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FOREWORD

This issue of *Law and Contemporary Problems* is timely. The law and the administrative procedures that govern the operation of our juries are undergoing extensive changes. The changes are mixed. On the one hand, efforts are being made to strengthen the jury by making it more representative of the population from which it is drawn. On the other hand, the Supreme Court has repeatedly clipped the jury's wings. By redefining what is a serious offense and a criminal prosecution, the Court has diminished the availability of jury trial as a matter of right; jury verdicts in the state courts need no longer be unanimous; and smaller juries, provided they comprise no less than six members, may now replace the traditional twelve-member jury.

The direction and momentum of the change are ominous. Consider, for example, the six-member jury. Initially, the smaller juries were installed in courts with limited jurisdictions where minor cases come to trial. Then the size of the federal civil juries was reduced to six members. At the time, proponents of this change argued, against clear evidence, that the reduction would not impair the quality of justice dispensed by juries.¹ As a result, to save money, six-member juries are now deciding billion dollar claims. The shoe is on the other foot: complaints are being heard and heeded that those juries are incompetent to judge "the complex case." Thus, the economy step reduced the jury's quality, and now that quality is impeached to justify another inroad into the domain of the civil jury, one that eventually may open the way for yet another round of restrictions.

Similarly, when the Supreme Court, in an earlier economy move, had sanctioned the six-member jury in criminal felony trials,² it was warned that this would drastically curtail the representation of minorities on the jury.³ It was the verdict of such a jury that preceded the recent Florida riots.

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The essays in this volume bring a number of different perspectives to bear on the institution of the jury at this critical moment in its history. Two of the

1. Zeisel & Diamond, *Convincing Empirical Evidence on the Six-Member Jury*, 41 U. CHI. L. REV. 281 (1974).

2. *Williams v. Florida*, 399 U.S. 78 (1970).

3. Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHIC. L. REV. 712-15 (1971).

essays deal with the court's power vis-à-vis the jury, three with problems of juror selection and one with the recent decisions of the U.S. Supreme Court that control the jury's operation both in the federal courts and in the courts of the states.

Professor Johnston discusses the conditions under which the trial judge may overrule the jury after it has rendered its verdict. This is one of the many points on which the law of the land is not unified. Some jurisdictions allow the judge to set aside a jury verdict if the weight of the evidence is overwhelmingly against the verdict. Other jurisdictions allow such setting aside only if there was no evidence whatsoever to sustain the verdict. Johnston argues that the latter standard is preferable, because legal history is in its favor and because our crowded courts would benefit from a standard that reduces the number of costly retrials.

Conceivably, one could go one step further and investigate the problem as follows. Under the "overwhelming weight" standard a certain number (x) of jury trials will be set aside. Under the "any evidence" standard fewer (y) jury verdicts (y being smaller than x) will be set aside. One would have to investigate the $x - y$ cases that would be set aside under the more generous rule, but would not be set aside under the narrower standard. One would then have to see which standard would better serve justice in these cases, and how costly the difference would be.

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Professors Scheflin and Van Dyke discuss one of the more interesting differences among the criminal laws of our states. In forty-eight of them, the jurors are instructed by the trial judge that their function is to decide the issues of fact, and then apply to these facts the law as it is given to them by the court. In two states, Indiana and Maryland, the jury is instructed differently. It is told that it is not only the judge of the facts in the case, but also judge of the law. The authors argue that this instruction should become the law of the land because for a long time in our history it was the law and because the instruction is, in fact, the truth.

At first blush, the Indiana-Maryland instruction strikes one as dangerous. Does not the certainty of the law suffer if every jury can decide for itself what the law should be? The reality, however, proves far less dramatic. The jury in these two states may not change the law so that a defendant would become guilty, if the law as given by the judge would acquit him. All the jury can do under the Indiana-Maryland instruction is acquit a defendant, or find him guilty of a lesser offense, if it finds that such acquittal or lesser conviction would better serve the ends of justice.

But this is precisely what juries may do in the rest of the country where

they are instructed not to judge but to follow the law. Indeed, this was one of the major findings of *The American Jury*⁴ in which we counted how often the jury's verdict differed from what the presiding judge would have done. We found that judge and jury disagree on the issue of guilt in roughly 20 percent of the verdicts. Differences in judging the facts of the case explained only part of that disagreement. In the majority of instances where there was disagreement, sentiments of equity entered the decision process; as a rule, these sentiments were not expressed overtly but became operative through raising or lowering the "reasonable doubt" barrier. Occasionally, the jury flaunts the law directly, as it did in the prohibition years. Juries may also acquit drunken drivers if they consider the mandatory loss of license too severe a penalty. In one instance, a jury acquitted a tavern-keeper who clearly had sold liquor to a minor when it turned out that the minor happened to be a sailor in the U.S. Navy; the jury decided that, if the youngster was old enough to die for his country, he was old enough to have a beer.

