ones.[39]

Interestingly, Cameron shows that hypermnesia – remembering more, rather than less, over time – is also a normal feature of human memory.[40]

These issues are exacerbated in the case of mental health conditions. Many people who come before the courts have experienced traumatic events in their lives and have conditions such as post-traumatic stress disorder (PTSD) and depression, which significantly affect memory and concentration.[41]

Similarly, the courts have traditionally placed a lot of emphasis on the value of seeing and hearing a witness give evidence – judging their credibility not just by what they say, but by their demeanour. But we now know that this too is unreliable. For example, some people with PTSD may experience dissociation when recalling traumatic events, which may cause them to appear distracted, detached or unwilling to cooperate.[42] Likewise, there is evidence that autistic people may be more likely to be wrongly judged as deceptive or lacking in credibility.[43] A person's demeanour may also be affected by their cultural background. So it's very risky to assume that you can tell whether someone is lying by the way they behave when being questioned.

However, it's important to understand that these problems are not specific to juries. You may have noticed the title of Cameron's article. She isn't writing about jury trials, but about refugee status determinations, which are carried out not by juries but by civil servants and professional judges. And indeed Cameron highlights research showing that, in distinguishing truth from falsehood, professionals such as judges and police officers don't perform any better than lay people.[44]

In short, professional judges are certainly not immune to making false assumptions about memory and demeanour. Judges are not trained in psychology or psychiatry, but in law, and a legal education by itself does not give you any special insight into human nature. So we shouldn't assume that judges are any better at getting the right answers than juries.

One problem here is that English criminal law is traditionally very resistant to the idea of admitting psychological or psychiatric expert evidence to help juries decide on the credibility of a witness. The traditional view is that such evidence is generally inadmissible in a criminal trial, because it amounts to "oath-helping", and that it is for the jury and not experts to decide whether a witness is telling the truth, applying

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[35] Cameron, H E (2010), "Refugee status determinations and the limits of memory," 22(4) *International Journal of Refugee Law,* 469-511
[36] Ibid., pp 471-479
[37] Ibid., pp 471-472
[38] Ibid.., pp 481-483
[39] Ibid., pp 489-492
[40] Ibid., pp 495-496
[41] Herlihy, J and Turner, S (2013) "What do we know so far about emotion and refugee law?" 64 *Northern Ireland Legal Quarterly* 1, 47–62 http://www.csel.org.uk/assets/images/resources/herlihy-turner-2013-nilq/NILQ-64.1.3-HERLIHY-AND-TURNER.pdf Graham, B, Herlihy, J & Brewin, C (2014), "Overgeneral memory in asylum seekers and refugees," *Journal of Behavior Therapy and Experimental Psychiatry* 45, 375-380 http://pc.rhul.ac.uk/sites/csel/wp-content/uploads/2019/09/Graham-Herlihy-Brewin-2014.pdf see generally Neale, D and Blair, J, "Bridging a Protection Gap: Disability and the Refugee Convention," Helen Bamber Foundation, 2021 https://www.helenbamber.org/sites/default/files/2021-04/Bridging%20a%20Protection%20Gap%20-%20Disability%20and%20the%20Refugee%20Convention.pdf
[42] See for instance UNHCR, "Beyond Proof: Credibility Assessment in EU Asylum Systems," UNHCR, 2013, pp 62-63 https://www.unhcr.org/51a8a08a9.pdf
[43] Lim, A, Young, R L & Brewer, N (2022) "Autistic Adults May Be Erroneously Perceived as Deceptive and Lacking Credibility," *Journal of Autism and Developmental Disorders* 52, 490–507 https://link.springer.com/article/10.1007/s10803-021-04963-4#citeas
[44] Cameron, p 490

their common sense and experience.[45] The problem with this, as we have seen, is that many people's assumptions about what makes a truthful witness are, in fact, wrong.

