

THE SCOTTISH CRIMINAL JURY: A VERY PECULIAR INSTITUTION

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I

INTRODUCTION

One of the benefits of the comparative study of legal institutions is that it exposes the extent to which they are shaped by contingency as well as by logic or principle. What is regarded in one jurisdiction as the only possible or acceptable way of doing something is often revealed to be pure preconception. In other words, the comparative study of law can act as a balance to the unconscious ethnocentrism often displayed in legal and political ideology. For this reason, the Scottish criminal jury is of particular interest because it embodies several unique characteristics which might seem very peculiar to those familiar with other versions of the institution. In particular, it comprises fifteen persons; its verdicts may be reached on the basis of a bare eight-seven majority; and it has a choice between three different verdicts—guilty, not guilty, and not proven—which even many Scots regard as illogical and unprincipled. The main purpose of this article is to describe and discuss the Scottish criminal jury. I shall also use the above peculiarities and other aspects of the institution to question various assumptions commonly held elsewhere about trial by jury.

II

ORIGINS AND BACKGROUND

While the exact origins of the Scottish criminal jury are obscure, it is clear that it developed roughly in tandem with, although in a different fashion from, its English counterpart.¹ It is thought to have derived from the Norman style of government which began to permeate Scotland in the eleventh and twelfth centuries,² although it is likely that there was already some form of community participation in different forums for resolving disputes.³ In succeeding centuries, other possible methods of settling conflicts, such as trial by ordeal, trial by combat, and trial by compurgation, died out and trial by jury became more

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1. See IAN DOUGLAS WILLOCK, *THE ORIGINS AND DEVELOPMENT OF THE JURY IN SCOTLAND* 20-30 (1966). This also summarises the English literature on the subject.

2. See *id.* at 20-21.

3. See *id.* at 5.

common.⁴ Initially, jurors were selected for their knowledge of the circumstances of the case, but by the fifteenth and sixteenth centuries a distinction began to emerge between jurors and witnesses. By the beginning of the nineteenth century, Baron Hume, regarded as the founder of modern Scottish criminal law, was able to state that jurors had long sat solely in a judicial capacity.⁵

The Scottish civil jury has a less interesting history.⁶ Unlike the criminal jury, it did not emerge spontaneously. While it may have existed in embryonic form in Scottish civil procedure, the modern version was adopted from England in 1815 and consequently possesses none of the peculiarities of its criminal counterpart.⁷ Instead, it is comprised of twelve persons, whose decision originally had to be unanimous but may now be reached by majority,⁸ with the normal choice of two verdicts. As elsewhere, the use of the civil jury has declined rapidly in recent years, and it was recently observed that many legal practitioners now regard it as a "somewhat exotic creature."⁹ Its use in the Sheriff Court, the lower of the civil courts, was abolished in 1980.¹⁰ In the higher civil court, the Court of Session, some cases are in theory still tried by jury, most notably actions for damages for personal injuries and for defamation.¹¹ In practice, however, there is trial by judge if the parties consent or if "special cause" is shown.¹² If an action involves complicated questions of law or difficult calculations of damages, this will usually be considered to be sufficiently "special" to justify dispensing with the jury.¹³ As a consequence of these two exceptions, the number of civil cases heard before a jury each year does not reach double figures.¹⁴ Thus, the rest of this article is concerned with the jury in criminal cases.

III

THE INCIDENCE OF JURY TRIAL

At the outset, it is necessary to explain the hierarchy formed by the Scottish criminal courts of first instance: the High Court of Justiciary; the Sheriff Court

4. *See id.* at 21-30.

5. *See id.* at 197.

6. *See id.* at 247-57 (discussing the development of the Scottish civil jury).

7. *See id.* at 256.

8. *See Administration of Justice Act § 11(1) (1933) (Scot.)*. The majority verdict was not introduced to civil procedure until 1933. *See id.*

9. Mark Lazarowicz, *Excessive Damages and Civil Jury Trial*, SCOTS LAW TIMES (NEWS) 1996, at 251-56.

10. *See Law Reform (Miscellaneous Provisions) Act, § 11 (1980) (Scot.)*.

11. *See Court of Session Act § 11 (1988) (Scot.)*. Section 11 replaced its outdated counterpart in the Court of Session Act § 11 (1825) (Scot.), and removed from the ambit of jury trial a large number of types of action which never in practice went to a jury.

12. *See id.* § 9.

13. *See, e.g., Stark v. Ford*, 1995 S.L.T. 69, 70 (Outer House).

14. *See Civil Juries: Abolition?*, SCOTS LAW TIMES (NEWS) 1988, at 212; *see also* ALAN PETERSON & T. ST. JOHN BATES, *THE LEGAL SYSTEM OF SCOTLAND* 33, 43 (3d ed. 1993); Lazarowicz, *supra* note 9.

sitting under "solemn" procedure (that is, with a jury); the Sheriff Court sitting under "summary" procedure (that is, without a jury); and the District Court.¹⁵ The High Court comprises around twenty-five judges who act as the ultimate tribunal for criminal appeals and also form the highest civil court of first instance (the Court of Session). Criminal trials in the High Court are always heard under solemn procedure by one judge sitting with a jury. The court sits in Edinburgh but goes on circuit as required to the other main towns in Scotland. Its powers of sentencing are unlimited.

At the next level, Scotland is divided into forty-nine sheriffdoms, each of which has a sheriff court with one or more sheriffs attached to it depending upon the volume of business.¹⁶ For example, the Glasgow Sheriff Court has more than twenty sheriffs, whereas the sheriff courts in Orkney and Shetland share one sheriff. Sheriffs, who have both civil and criminal jurisdiction, are appointed from the ranks of long-standing legal practitioners. In criminal matters, sheriffs have a dual jurisdiction. Under solemn procedure, the sheriff sits with a jury and the maximum sentence he may impose is three years' imprisonment; under summary procedure, the sheriff sits alone, and the maximum sentences available are three months, or six months in the case of a second or subsequent offence of theft or violence, or a fine of £5,000.¹⁷ Finally, there are district courts throughout Scotland where minor criminal cases are heard under summary procedure before one or often more lay justices of the peace. The maximum penalties available to the district court are sixty days' imprisonment or a fine of £2,500.

As in most other jurisdictions, the vast bulk of cases are processed through the lower criminal courts. Of all the criminal cases dealt with by the Scottish courts in the year up to March 31, 1995, only 2.2% were heard under solemn procedure and thus offered even the possibility of trial by jury.¹⁸ Again, as elsewhere, most accused tend to plead guilty, and only one-third of those solemn cases result in a trial.¹⁹ Thus, of all those persons prosecuted in the Scottish criminal courts in 1994-95, fewer than one percent put their case to a jury.²⁰ In fairness, it should be noted that because of the greater propensity of those prosecuted under summary procedure to plead guilty, jury trials comprised 7.7% of all trials in Scotland during that period.²¹ Nevertheless, this still means

15. See generally ROBERT WEMYSS RENTON & HENRY HILTON BROWN, CRIMINAL PROCEDURE ¶¶ 1-08 to 1-10, 1-17 (6th ed. 1996), for a full account of the jurisdiction and powers of the Scottish criminal courts. This is the "bible" for Scots criminal lawyers and will frequently be referred to throughout this article.

16. See generally *id.*

17. See Crime and Punishment Act § 13 (1997) (Scot.). Though not yet implemented, the Act increases these maxima to five years' imprisonment under solemn procedure and six months (or 12 months in the case of a subsequent offence of theft or violence) under summary procedure.

18. See 1994-95 HER MAJESTY'S SCOTTISH OFFICE, CROWN OFFICE AND PROCURATOR FISCAL SERV. ANN. REP. 46; see also 1996-97 HER MAJESTY'S SCOTTISH OFFICE, CROWN OFFICE AND PROCURATOR FISCAL SERV. ANN. REP. 41 [hereinafter collectively CROWN OFFICE REPORTS].

19. See CROWN OFFICE REPORTS, *supra* note 18.

20. See *id.*

21. See *id.*

that 92.3% percent of contested cases were heard either by a sheriff sitting alone or by lay magistrates.²² Further, one cannot escape the fact that fewer than one in a hundred of all persons accused of crime in Scotland have their fate determined by a jury,²³ an astonishingly low proportion given the significance invested in trial by jury and the confidence in the criminal justice system which the institution generates.