As to judge-jury disagreement in Indiana and Maryland, there is no evidence that it occurs more frequently there than in the rest of the country. Were that the case, it would be hard to understand why it is that defendants in Maryland are notoriously hesitant to demand a jury trial. But then, if the instruction makes so little difference, would it not be better, as Schefflin and Van Dyke argue, to tell juries everywhere the truth about their great power to nullify the law? Not necessarily. Our finding that juries in Indiana and Maryland do not act differently from juries elsewhere is predicated on differences that have been in the law for a very long time. To change the law dramatically now and make instructions conform to the Indiana-Maryland model could be understood as a deliberate encouragement of more nullification.

When Harry Kalven and I first confronted the 20 percent figure that measured the average level of judge-jury disagreement across the country, we thought it was about the right size. If the rate of disagreement were smaller, it would raise questions as to whether it is worth our while to preserve that costly institution, the jury. If the rate of disagreement were larger, we might become concerned over the wide discrepancy between jury justice and the law. We believed, therefore, as Judge Bazelon does,⁵ that these things are best left as they are.

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Mr. Fahringer has written a "primer" on how defense counsel should go about selecting a jury in a criminal case. It contains much good advice, but

4. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 55-59 (1966).

5. Schefflin & Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43:4 *LAW & CONTEMP. PROB.* 66-67 (1980).

caution is in order. At best, such advice is like the baseball manager's rule of thumb: against a left-handed batter, put a right-handed pitcher. In the absence of more specific knowledge, the rule will improve average performance by a few percentage points.

But we would do well to remember the spectacular failures: In the Harrisburg trial of the Berrigans, one of the two jurors who held out for conviction was the mother of four conscientious objectors.⁶ And in the Mitchell-Stans trial of the Nixon era, the college-educated Mr. Choa, by all statistical expectations a prosecution-prone juror, brought a jury who stood eight-to-four for conviction around to an acquittal, a feat we had thought was confined to fiction.⁷

Fahringer's paper is skewed in that it is written as if prosecutors did not exist or, at any rate, had no legitimate interest in the selection of the jury. The harm, however, is small; all the prosecutor needs to do in order to appropriate the "primer" for his purposes is turn Fahringer's assertions inside out. For instance, where Fahringer writes, "Wage earners are dangerous in income tax prosecutions," the prosecutor will read, "Wage earners are desirable in income tax prosecutions." And when he writes, "Young, idealistic jurors, 'limousine liberals,' may be unacceptable in a political corruption case," the prosecutor need only substitute "acceptable."

If only by his omission of the other side in the adversary process, Fahringer raises a fundamental question: how should the legal system order the jury selection process so as to best serve the ends of justice? The importance of that larger question is emphasized by Fahringer's opening sentence: "The selection of a jury is the most important part of any criminal trial." A few lines later he adds: "In most cases the defendant's fate is fixed after the jury is chosen," i.e., before the trial even begins. If this were true, our justice system would be in real trouble. One would have thought it axiomatic that the main determinant of a defendant's fate must be the evidence presented at trial. I shall return to this fundamental question.

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Courtney Mullin introduces us to another aspect of the defense counsel's fight for a good jury. Her theme is jury selection in a capital case. She has learned much about this problem in the course of her work as a member of the team that assists Millard Farmer, one of our truly great defense lawyers. In capital cases, the decision between life and death is largely left to the jury's

6. See J. NELSON & R. OSTROW, *THE FBI AND THE BERRIGANS* 297 (1972).

7. Up to then only Henry Fonda had accomplished it in *Twelve Angry Men*. See Zeisel & Diamond, *The Jury Selection in the Mitchell-Stans Conspiracy Trial*, 1976 AM. B. FOUNDATION RESEARCH J. 151, 169.

discretion. The task of selecting a jury is complicated by the fact that, during the last twenty years, the overwhelming majority of the citizenry has become enamoured of the death penalty. The task is further complicated by the deep racial cleavage that exists regarding that attitude. Among the white population, the proportion of persons favoring the death penalty has risen to around 70 percent. Among blacks, the proportion has remained below 40 percent. Such statistics suggest the difficult practical problems the defense faces in capital trials of black defendants in predominantly white communities.

How should we and the law react if the sentiment of the population itself (not only of the jury selected from it) shifts in favor of one of the two sides in the adversary process?

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Professor Hassett discusses a troublesome problem in jury selection—what to do with jurors who have pretrial knowledge about a case—and offers an intriguing solution: there is no harm, he argues, in knowledgeable jurors; there was indeed a time when jurors were supposed to know more about the case than the judge; being knowledgeable about a case, Professor Hassett argues, does not necessarily mean being biased.

Hassett believes we should hesitate to eliminate prospective jurors who have read or heard a great deal about the case, even if they have formed certain preliminary opinions. Their wholesale elimination, he argues, fosters juries in which the uneducated or the indolent are in the majority.

Hassett believes that only a carefully conducted voir dire can reveal whether the prior knowledge had the effect of closing the juror's mind. The trouble with that view is that the voir dire is becoming more and more restricted everywhere. The scope of questioning is being reduced; the questioning has shifted from counsel to the judge; and en bloc questioning is replacing the voir dire of individual jurors. With such abbreviated voir dire, the peremptory challenges cannot be based on more than the visible demographic characteristics of the prospective jurors, an insufficient basis for fateful decisions.⁸

If the information the jurors have obtained through pretrial publicity is presented later at the trial, the harm may be relatively small. Take the recent Illinois conviction of the man who had abused and killed thirty-seven young men over a five-year period.⁹ Because of the news coverage, there was no way a juror could not know of these facts. But the facts were not denied at the

8. That they are often fateful cannot be doubted any longer. See Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491 (1978).