In some criminal cases, expert psychological or psychiatric evidence has been held admissible because it is relevant to how a defendant's or witness's medical condition, which is outside the normal experience of the jury, might affect the inferences to be drawn from their behaviour as to their state of mind.[46] Expert evidence has also been admitted to show that a confession is unreliable because of the suggestibility of the accused.[47] And in some cases it has been acknowledged that expert evidence could be admissible where a defendant's or witness's mental condition is likely to affect the way in which they give their evidence.[48]

But it remains the case that psychological or psychiatric evidence are not admissible on matters that are considered to be within the experience and knowledge of the jury. For example, save in relation to the reliability of confessions, evidence about mild intellectual impairment is generally not admissible where the defendant's IQ is over 69.[49] This arbitrary rule appears to be based on the judiciary's unsound assumption that the effect of mild intellectual impairment on a person's evidence or behaviour will be within the experience of the jury. This illustrates a problem with the English jury trial. But it is a problem that would not be solved by replacing jurors with professional judges. It can only be solved by changing the approach to the admissibility of evidence.

Finally, we should consider one of the more outlandish ideas that has been floated: replacing jurors with artificial intelligence. I'm not an AI expert, but I would have very grave concerns about whether such a system could ever be genuinely fair or just. An AI system is only as good as the data we human beings feed into it. And the datasets on which AI systems are trained can often inadvertently impart biases which have profound effects on decision-making. For example, a 2021 New York Times article highlighted an incident where Google Photos automatically sorted photographs of a Black man into a folder marked "gorillas".[50]

Similarly, the article quotes a Black computer expert, Deborah Raji, who was working on a content moderation system designed to remove pornography from social networks. She noticed that the system was being trained to distinguish pornography from non-pornography by comparing anodyne stock photos with images from online pornography sites. Because the people in the stock photos were mainly White, and the people in the pornographic images were not, the system was unconsciously being trained to identify images of Black people as pornography. And another Black computer expert, Joy Buolamwini, found that the facial recognition system at her workplace would not recognise her face – but when she wore a white mask, it did.[51]

None of this is to say that AI isn't useful. But it doesn't always remove human biases from decision-making. Sometimes it replicates and exacerbates them. And given what we have already learned about how people may make false assumptions about a witness's credibility, we can see that the same false assumptions could well affect an AI-based courtroom. For instance, an AI trained to analyse a person's body language might well misidentify a person with autism or PTSD as a liar, because their body language might not match the programmers' expectation of how a truthful witness behaves. In this scenario we wouldn't have eliminated our human biases. We'd simply have automated them.

Conclusion

I want to wrap up by saying this: to an extent, the jury's still out on juries. We don't really know with any certainty whether racial bias is a significant factor in jury decision-making. Although Thomas' research is often held up as proving that juries are race-blind, there are good reasons to question this conclusion. Nor do we know with any certainty whether juries are getting the answers right, a question which is very difficult to test empirically. But before throwing out the institution of trial by jury, we should keep in mind that trial by professional judges is not necessarily a better alternative. A legal education does not give a person the

[45] See R v Turner [1975] QB 834
[46] *R v Thompson* [2014] EWCA Crim 836; *R v Huckerby and Power* [2004] EWCA Crim 3251
[47] *R v Raghip*, Times, 9 December 1991; *R v King* [2000] 2 Cr App R 391; *R v Steel* [2003] EWCA Crim 1640
[48] *R v Mulindwa* [2017] EWCA Crim 416*; R v S (VJ)* [2006] EWCA Crim 2389
[49] See *R v Henry* [2005] EWCA Crim 1681; *R v Jackson-Mason* [2014] EWCA Crim 1993
[50] New York Times, "Who Is Making Sure the A.I. Machines Aren't Racist?" 15 March 2021 https://www.nytimes.com/2021/03/15/technology/artificial-intelligence-google-bias.html
[51] Ibid.

wisdom of Solomon. And while we don't know to what extent juries are racially biased, there is good evidence that judges are. Nor should we subscribe to gimmicks such as replacing juries with artificial intelligence. It may well be that the key to reducing bias and improving rigour in the justice system lies in changes to the trial process and the rules of evidence, rather than in replacing trial by jury.