A. Jurisdiction

There are very few crimes which may not be prosecuted under summary procedure. The High Court, where procedure is solemn, has exclusive jurisdiction over the common law crimes of murder and rape (as well as over treason and some other extremely rare offences); thus, those accused of such crimes are always entitled to trial by jury.²⁴ All other common law crimes, including assault, robbery, burglary, theft, and fraud, may be tried under either solemn or summary procedure and thus need not necessarily be heard before a jury.²⁵ For statutory crimes, the relevant legislation sometimes specifies the mode of trial, but very few offences demand solemn procedure. Examples of statutory offences requiring solemn procedure are breaches of the Official Secrets Acts, some terrorist offences and, most commonly, the crime of causing death by dangerous driving.²⁶ However, the great majority of statutory crimes may be prosecuted only under summary procedure, and thus a jury can never be involved in such cases.²⁷ Finally, some statutory offences—like most common law offences—may be heard under either summary or solemn procedure.²⁸

Where a crime may be tried under either solemn or summary procedure, it is the public prosecutor who decides upon the mode of trial.²⁹ At this stage, it should be noted that Scotland has a long-standing tradition of the public prosecution of crime.³⁰ Great importance has always been attached to the independence of the Scottish prosecution service and the fact that it is unaccountable to the police, the courts, the victims of crime, or the accused.³¹ In each and every case, the public prosecutor is “master of the instance,”³² which means that it is entirely up to the prosecution whether to prosecute at all, what charges to

22. *See id.*

23. *See id.*

24. *See* RENTON & BROWN, *supra* note 15, ¶¶ 1-08 to 1-10, 1-17.

25. *See id.*

26. *See* Official Secrets Acts § 10 (1911, 1989) (Scot.); Prevention of Terrorism (Temporary Provisions) Act, § 13 (1989); Road Traffic Act § 1 (1989) (Scot.); Road Traffic Offenders Act § 9, sched. 2 (1988) (Scot.).

27. *See* RENTON & BROWN, *supra* note 15, ¶¶ 1-08 to 1-10, 1-17.

28. *See id.*

29. *See id.*

30. *See* SUSAN R. MOODY & JACQUELINE TOMBS, PROSECUTION IN THE PUBLIC INTEREST 18-22 (1982); *see also* JULIA FIONDA, PUBLIC PROSECUTORS AND DISCRETION: A COMPARATIVE SURVEY 65-95 (1995).

31. *See* MOODY & TOMBS, *supra* note 30, at 18-22; RENTON & BROWN, *supra* note 15, ¶ 3.06.

32. MOODY & TOMBS, *supra* note 30, at 18-22; RENTON & BROWN, *supra* note 15, ¶ 3.06.

bring, where to proceed, what procedure to use, and whether to accept a plea bargain.³³ In determining the appropriate venue and whether to prosecute under solemn or summary procedure, the main factor taken into account by the prosecutor is the adequacy of the sentencing power of the court in light of the seriousness of the crime.³⁴ For example, a minor assault, resulting in a black eye for the victim, will almost certainly be prosecuted either in the district court, where the maximum penalty is sixty days' imprisonment, or in the sheriff court under summary procedure, where the maximum penalty is three months. Thus, such cases will not be heard before a jury. On the other hand, a serious assault with a weapon, resulting in severe injuries, will probably be prosecuted before a jury either in the sheriff court under solemn procedure, where the maximum penalty is three years, or the High Court, with its unlimited sentencing power. In this context, it should be noted that recent legislation, not yet activated, enables the sheriff's current sentencing powers under summary procedure to be doubled.³⁵ The effect of this is likely to be a further decrease in the number of jury trials.

In Scotland, if a case may be heard under either solemn or summary procedure, the accused has no say in the matter.³⁶ This is unlike England and Wales, where, at least with respect to the large number of "either-way" crimes, it is the defendant, and not the prosecutor, who decides whether the case will be tried in the Crown Court before a jury or in the Magistrates Court without a jury.³⁷ In the interests of efficiency and the reduction of costs, there have been several attempts in England and Wales to limit the defendant's "right" to opt for jury trial by making various "either-way" offences, primarily petty dishonesty and minor violence, triable only under summary procedure. However, these proposals have been criticised as an attack on citizens' civil liberties and contrary to due process.³⁸ In Scotland, on the other hand, the accused has never had any such "right," and perhaps more significantly, there has never been any pressure to grant the accused such an option.³⁹ Thus, what in England is often perceived to be a fundamental principle of trial by jury is revealed simply to be the product of the way in which the institution happened to develop in that jurisdiction.

33. See MOODY & TOMBS, *supra* note 30, at 18-22; RENTON & BROWN, *supra* note 15, ¶ 3.06.

34. See MOODY & TOMBS, *supra* note 30, at 18-22; RENTON & BROWN, *supra* note 15, ¶ 3.06.

35. The Crime and Punishment Act § 13 (1997) (Scot.), increases the previous maxima of three and six months to six and 12 months.

36. See ANDREW ASHWORTH, *THE CRIMINAL PROCESS: AN EVALUATIVE STUDY* 247-48 (1994).

37. See Nicholas Blake, *The Case for the Jury*, in *THE JURY UNDER ATTACK* 141 (Mark Findlay & Peter Duff eds., 1988).

38. See *id.* at 145-46; see also John Jackson, *Trial by Jury and Alternative Modes of Trial*, in *CRIMINAL JUSTICE IN CRISIS* 255-63 (Mike McConville & Lee Bridges eds., 1994); Gerry Maher, *Reforming the Criminal Process: A Scottish Perspective*, in *CRIMINAL JUSTICE IN CRISIS*, *supra*, at 62-65. For analysis of this issue, see ASHWORTH, *supra* note 36, at 242-52.

39. See THOMSON COMMITTEE, *CRIMINAL PROCEDURE IN SCOTLAND, SECOND REPORT*, Cmnd. 6218, ¶¶ 51.46-47 (1975).

Unlike some jurisdictions, there has been very little pressure in Scotland to curtail the role of the jury in cases involving complex commercial crime.⁴⁰ The prosecutor can always avoid jury trial, of course, by choosing to proceed under summary procedure in the Sheriff Court, but in that case the maximum penalty which can be imposed is only three months' imprisonment (or six months for a second offence) and a fine of £5,000. Various suggestions to modify or remove the jury from complicated fraud trials were considered by the Thomson Committee in the 1970s, largely because there was concern in England over the issue.⁴¹ Nonetheless, these proposals were rejected by the majority of respondents to the enquiry and found little favour with the Committee itself.⁴² In a recent review of trial by jury conducted by the Scottish Office, the question of juror comprehension was briefly touched upon,⁴³ but there was little concern that this posed a particular problem and there were no proposals for change as regards this issue.⁴⁴ This review did not even mention the trial of complex commercial crime, largely because such cases have simply not proved to be a problem in Scotland. It should be noted however, that Scotland has not yet had any long and complex prosecutions of large-scale commercial frauds of the sort that have caused difficulties in other jurisdictions.

B. Citing and Empanelling the Jury

In Scotland, every person aged between eighteen and sixty-five is eligible for jury service, subject to various provisos which will be dealt with shortly.⁴⁵ Until relatively recently, there was a property qualification,⁴⁶ but this was increasingly ignored in practice and finally abolished in 1980.⁴⁷ Thus, the clerk of the sheriff court now obtains a list of names randomly drawn from the electoral roll and writes to those so chosen, requesting the details necessary to establish whether they are eligible for jury service.⁴⁸ This same procedure is also applicable to any High Court trials which take place in the sheriffdom.⁴⁹

As in other jurisdictions, various categories of persons are ineligible because of their involvement in the criminal justice system, including members of the judiciary and court staff, legal practitioners, police and prison officers,

40. For example, in England and Hong Kong. *See generally* FRAUD TRIALS COMMITTEE, REPORT; *see also* PETER DUFF ET AL., JURIES: A HONG KONG PERSPECTIVE 43-51 (1992); Michael Levi, *The Role of the Jury in Complex Cases*, in THE JURY UNDER ATTACK, *supra* note 37, at 95-111.

41. *See* THOMSON COMMITTEE, *supra* note 39, ¶¶ 51.34-.41.

42. *See id.*

43. *See* SCOTTISH OFFICE, JURIES AND VERDICTS, 1994, ¶¶ 4.1-4 [hereinafter JURIES AND VERDICTS].

44. *See* SCOTTISH OFFICE, FIRM AND FAIR, 1994, Cmnd. 2600 [hereinafter FIRM AND FAIR]. The jury proposals are in chapter 3.

45. *See* Law Reform (Miscellaneous Provisions) Act § 1, sched. 1 as amended (1980) (Scot.) for jury ineligibility and disqualification rules.

46. *See* Juries Act § 1 (1825) (Scot.).