9. *Illinois v. Gacy*, 79 C. 72 (1980).

trial; the defense was insanity. And it is not easy to see why pretrial knowledge in this case should impair a juror's ability to judge the defense of insanity fairly.

Difficulties arise when facts alleged in pretrial publicity, for instance a confession, may be excluded from the trial evidence. In such situations, only carefully conducted voir dire can help—with each juror in the absence of the others, possibly *in camera*. In cases that have received such pretrial publicity, the courts often allow more detailed voir dire; but the general trend of curtailing the voir dire is also affecting these publicized cases.

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One of the complaints that runs through all three papers on jury selection is that recognizable minorities, however defined, often are underrepresented on our juries. This is true, but if we want to develop the proper remedies, we must understand the reasons for that underrepresentation. The jury selection process has three distinct phases and the loss, albeit in different forms, occurs at each or all of them.

The first loss occurs because relatively few members of minority groups make it to the starting gate, the voter lists from which the jurors are eventually selected. The federal Jury Selection and Service Act prescribes that other lists supplement the voter lists where they are unduly deficient.¹⁰ Lists of public utility customers and of automobile licenses could effectively improve the representativeness of these first lists. But in the state courts that prescription is rare.

The next major hurdle for the minorities is the nearly universal rule under which a juror is excused if serving would bring undue hardship. There are three devices by which this situation can be alleviated: shorten the jury service to "one trial or one day" (if the prospective juror is not seated as a juror during that day); increase the juror fee; avoid recalling persons for jury service who have served previously as long as there are others who have not served at all. Together, these three devices could reduce the burden of jury service to a level that could be demanded of every citizen. Under such an approach the courts would excuse a juror only in rare cases and thereby would improve immensely the representative character of the jury.

The third point at which the minority jurors are likely to lose out is the final stage of the jury selection process, when the adversaries exercise their peremptory challenges. If the prosecutor or defense lawyer has sufficiently strong feelings about a certain minority, he or she usually can eliminate prospective jurors who are members of that minority by means of these challenges.

10. Jury Selection & Service Act of 1968, Pub. L. No. 90-274, 28 U.S.C.A. § 1863(b)(2) (West Supp. 1980).

Ethnic minorities are not the only groups that may suffer exclusion from juries. In the trial of Dr. Spock on the charge of conspiring to violate the Military Service Act, the prosecutor, albeit with some improper help from the judge, managed to eliminate all women from the jury.¹¹ The courts of some states have begun to make such wholesale elimination of minorities more difficult,¹² but it is too early to predict how these efforts will ultimately fare. One thing is certain: the long-term trend of the law is toward more proportionate representation of all strata of the population. As Marjorie Schultz points out in her review of the Burger Court decisions dealing with the jury, this is the only aspect of the jury system in which the Court followed the Warren Court's tradition; it has been "expanding a party's rights to have a case heard by a jury which more closely reflects the composition of his community."¹³

However, the solution of one problem may generate others. If we take pains to make our juries represent ever more faithfully the population from which they are drawn, we must not be surprised to find the local and regional prejudices represented in these juries.

Up to the point the law can give relief in such situations. It can grant a change of venue and it can allow a more detailed voir dire questioning that will do a better job of eliminating prejudiced jurors. But these relief devices have their limits. Ultimately, there are two options. The court can dismiss the case. The other option is to learn to live with occasional malfunctioning and repair the damage as best we can. Some countries have not been as patient. When, in Czechoslovakia after the first World War, local juries acquitted Slovak saboteurs, the country responded by abolishing the jury. We have had comparable malfunctioning in this country, for instance, during the first years of the southern civil rights movement, when juries regularly acquitted defendants charged with atrocities and even murder of civil rights workers. Nevertheless we kept faith with the jury and were eventually rewarded. As the popular prejudice receded, the jurors improved their performance.

Like most of our legal institutions, the jury is in flux. Its core is anchored in the Constitution; its peripheral facets are allowed to change. Ultimately, these changes are guided and supervised by the Supreme Court, but they have their origin in scholarly discussions such as those assembled in the present volume, dedicated to the jury, that "daring effort in human arrangements to work out a solution to the tensions between law and equity and anarchy."¹⁴

Hans Zeisel*

11. See Zeisel, *Dr. Spock and the Case of the Vanishing Women Jurors*, 37 U. CHI. L. REV. 1 (1969).

12. *People v. Wheeler*, 583 P.2d 748, 22 Cal. 3d 258 (1978).

13. See Schultz, *The Jury Redefined: A Review of the Burger Court Decisions*, 43:4 LAW & CONTEMP. PROB. 23 (1980).

14. H. KALVEN & H. ZEISEL, *supra* note 4, at 499. These words, the last in the book, were written by Harry Kalven.

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