47. *See* Law Reform (Miscellaneous Provisions) Act, sched. 3 (1980) (Scot.). A similar reform had taken place in England and Wales some 10 years earlier under the Criminal Justice Act § 25 (1972).

48. *See* RENTON & BROWN, *supra* note 15, ¶ 15-07.

49. *See id.*

procurators fiscal and their staff, and various types of social workers involved with the juvenile justice system and probation schemes.⁵⁰ A more recent category of persons disqualified are those who have at any time been sentenced to five years' imprisonment or more, or who have received a sentence of three months and have not yet been rehabilitated under the Rehabilitation of Offenders Act of 1974.⁵¹ An even more recently added disqualification was for anyone on bail for any offence.⁵² Further, persons suffering from serious mental disorders are disqualified from jury service.⁵³ Finally, in order to ensure that potential jurors have a sufficient grasp of the English language, the statute stipulates that they must have been resident in the United Kingdom for any period of at least five years since attaining the age of thirteen.⁵⁴

Certain other groups of persons are entitled to be excused from jury service of right, due to the social value of their occupations. These include doctors, dentists, nurses, pharmacists, and veterinarians, members of the armed forces, ministers of religion and those in holy orders, and members of the United Kingdom and European parliaments.⁵⁵ Those who have attended for jury service within the last five years are also entitled to be excused of right.⁵⁶ Finally, any potential juror may seek to be excused for good reason, for example, if they are suffering from a serious long-term illness making their attendance at court impossible.⁵⁷

As a result of the various disqualifications and exemptions, there has been recent concern that juries are not as representative of the community as they might be. These concerns led to consideration of the problem of "juror attrition" in a general consultation paper on the jury issued by the Scottish Office.⁵⁸ The suggestion was that the procedures for selecting and contacting jurors from the electoral roll were not working as well as they might, and more significantly, that larger proportions of potential jurors from the middle and upper socio-economic groups were disqualified or being excused from jury service.⁵⁹ A study carried out for the consultation paper demonstrated that of 11,806 members of the public in Edinburgh eligible to serve on the jury, contact was made with only 7,500 (sixty-eight percent) by the sheriff clerk.⁶⁰ Of these, 2,520 were statutorily excluded, 1,560 were excused, and, ultimately, only 3,283 (thirty percent) were present in court as potential jurors.⁶¹ Further, thirty-eight

50. See Law Reform Act, sched. 1, pt. 1 (1980) (Scot.).

51. See *id.* pt. 2.

52. See Criminal Justice Act § 7 (1995) (Scot.).

53. See Law Reform Act, sched. 1, pt. 1 (1980) (Scot.).

54. See RENTON & BROWN, *supra* note 15, ¶ 15-01.

55. See Law Reform Act, sched. 1, pt. 3 (1980) (Scot.). More cynical readers might question the inclusion of the last listed group as socially useful.

56. See *id.*

57. See Law Reform (Miscellaneous Provisions) Act § 1(5) (1980) (Scot.).

58. See JURIES AND VERDICTS, *supra* note 43, ¶ 3.35.

59. See *id.* app. 1, at 48.

60. See *id.* app. 1, at 49.

61. See *id.* ¶¶ 3.27-28.

percent of potential jurors from the upper socio-economic group were excused compared with eighteen percent and twenty-three percent from the bottom two groups.⁶² This paper led to proposals for reform in a government White Paper on criminal justice,⁶³ and legislation was then enacted to try to reduce the level of "attrition" and make it more difficult to secure an excusal on the ground of inconvenience.⁶⁴

Once eligibility has been established, a list of potential jurors is drawn up and the sheriff clerk summons sufficient persons when a trial is about to take place.⁶⁵ The resulting "list of assize" is kept in the clerk's office and, upon application, a copy is available without charge to the defence.⁶⁶ Until very recently, the list of assize had to state the occupation of the prospective jurors, but following a recommendation which resulted from the recent review of the jury,⁶⁷ this requirement was removed and the list now records only jurors' names and addresses.⁶⁸ The reason for this was that while jurors' occupations were thought to form the basis for many peremptory challenges, occupation alone was not thought sufficient to justify any challenge for cause upon the abolition of peremptory challenges.⁶⁹ Therefore, there was no "substantive reason" for jurors' occupations to be revealed.⁷⁰ The jurors are selected by ballot in open court from those potential jurors who have appeared at court in response to being cited.⁷¹

C. Questioning of Jurors and Challenge for Cause

There is no equivalent to the *voir dire* procedure in Scotland, a fact which might surprise some American readers. The strong opposition of the Scottish criminal justice system to any procedure of this type is well illustrated by the observations of the Appeal Court in *McCadden v. H. M. Advocate*:⁷²

There may never be a process which eliminates the possibility of personal prejudices existing among jurors, the nearest practical one (and it is not foolproof) being possibly the "vetting" of jurors, a system against which the law of Scotland has steadfastly closed the doors. Evidence of how it is used and abused in countries in which it is operated only tends to confirm the wisdom of that decision.⁷³

The court went on to observe that it should not be "lightly assumed" that jurors will pursue their prejudices in defiance of their oath and the directions of

62. *See id.* app. 1, at 51.

63. *See* FIRM AND FAIR, *supra* note 44, ch. 3.

64. *See* Criminal Justice Act §§ 6, 7 (1995) (Scot.).

65. *See* RENTON & BROWN, *supra* note 15, ¶ 15-10.

66. *See id.* ¶ 15-08.

67. *See* JURIES AND VERDICTS, *supra* note 43, ¶ 3.35; *see also* FIRM AND FAIR, *supra* note 44, ¶ 3.11.

68. *See* Criminal Justice Act § 6 (1995) (Scot.).

69. For a discussion of challenges, *see infra* Parts III.C-D.

70. FIRM AND FAIR, *supra* note 44, ¶ 3.11.

71. *See* RENTON & BROWN, *supra* note 15, ¶ 18.34.

72. 1985 J.C. 98. The opinion was given on behalf of the court by the Lord Justice Clerk, Scotland's second most senior judge.

73. *Id.* at 102.

the judge.⁷⁴ On a more practical note, the court pointed out that the broad base from which jurors are drawn means that any prejudices and biases tend to cancel each other out, and further, that the majority verdict, whereby a bare eight-to-seven vote either way suffices, ensures that it is unlikely that one prejudiced juror can affect the outcome of the case.⁷⁵

As a consequence, there may be no general questioning of potential jurors by the judge or by any of the parties to the case. The total antipathy of the Scottish legal system to any form of *voir dire* is also illustrated in *M. v. H. M. Advocate*.⁷⁶ This case involved terrorist offences which had spilled over from Northern Ireland to Scotland.⁷⁷ At the request of one of the defence counsel, potential jurors were asked by the judge whether they had lost any near relatives in the religious and political disturbances in Northern Ireland which might affect their ability to give unbiased consideration to the issues involved.⁷⁸ As it happens, no jurors declared themselves to be in this position.⁷⁹ During the course of an appeal based on other grounds, however, the Appeal Court stated that they did not approve of this procedure:

[T]here should be no general questioning . . . of persons cited for possible jury service to ascertain whether any of them could or should be excused from jury service in a particular trial The essence of the system of trial by jury is that it consists of fifteen individuals chosen at random from amongst those who are cited for possible service.⁸⁰

Further, most views presented to the Thomson Committee on Criminal Procedure, which reported shortly after the above case, were also opposed to any kind of investigation of jurors' attitudes.⁸¹

Challenges for cause are permissible, but because such challenges are very rare, no clear procedure has evolved for dealing with them.⁸² It has always been regarded as sufficient cause for challenge if a potential juror is clearly disabled in some way, for example, if he is insane, deaf, dumb, or blind,⁸³ but further development of this area of law has obviously been severely limited by the attitude to questioning jurors. It is difficult to challenge a juror for cause if one has no information about that juror beyond a name and address or, formerly, an occupation. Further, it has been held that

[i]t is not a sufficient cause for a juror to be excused that he is of a particular race, religion, or political belief or occupation, or indeed that the juror might or might not

74. *Id.*

75. *See infra* text accompanying note 131.

76. 1974 S.L.T. (Notes) 25 (H.C.J.). These observations were made by the Lord Justice General, Scotland's most senior judge, in the course of giving the court's opinion.

77. *See id.*

78. *See id.*

79. *See id.*

80. *Id.*

81. *See* THOMSON COMMITTEE, *supra* note 39, ¶ 51.27.

82. *See id.* ¶ 51.23.

83. *See* RENTON & BROWN, *supra* note 15, ¶ 18.36.

feel prejudice one way or the other towards the crime itself or to the background against which the crime has been committed.⁸⁴

On the other hand, it is regarded as sufficient cause if a potential juror has a personal connection with one of the parties to the case or has personal knowledge of the facts.⁸⁵ In order to ensure that such jurors are identified, before the case is called, the clerk tells potential jurors the names of the accused, the complainant, and anyone else named in the indictment and indicates that if they know any of these persons, they should make this known.⁸⁶ Once the jury has been empanelled, the judge may remind the jurors that if they know any of the parties involved or feel that there is any reason why they should not serve on the jury, they should make this known to the court immediately.⁸⁷

In essence, however, it can be seen that the philosophy underlying jury selection in Scotland, as well as in England and Wales, is very different from that governing the process in the United States. In Scotland, there is a very strong view that the accused, and the prosecutor, must simply accept the jurors who emerge randomly from the selection process. The feeling is that the prejudices and biases of the various individuals comprising the jury will assume little significance in the dynamic of group decisionmaking, particularly when a bare majority suffices. There is a lot to be said for this point of view. The complete lack of information about prospective jurors means that no attempt can be made by either side to "stack" the jury in its favour. Further, the simplicity of the selection procedure helps to ensure that the jury really does represent the community, although this of course means that any prejudices generally held in the community are likely to be replicated in the jury room. In practical terms, the absence of any kind of *voir dire* procedure also renders trial by jury quicker and cheaper than on the other side of the Atlantic.

In conclusion, it is once again significant that what is perceived to be an integral part of the institution of trial by jury in one group of related jurisdictions is regarded with abhorrence in a different group of jurisdictions. It is clear that these views are shaped by specific histories and cultures rather than deriving logically and necessarily from the principles which support trial by jury.

D. Peremptory Challenge

In Scotland, the right of peremptory challenge has gradually disappeared. The position was formalised in the early nineteenth century when the accused was granted five peremptory challenges,⁸⁸ but the number was reduced to three

84. See *M. v. H. M. Advocate*, 1974 S.L.T. J25 (H.C.J.).

85. See *Pullar v. H. M. Advocate*, 1993 S.C. (J.C.) 126, 134-35 (1993).

86. See *id.* at 134.

87. See *id.* at 135.

88. See Jurors Act § 16 (1825) (Scot.); WILLOCK, *supra* note 1, at 193. However, ALBERT V. SHEEHAN, CRIMINAL PROCEDURE ¶ 1.42 (1990), states that the right of peremptory challenge was formalised in the Jurors in Criminal Trials Act § 1 (1822) (Scot.). The last manifestation of this right was in the Criminal Procedure Act § 130 (1975) (Scot.).

in 1980,⁸⁹ and abolished altogether in 1995.⁹⁰ Three reasons have been cited to justify this whittling away of the peremptory challenge. First, it was sometimes argued that such challenges increased the overall inconvenience to the public of jury service because additional jurors had to be cited to cater for the possibility of such challenges, particularly in cases involving several accused.⁹¹ Second, it was frequently alleged that good citizens, who were willingly attempting to fulfil their civic duty, were puzzled, embarrassed, or even angered by being challenged in open court for reasons they simply did not understand.⁹² Both these arguments have some validity. The third and most influential argument, which clinched the abolition of the peremptory challenge, was the allegation that this opportunity was frequently “abused” by the defence in an attempt to secure a jury which was less likely to convict.⁹³ It was suggested that prospective jurors were challenged on the basis of sex, occupation, or even dress, the wearing of a suit and tie being regarded as fatal to one’s chances of making the jury panel.⁹⁴ It was also claimed that in cases of fraud or financial crime, prospective jurors who seemed likely to be able to understand the facts in the case—for example, accountants or bankers—were routinely challenged.⁹⁵ This argument is based upon two assumptions, and it is worth examining each of these in turn.

First, there is the claim that defence solicitors and advocates regularly “abused” their peremptory challenges in an attempt to secure the type of jury they wanted.⁹⁶ Assuming that this does amount to “abuse,” which of course might well be contested, it is fair to say that there is much anecdotal evidence to support this charge,⁹⁷ although there is virtually nothing in the way of any firm data about the extent and nature of the phenomenon. The government’s recent consultation paper admitted as much, stating that “there is no direct evidence of whether and on what scale such abuse occurs,” but added that “the procedure clearly has the potential for abuse.”⁹⁸ Of the 994 jurors in the attrition study who were balloted, six percent were challenged, five percent by the defence and one percent by the Crown, and while there was no evidence of any sexual bias in the use of the challenge, it did seem that potential jurors from the upper socio-economic groups were more likely to be challenged by the defence.⁹⁹ It should be noted, however, that the numbers involved were very small. Only forty-eight jurors from the upper socio-economic group were bal-

89. See Criminal Justice Act § 23 (1980) (Scot.).

90. See Criminal Justice Act § 8 (1995) (Scot.)

91. See JURIES AND VERDICTS, *supra* note 43, ¶¶ 3.28-34.

92. See *id.*

93. See *id.*

94. See *id.* ¶ 3.30.

95. See *id.*; see also THOMSON COMMITTEE, *supra* note 39, ¶ 51.29.

96. See JURIES AND VERDICTS, *supra* note 43, ¶¶ 3.28-34.

97. See *id.*

98. *Id.* ¶ 3.31.

99. See *id.* app. 1, ¶ 10.4, tbl. 10. Of course, this might simply mean that in some cases, men were routinely challenged whereas in others, it was women that were treated in this way, and that these opposing trends cancelled each other out.

loted, eight of whom were challenged (seventeen percent) as against 306 jurors from the next highest socio-economic group, of whom eight percent were challenged.¹⁰⁰ This hardly seems sufficiently convincing evidence to justify the abolition of a procedure which had formed part of trial by jury for almost two hundred years.

The second step in the argument is that the "abuse" of the peremptory challenges led to an increased likelihood of acquittal.¹⁰¹ There is no evidence to support this claim. Such an argument assumes that Scottish defence practitioners, with virtually no information to go on, were successful in predicting the likely reactions of potential jurors to particular cases. Evidence from other jurisdictions suggests that even where there is much more information available about prospective jurors, it is extremely difficult for the lawyers involved to predict their behaviour.¹⁰² Further, the argument assumes that, even if Scottish practitioners did have some success, three challenges (or previously five) were enough to alter the dynamics of a jury of fifteen which may reach a verdict on the basis of a simple majority. Clearly, the role of any individual juror can be much more crucial where there is a requirement of unanimity or some sort of weighted majority. Significantly, some Home Office research carried out in England and Wales before the abolition of the peremptory challenge there on similar unsatisfactory grounds¹⁰³ revealed that the acquittal rate was no higher in cases where the challenge had been used than in cases where it had not.¹⁰⁴

Therefore, the reasons given for the abolition of the peremptory challenge in Scotland were unsatisfactory. There was little evidence that it was being "abused" and no evidence whatsoever that this "abuse" had any effect on the outcome of cases. This is regrettable because, in my view, there is a perfectly respectable argument of principle which could have been used against the peremptory challenge. Quite simply, the jury in Scotland is clearly meant to be fifteen people chosen at random from the community, and there is no justification for either side to attempt to alter its composition except where there are grounds for challenge for cause. Furthermore, the existence of the bare majority verdict means that the presence of one biased juror is very unlikely to make any difference to the outcome of the case, unlike the position where there is a requirement of unanimity. Yet this type of argument was rarely advanced by those responsible for the demise of the peremptory challenge in Scotland. The right thing was done for the wrong reasons.

100. *See id.*

101. *See id.* ¶ 3.30.

102. *See* VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 76-78 (1986); *see also* SEAN ENRIGHT & JAMES MORTON, *TAKING LIBERTIES: THE CRIMINAL JURY IN THE 1990S*, at 63-67 (1990).

103. *See* Criminal Justice Act § 118 (1988) (Scot.). *See also* ENRIGHT & MORTON, *supra* note 102, ch. 4, for details.

104. *See* Julie Vennard & David Riley, *The Use of the Peremptory Challenge and Stand by of Jurors and Their Relationship to Trial Outcome*, 1988 *CRIM. L. REV.* 731-38.

Finally, it is interesting to note that the disappearance of the peremptory challenge aroused little reaction in Scotland, whereas in England, its gradual demise caused an outcry and was often portrayed as a serious attack upon the civil liberties of defendants.¹⁰⁵ Again, what was often regarded as a fundamental aspect of jury trial in England appears to have been discarded quite easily in Scotland. To some extent, this might be explained by the existence of the requirement for a ten-to-two majority in England, but it probably also reflects the differing ideologies which simply happen to have grown up around the same institution, without much basis for their differences in terms of strict logic.

E. Publicity Before and During the Trial¹⁰⁶

Essentially, all that may appear in the media about a criminal prosecution is a fair and accurate report of legal proceedings, published contemporaneously and in good faith.¹⁰⁷ The Scottish judiciary takes a very severe attitude toward any potentially prejudicial publicity before or during the trial. While the position is now primarily governed by legislation, it is useful to examine the common law position first. One recent example will suffice to demonstrate the stringent approach invariably adopted by the Scottish courts. In *Muir v. British Broadcasting Corporation*, the BBC was about to broadcast an update of an earlier programme about prisoners being beaten by prison officers in Glasgow's Barlinnie prison.¹⁰⁸ The programme reported a prison doctor's view that a particular individual's injuries were consistent with his having been assaulted by guards.¹⁰⁹ The report further revealed that the doctor had been dismissed from the prison service but was being backed by the British Medical Association, and that the European Committee for the Prevention of Torture also believed the prisoner's injuries were consistent with his allegations of mistreatment.¹¹⁰ The prison doctor was to be a witness in a trial of three prison officers for assaulting inmates at Barlinnie which was due to start the following month. The charges did not relate to the prisoner featured in the programme, and there was no reference to the accused in the programme nor to the proceedings against them. Nevertheless, on application by the three accused, the High Court banned the programme because there was a "distinct risk that at least one out of the fifteen jurors may get the impression from this programme that Doctor Danson was a witness of considerable credit whose views should be taken to be of great importance."¹¹¹ The Court observed that the test to be applied in such cases is

105. See Sean Enright, *Reviving the Challenge for Cause*, 139 NEW L.J. 9-10, 19 (1989); see also TONY GIFFORD, *WHERE'S THE JUSTICE: A MANIFESTO FOR LAW REFORM* 50-51 (1986); James Gobert, *The Peremptory Challenge—An Obituary*, 1989 CRIM. L. REV. 528-38; E.P. Thompson, *Subduing the Jury*, LONDON REVIEW OF BOOKS, Dec. 4, 1986, at 7-9 & Dec. 18, 1986, at 12-13.

106. For a discussion of contempt of court in Scotland, see ERIC M. CLIVE ET AL., *SCOTS LAW FOR JOURNALISTS* 100-31 (5th ed. 1988).

107. See Contempt of Court Act § 4 (1981) (Scot.).

108. 1997 S.L.T. 425 (H.C.J.).

109. See *id.*

110. See *id.*

111. *Id.* at 427-28.

whether there is “more than minimal risk of prejudice.”¹¹² Thus, either the accused or the Crown may apply to prevent media coverage of not only their own case, but of a much broader range of subjects which might impinge incidentally upon the forthcoming trial.

In terms of statute, the Contempt of Court Act of 1981 makes it an offence of strict liability to publish, including broadcast, anything which creates a “substantial risk” that the course of justice in any “active” proceedings will be “seriously impeded or prejudiced.”¹¹³ This legislation covers Scotland, England, and Wales, but, as Alistair J. Bonnington states, “its application in Scotland is so starkly different from that in England that it is difficult to believe that the two jurisdictions are dealing with the same statutory provisions.”¹¹⁴ First, the Lord Advocate, Scotland’s senior law officer, is much more likely than his English counterpart, the Attorney General, to act when there has been prejudicial publicity.¹¹⁵ Second, the Scottish courts have interpreted the provision that there must be a “substantial risk” to mean that there must be “some risk, greater than a minimal one,” of prejudice.¹¹⁶ This rather odd interpretation of the statutory formula means that it is relatively easy in Scotland to allege contempt.¹¹⁷ Finally, in Scotland, the accused himself may bring proceedings under the Act, whereas in England the Attorney General must either bring or consent to any such proceedings.¹¹⁸

Bonnington demonstrates the contrasting approaches adopted in Scotland and England with reference to a recent English case, where the Attorney General refused to take action over what was undoubtedly prejudicial reporting of a trial, on the ground that he thought that contempt proceedings were unlikely to succeed.¹¹⁹ Bonnington observes that in Scotland the Lord Advocate would undoubtedly have prosecuted in such a case, and further, that if he had not, the accused could have taken action.¹²⁰ Bonnington’s predicted result of such proceedings in Scotland was that “there is little doubt that all newspapers would have been convicted and would have suffered substantial fines—in the case of the *Sun*¹²¹ editor, a jail sentence would have been quite likely.”¹²² In summary, therefore, the strict approach of the Scottish judiciary to the possibility of prejudicial reporting has meant that the media has rarely impinged upon jury

112. *Id.* at 427.

113. Contempt of Court Act § 2 (1981) (Scot.).

114. Alistair J. Bonnington, *Press and Prejudice*, 145 NEW L.J. 1623 (1995).

115. *See id.*

116. *H. M. Advocate v. Caledonian Newspapers Ltd.*, 1995 S.L.T. 926, 930.

117. *See generally* CLIVE ET AL., *supra* note 106, at 103, who thought that this was a “new and important” test because it clarified a previously vague standard. However, as events show, this view proved to be unduly optimistic.

118. *See* Contempt of Court Act § 7 (1981) (Scot.). This difference reflects the common law position in each of the jurisdictions.

119. *See* Bonnington, *supra* note 114, at 1623.

120. *See id.*

121. The most popular tabloid newspaper in the United Kingdom.

122. Bonnington, *supra* note 114, at 1623.

trial in Scotland. It should be remembered that, unlike in the United States, in Scotland there is no constitutional right to freedom of expression or freedom of information to counter-balance the strict laws of contempt.

Despite their draconian attitude toward potentially prejudicial publicity, Scottish judges have not looked sympathetically upon claims made by the accused about the effects of adverse publicity where this has unfortunately occurred. Bonnington observes that there has never been a successful application to prevent a trial proceeding because of prejudicial pretrial publicity, nor a successful appeal against conviction based on the grounds of prejudicial publicity.¹²³ He cites in illustration of this claim the rather contradictory case of *Stuurman v. H. M. Advocate*,¹²⁴ where the court imposed large fines on the media for “causing ‘the greatest risk of prejudice,’”¹²⁵ and yet only a few weeks later decided that the accused could nevertheless receive a fair trial.¹²⁶ Another interesting case is *H. v. Sweeney*,¹²⁷ where the trial proceeded despite overwhelming publicity, including the resignation of the Solicitor General,¹²⁸ the publication of alleged confessions by the accused, and “no fewer than 160 articles” in the media.¹²⁹ The High Court’s view was that the admittedly prejudicial coverage of the case was outweighed by the public interest in the prosecution of serious crime, the gap of several months before the trial was to commence, and the beneficial effect upon the jury of a careful direction by the judge not to be swayed by the publicity.¹³⁰

F. The Number of Jurors

The Scottish criminal jury comprises fifteen persons. In the early days of jury trial, the number of jurors was not fixed, although there was always a preference for an odd number because of the existence of the majority verdict.¹³¹ By the end of the sixteenth century, the jury virtually always comprised fifteen persons. This practice was eventually confirmed implicitly in the Jurors Act.¹³² In the 1970s, the Thomson Committee considered the possibility of a smaller jury.¹³³ Its primary concern was whether it was necessary to inconvenience quite so many members of the public, observing that the Scottish civil jury, as

123. *See id.*

124. *See id.* (relying generally on *Stuurman*, 1980 J.C. 111, 111-13, 121 (1980)).

125. *Id.*

126. *See id.*

127. 1983 S.L.T. 48, 55-57 (H.C.J.) (The Lord Justice-General).

128. Scotland’s second most senior law officer.

129. *See Sweeney*, 1983 S.L.T. at 56; *see also* ROSS HARPER & ARNOT MCWHINNIE, THE GLASGOW RAPE CASE 139-42 (1983).

130. *See Sweeney*, 1983 S.L.T. at 56-57.

131. *See WILLOCK*, *supra* note 1, at 184-90.

132. §§ 7, 17 (1825) (Scot.); *see WILLOCK*, *supra* note 1, at 189.

133. *See THOMSON COMMITTEE*, *supra* note 39, ¶ 51.12. The Committee stressed that this recommendation was dependent upon the retention of the three verdict system. For a discussion of this, *see infra* Part III.I.

well as criminal juries in other jurisdictions, operated with fewer jurors.¹³⁴ Although the committee was not impressed with the argument that a slightly smaller jury was less likely to provide a representative cross-section of the population, dismissing this as “speculative,”¹³⁵ it nonetheless concluded that the number of jurors should be reduced to twelve, with a simple majority of seven votes being necessary for a guilty verdict.¹³⁶ However, this recommendation was not acted upon. The more recent Scottish Office review also raised the question of unnecessary inconvenience to citizens and asked for views on the reduction of the size of the jury to eleven, twelve, or thirteen persons.¹³⁷ Most of those who responded were not in favour of any change and thus, the number of jurors was left at fifteen.¹³⁸ Both the Thomson Committee and the Scottish Office review emphasised that the size of the jury could not be looked at in isolation and was bound up with the majority required for a verdict and the three verdict system.¹³⁹ Consequently, I shall return to the number of jurors when these issues are discussed below.

G. Management of the Jury¹⁴⁰

After the jury has taken the oath, there must be no communication on the subject of the trial between a juror and nonjuror. If this rule is broken, the trial is not necessarily abandoned, nor is any conviction necessarily quashed. The consequences of the infringement depend very much on the circumstances, in particular the severity of the breach and its potential to prejudice the trial. If the infringement is minor, it may not be necessary to excuse the juror and a direction by the judge to the jury may suffice. Alternatively, the juror may be excused and the trial may continue. However, if the breach is particularly serious and there is a danger that it may prejudice the whole jury, it may well be necessary to abandon the trial. Where a trial is adjourned overnight, the jury is not secluded (that is, sequestered) except in the most exceptional of cases. Once the verdict is being considered the matter is entirely different, and the jury must be secluded.¹⁴¹

If a juror becomes ill during a trial or is excused for some other reason, the trial may continue provided that there are not less than twelve jurors remaining.¹⁴² In such cases, a majority of eight jurors is still required to return a guilty verdict; otherwise the result must be acquittal.¹⁴³ There is no provision in Scot-

134. See THOMSON COMMITTEE, *supra* note 39, ¶ 51.08.

135. *Id.* ¶ 51.11.

136. See *id.* ¶ 51.13.

137. See JURIES AND VERDICTS, *supra* note 43, ¶¶ 5.1.-4.

138. See FIRM AND FAIR, *supra* note 44, ¶¶ 3.20, 3.21.

139. See JURIES AND VERDICTS, *supra* note 43, ¶¶ 5.1.-4; THOMSON COMMITTEE, *supra* note 39, ¶ 51.12.

140. The following section is based very closely on RENTON & BROWN, *supra* note 15, ¶¶ 18.42-.45, where all the necessary citation of the statutory provisions and cases will be found.

141. See *infra* notes 151, 152 and accompanying text.

142. See RENTON & BROWN, *supra* note 15, ¶¶ 18.42-.45.

143. See *id.*

land for alternate jurors. Such a provision has not as yet proved necessary because trials rarely last for more than a couple of days and up to three jurors may be lost without the trial having to be abandoned.¹⁴⁴

It is worth noting that in Scotland there are no opening statements by the lawyers. Instead, jurors are given a copy of the indictment, which comprises a narrative of the essence of the case against the accused.¹⁴⁵ Immediately after the prosecution has presented all its witnesses, the defence may submit that there is no case to answer. The arguments are heard outside the presence of the jury and if the submission succeeds, the judge, rather than the jury, acquits the accused. If the submission is unsuccessful, the case simply continues.¹⁴⁶ In making this decision, the judge should not assess the credibility or reliability of the evidence since these are jury matters; he should simply determine whether the evidence, if accepted, would be sufficient in law for conviction.¹⁴⁷ It is worth noting that this procedure was unknown in Scotland until it was imported from England in 1980. As well as the statutory power to withdraw the case from the jury at the close of the prosecution case, the judge also has a common law power, which he may exercise on application or of his own volition, to hold that there is insufficient evidence to allow the case to go to the jury. However, he may do this only after all the evidence has been heard and the closing speeches made. In this eventuality, the judge cannot acquit the accused, but must direct the jury to return a verdict of not guilty.¹⁴⁸

The Sutherland Committee recently raised the question of whether the judge should be empowered to withdraw a case from the jury or to direct the acquittal "if he believes [the jury] could not reasonably reach a guilty verdict"; the Committee suggested that this matter, which was peripheral to its remit, should be given further consideration.¹⁴⁹ It added nothing further, but the proposal seems to imply that the judge should make some assessment of the reliability and credibility of the evidence. If so, this is a rather revolutionary proposal because it seems to involve a degree of usurpation by the judge of the jury's role. For example, if, in the judge's opinion, no jury could reasonably believe the main prosecution witness, and there is insufficient other evidence to convict, then the judge should presumably withdraw the case from the jury. As yet, the government has not taken this matter up, and it seems probable that the proposal will simply be forgotten, largely because of its radical nature.

144. *See id.*

145. *See id.*

146. *See* Criminal Procedure Act § 97 (1995) (Scot.).

147. The Scottish requirement that the prosecution evidence must be corroborated is of particular importance in this context. For instance, it might be that the evidence of the victim, although totally convincing, is not corroborated by any evidence from another source, in which case the judge would be bound to accede to the defence application that there is no case to answer and acquit the accused.

148. *See* Kent v. H. M. Advocate, 1950 J.C. 38, 39; *see also* RENTON & BROWN, *supra* note 15, ¶ 18-76.

149. SUTHERLAND COMMITTEE ON CRIMINAL APPEALS AND MISCARRIAGES OF JUSTICE PROCEDURES, 1996, Cmnd. 3245, at 19, 20 [hereinafter CRIMINAL APPEALS]. Its deliberations will be further discussed below in Part III.J.

At the end of the trial, the prosecutor and defence briefly address the jury, and then the judge directs the jury as to the law. The judge is not required to summarise the evidence, as he is in some jurisdictions, but particularly in a long or complicated trial, he would normally remind the jury of the main points.¹⁵⁰ When the jury retires to consider its verdict, the clerk of court, acting in practice through a court officer, encloses the jurors in a room by themselves.¹⁵¹ If necessary, the jury must be secluded in overnight accommodation.¹⁵² Apart from instructions by the judge in connection with administrative matters—for example, food and accommodation or emergencies—no one may visit the jury room, nor may any juror leave it, except where further directions are sought or given or where the jury asks to examine a production.¹⁵³ The legislation provides that any contravention of these provisions shall lead to the acquittal of the accused.¹⁵⁴

Under the Contempt of Court Act of 1981, which applies both in Scotland and south of the border, it is contempt for anyone to obtain, disclose, or solicit any particulars of the deliberations in the jury room.¹⁵⁵ Thus, the phenomenon in the United States of jurors revealing the secrets of the jury room, sometimes for large sums of money, cannot happen in Great Britain. This rigorous approach was implemented in 1981 following revelations in a political weekly by a juror from the trial of a prominent politician for conspiracy to murder, and the subsequent failure of an attempt to prosecute the magazine for contempt.¹⁵⁶ The major disadvantage of the legislation is that it makes serious research into juries' reasons for their verdicts virtually impossible. For this reason, the recent English Royal Commission on Criminal Justice recommended that the Act be amended to allow research into the process by which jurors reach decisions.¹⁵⁷ This proposal is still under consideration by the government.¹⁵⁸

H. The Majority Verdict

The Scottish criminal jury may return a verdict, whether for conviction or acquittal, on the basis of a bare majority of eight to seven.¹⁵⁹ Consequently, there is no such thing as a hung jury; every trial produces a verdict. The jury should be directed by the judge that eight votes are necessary for conviction, and it should not be told to try for unanimity before returning a majority ver-

150. See *Shepherd v. H. M. Advocate*, 1997 S.L.T. 525, 528 (H.C.J.).

151. See *Criminal Procedure Act § 99* (1995) (Scot.).

152. See *Thomson v. H. M. Advocate*, 1998 S.L.T. 364, 365-66 (H.C.J.).

153. See *Criminal Procedure Act § 99* (1995) (Scot.).

154. See *id.*

155. *Contempt of Court Act § 8(c)(1)* (1981) (Scot.).

156. See *Attorney-General v. New Statesman and Nation Publ'g Co.*, 1 All E.R. 644, 646-47, 650 (1980) (holding that the Attorney General's contempt of court argument was not justified in this particular instance).

157. See ENGLISH ROYAL COMMISSION ON CRIMINAL JUSTICE REPORT, 1993, Cmnd. 2263, at 2.

158. See FIRM AND FAIR, *supra* note 44, ¶ 3.14; see also CRIMINAL APPEALS, *supra* note 149, ¶ 3.7.

159. See RENTON & BROWN, *supra* note 15, ¶ 18-79.

dict.¹⁶⁰ In returning the jury's verdict, the foreman must state, or be asked, whether it is unanimous or by majority, but should not be asked for the size of the majority.¹⁶¹ The Thomson Committee considered the possibility that the actual numbers of those voting for each of the three verdicts should be announced in open court in order to prevent mistakes.¹⁶² Because it infringed upon the privacy of the jury room, this option did not find favour with the committee. However, the Committee suggested that the judge might be encouraged to enquire into the voting in order to satisfy himself that the verdict was correct.¹⁶³ More recently, in *McCadden v. H. M. Advocate*, the Lord Justice Clerk suggested that the jurors ought to be asked how many of them voted guilty,¹⁶⁴ but this was disregarded in practice and disapproved in the subsequent case of *Pullar*.¹⁶⁵ Thus, the size of the majority remains a mystery in all cases.

In his history of the Scottish jury, Willock observes that the verdict of the Scottish jury seems always to have been reached by majority vote.¹⁶⁶ He suggests that in medieval times, verdicts were reached by taking the sense of the meeting, or the feeling of the community, and that dissent was tolerated but not thought to be of much importance.¹⁶⁷ Thus, by midway through the sixteenth century, the majority verdict had become formally established as an integral part of trial by jury, encouraging the use of an odd number of jurors, and it also had become established that a majority of one was sufficient to determine the verdict.¹⁶⁸ In contrast, a firm rule had developed in England by the middle of the fourteenth century, remaining unaltered until very recently, that the verdict must be unanimous.¹⁶⁹

The adequacy of a bare majority of eight to seven is obviously open to question. This emerges very starkly when one considers that until the abolition of capital punishment in the early 1960s, it was theoretically possible for someone to be executed on the basis of this majority. In essence, is it really safe to convict someone if seven out of fifteen jurors think that the case has not been satisfactorily proven? If almost half of the jurors are not convinced of the accused's guilt, is this not evidence in itself that the case has not been proven beyond reasonable doubt? These questions have been ably analysed by Gerry Maher, who argues that the rule of unanimity is not always necessary to show that the principle of proof beyond reasonable doubt is being taken seriously.¹⁷⁰ In his view, one must take into account other means by which the criminal process attempts

160. *See id.*

161. *See* Criminal Procedure Act § 100(1) (1995) (Scot.).

162. *See* THOMSON COMMITTEE, *supra* note 39, ¶¶ 51.51-56.

163. *See id.*

164. 1985 J.C. 98, 103 (1985).

165. *Pullar v. H. M. Advocate*, 1993 S.C. (J.C.) 126, 136-37.

166. *See* WILLOCK, *supra* note 1, at 226.

167. *See id.*

168. *See id.*

169. *See infra* text accompanying note 173.

170. *See* Gerry Maher, *The Verdict of the Jury*, in *THE JURY UNDER ATTACK*, *supra* note 37, at 45-52.

to ensure proof of guilt at a level of practical certainty. The Scottish system, for instance, demands corroboration of the Crown case and provides the protection of the not proven verdict.¹⁷¹ Nevertheless, Maher does question whether conviction by a simple majority does in fact give sufficient weight to the principle of requiring proof beyond reasonable doubt.¹⁷²

Clearly, a practical advantage of the Scottish position is that there is no such thing as a hung trial. However, a less obvious point is made by Maher in his critique of the English position. The law in England now requires a majority of ten to two, whether for conviction or acquittal.¹⁷³ Where the jury splits nine to three, there will be a retrial.¹⁷⁴ As Maher observes, this does not sit comfortably with the presumption of innocence or with the associated principle of double jeopardy.¹⁷⁵ The prosecution has had its chance to prove the accused's guilt and has failed; surely the presumption of innocence means that the accused is entitled to be acquitted. As Maher puts it, "[t]he presumption of innocence therefore closes the logical space between proof of guilt and proof of innocence," and thus where the verdict is not one of guilt, the result must be acquittal rather than a retrial.¹⁷⁶ This criticism cannot be levelled at the Scottish position.

The majority verdict has been considered on several occasions in recent years. The Thomson Committee canvassed, without much enthusiasm, the possibility that the ratio required for a guilty verdict should be two to one, that is, ten to five or, if the size of the jury were reduced, eight to four, but the overwhelming weight of submissions was in favour of retaining the bare majority.¹⁷⁷ Ultimately, only one member of the Committee dissented from this view, the remainder arguing that a "weighted" majority was unnecessary in view of other safeguards for the protection of the innocent. The Committee suggested that if its recommendation to reduce the size of the jury to twelve persons were adopted, a seven-to-five majority should be required for conviction and an even split of six to six should lead to acquittal.¹⁷⁸ The recent Scottish Office review also sought reaction to a possible increase in the number required for conviction, particularly if the three verdict system were to be abolished.¹⁷⁹ It cited the arguments both for and against the simple majority, while expressing no opinion on the matter itself.¹⁸⁰ The government announced that most respondents to this review favoured the straightforward majority, and given that the size of

171. See *infra* Part III.I.

172. See Maher, *supra* note 170, at 45-52.

173. See *id.* at 43.

174. See *id.*

175. See *id.* at 50-52.

176. *Id.* at 50.

177. See THOMSON COMMITTEE, *supra* note 39, ¶¶ 51.06-07.

178. See *id.* ¶ 51.12. This would not be symmetrical and consequently avoids the practical and theoretical difficulties often posed by the "weighted" majority verdict.

179. See JURIES AND VERDICTS, *supra* note 43, ch. 6.

180. See *id.*

the jury was to remain at fifteen and the three verdict system was to be retained, there was no case for changing the existing position.¹⁸¹

Finally, it is worth noting that the abandonment of the unanimity rule in England and its replacement with the requirement of a ten-to-two majority¹⁸² provoked a great deal of vehement protest. For instance, M.D.A. Freeman claimed that "the concept of a majority verdict strikes at the root of the fundamental principle of English law that guilt must be proved beyond reasonable doubt."¹⁸³ Yet in Scotland, which is ruled by the same government and has a very similar culture, the principle that guilt must be proved beyond reasonable doubt has happily coexisted with the majority verdict for centuries. Further, there are several other jurisdictions where the majority verdict is not thought to prejudice the presumption of innocence, a fact which appears to be ignored by the English critics of the abandonment of the unanimity rule.

I. The Three Verdict System

Undoubtedly the most peculiar aspect of the Scottish system of trial by jury is that it allows the jury in criminal trials a choice of three verdicts: guilty, not proven, and not guilty. This phenomenon was the result of an historical accident, but it has now formed part of the Scottish criminal justice system for over 250 years.¹⁸⁴ The verdicts of guilty and not guilty are self-explanatory, but the intermediate verdict of "not proven" requires some elucidation. While there is no common law or statutory definition of "not proven," the vital point is that it has exactly the same effect as a not guilty verdict; it counts as an acquittal.¹⁸⁵ The difference is that the verdict of "not guilty" is thought to mean that the accused definitely did not commit the crime, that is, it is a positive declaration of innocence, whereas the verdict of "not proven" is thought to imply solely that the accused's guilt has not been conclusively demonstrated.¹⁸⁶ As a result of this uncertainty, the Court of Appeal has discouraged judges from attempting to direct jurors as to the difference between not proven and not guilty, although they must be informed of the three verdicts available to them.¹⁸⁷ It has also been held that it is not necessary to tell jurors that not proven is a verdict of ac-

181. See FIRM AND FAIR, *supra* note 44, ¶ 3.20.

182. See Criminal Justice Act § 13 (1967).

183. M.D.A. Freeman, *The Jury on Trial*, 34 CURRENT LEGAL PROBS. 65, 69 (1981); see also ENRIGHT & MORTON, *supra* note 102, at 75-76; Blake, *supra* note 37, at 143.

184. See WILLOCK, *supra* note 1, at 217-25.

185. As explained above, where the jury is not unanimous, there must be at least eight votes for conviction in order to convict the accused, and the judge directs the jury to this effect. Where the votes for acquittal are split, the majority of such votes dictates whether the verdict is one of not guilty or not proven, an even split resulting in the latter verdict. See RENTON & BROWN, *supra* note 15, ¶ 18-90. This seems to indicate that if the jury is unsure which verdict to deliver, the judge should enquire into the actual figures, which is difficult to reconcile with the principle that no such enquiry should be made. See also *McCadden v. H. M. Advocate*, 1985 J.C. 98, 103; *Pullar v. H. M. Advocate*, 1993 S.C. (J.C.) 126, 136-37.

186. See JURIES AND VERDICTS, *supra* note 43, at 29.

187. See *McDonald v. H. M. Advocate*, 1989 S.L.T. 289, 299 (H.C.J.).

quittal,¹⁸⁸ presumably because they are always told that at least eight votes of guilty are required for conviction and thus can work out the consequences of a not proven verdict for themselves.

Whatever its meaning, there is no doubt that the not proven verdict is used fairly frequently by the Scottish courts. Around one-third of all jury acquittals are the product of the not proven verdict, while the equivalent in nonjury trials is around one-fifth.¹⁸⁹ The verdict has attracted much criticism over the years, primarily on the ground of its lack of logic. It is argued, quite simply, that if the Crown cannot prove its case beyond reasonable doubt, the only possible verdict should be not guilty. That is dictated by the presumption of innocence, and therefore there is no place for a "second class" acquittal.¹⁹⁰ Debate has tended to focus around two main arguments which are usually put forth in favour of the three verdict system.¹⁹¹

First, it is claimed that the jury may well not be convinced of the accused's innocence. Of particular significance here is the Scottish rule that the prosecution case must be corroborated.¹⁹² It is argued that there are many cases where one witness is completely believed, but there is insufficient corroborating evidence to allow the jury, or the judge in a nonjury trial, to convict, although they may be fairly certain that the accused is indeed guilty.¹⁹³ This might be particularly so with regard to the victim of a sexual assault. The Scottish Office paper supports this claim by demonstrating that the not proven verdict comprised "a slightly higher proportion" of acquittals in rape and sexual assault cases over a number of years.¹⁹⁴ In such cases, the not proven verdict is more satisfactory for the victim because it does not necessarily cast doubt upon her honesty or reliability. In response to this argument, it might well be observed that this does not alter the fact that the presumption of innocence demands a verdict of not guilty if the Crown case cannot be proved.

Second, it is claimed that if jurors were faced with a straight choice between guilty and not guilty, they might opt for guilty where otherwise they would have found the case not proven.¹⁹⁵ In other words, there would be an increased danger of wrongful convictions. The majority of the members of the Thomson Committee were sufficiently worried by this possibility to recommend that the not proven verdict should be retained, although they accepted the argument that the three verdict system was illogical.¹⁹⁶ In response, it might be observed that, first, their concern is based purely on speculation, and, second, there is al-

188. See *McRae v. H. M. Advocate*, 1990 J.C. 28, 28-29.

189. See JURIES AND VERDICTS, *supra* note 43, at 27-28. Nevertheless, four-tenths of not proven verdicts are returned in nonjury trials as a result of the far greater number of such trials. See *id.* at 28, tbls. 1, 2.

190. See THOMSON COMMITTEE, *supra* note 39, ¶ 51.05.

191. See *id.* ¶ 51.05; see also JURIES AND VERDICTS, *supra* note 43, ch. 10.

192. See RENTON & BROWN, *supra* note 15, ¶ 24-69.

193. See JURIES AND VERDICTS, *supra* note 43, ch. 10.

194. *Id.* ¶ 10.4, tbl. 3.

195. See *id.* ¶ 10.1.

196. See THOMSON COMMITTEE, *supra* note 39, ¶ 51.05.

ways a danger of wrongful conviction, yet no other country in the world feels that giving the jury a choice of three verdicts is a solution to this problem.

There is a third possible argument which has not been addressed in the debate over the not proven verdict. Anecdotal evidence suggests that the verdict is sometimes used if the jury knows perfectly well that the accused is guilty but thinks that the law needs to be tempered with mercy. The classic example might be the wife who has been battered by her alcoholic husband for years and eventually stabs him to death with the bread-knife as he lies in a drunken stupor on the couch. It is not unknown in such a case for a jury to return a verdict of not proven to a charge of murder,¹⁹⁷ even in the face of overwhelming evidence, presumably because it sees no purpose in further punishing the accused. In essence, the not proven verdict provides the jury with a rather subtle way of "nullifying" the law instead of having to confront it directly and openly. What the jury is really saying through the medium of a not proven verdict is that while it knows perfectly well the accused is guilty, it is not prepared to convict in this particular case. Given the issues raised by jury "nullification," it is not surprising that this argument has not been officially cited in support of the not proven verdict.

It is worth examining in more detail the most recent controversy over the not proven verdict because it has attracted a great deal of public and political interest. The debate was started by the trial of a young man for the brutal killing of a female student, which, to the astonishment of most observers, resulted in a not proven verdict by the jury.¹⁹⁸ The media strongly hinted that the accused had indeed committed the crime, and the police gave the impression that as far as they were concerned the matter was closed.¹⁹⁹ Within weeks, the victims' parents were organising a petition which demanded the abolition of the not proven verdict, attracting much support and a great deal of media attention.²⁰⁰ Implicit in much of the criticism of the not proven verdict was the belief that were it not available, the jury would have returned a guilty verdict. This, of course, although likely, is impossible to tell.²⁰¹

Around this time, the Lord Advocate, the senior law officer in Scotland, revealed in an extensive interview with a Sunday newspaper that he felt some "unease" over the not proven verdict.²⁰² Nevertheless, he confirmed that nei-

197. The doctrine of provocation would not allow the charge to be reduced to culpable homicide in such a case.

198. For a full account of the debate, see Peter Duff, *The Not Proven Verdict: Jury Mythology and Moral Panics*, 41 JURID. REV. 1, 1-12 (1996).

199. *See id.*

200. For instance, a member of Labour's shadow ministerial team announced he would introduce a Private Member's Bill to abolish the verdict. *See* Joy Copley, *Bill Launched to Abolish "Not Proven"*, SCOTSMAN, Apr. 22, 1993, at 6.

201. *See Not Proven: "That Bastard Verdict"* (BBC Scotland television broadcast, Focal Point Documentary, May 13, 1993) [hereinafter BBC Broadcast]; *see also* FIRM AND FAIR, *supra* note 44, at 32.

202. *See* Kenny Farquharson, *Law Chief Uneasy over "Not Proven"*, SCOTLAND ON SUNDAY, Mar. 21, 1993, at 21.

ther he nor the Scottish Office was persuaded that there was enough dissatisfaction to justify scrutiny of the verdict.²⁰³ However, the campaign to abolish the not proven verdict continued to gather momentum and, shortly afterwards, the BBC (Scotland) devoted its flagship documentary to the issue, entitling the programme "Not Proven: 'That Bastard Verdict'" (the latter phrase being a description of the verdict by Sir Walter Scott, who hated its illogicality²⁰⁴). Supporters of the verdict were given an opportunity on the programme to explain their point of view, but the thrust of an emotive programme was essentially hostile to the retention of the three verdict system. Further, the BBC had commissioned a public opinion poll which produced the devastating finding that the majority of the Scottish public, including those who had served as jurors, simply did not understand the not proven verdict or its implications.²⁰⁵ Many people erroneously thought that the accused could be retried if more evidence came to light.²⁰⁶

At this time, by pure coincidence, the Scottish Office was beginning a major review of various aspects of the criminal justice process, the primary motive being to cut costs and increase efficiency.²⁰⁷ The government simply added to this review an examination of the not proven verdict along with various other aspects of trial by jury, a pragmatic solution to the increasing political pressure.²⁰⁸ As described above, the Scottish Office consultation paper raised several other issues, including the preemptory challenge, the size of the jury, and the simple majority verdict, but the bulk of the paper was devoted to the not proven verdict.²⁰⁹ The government expressed no opinion on its future, but simply canvassed the arguments for and against it and invited the submission of views.²¹⁰

Ultimately, the decision was to retain the not proven verdict. The consultation exercise had not revealed "a consensus for change," either among the legal profession or the public.²¹¹ Further, the government noted that respondents were divided about the logical case for three verdicts, some asserting that "the three verdicts were entirely logical and, indeed, more consistent with reality

203. *See id.*

204. *Quoted in* WILLOCK, *supra* note 1, at 217.

205. *See* BBC Broadcast, *supra* note 201; *see also* JURIES AND VERDICTS, *supra* note 43, at 31; Alistair Bonnington, *Third Option for Scots Juries*, *HERALD*, May 13, 1993, at 15. *But cf.* Lord McCluskey, *Fiddling with Scottish Justice*, *SCOLAG* 69, 70 (1994); John Robertson & Iain Duff, *Parents Vow to Continue Campaign*, *SCOTSMAN*, June 28, 1994, at 4 (reporting comments of the Solicitor General).

206. *See* BBC Broadcast, *supra* note 201

207. *See* FIRM AND FAIR, *supra* note 44, at 1.

208. *See* Joy Copley, *Justice System in Scotland Comes Under Review*, *SCOTSMAN*, May 26, 1993, at 1.

209. *See* JURIES AND VERDICTS, *supra* note 43.

210. *See id.*

211. *See* FIRM AND FAIR, *supra* note 44, ¶ 3.16. It is interesting to note that a factor which influenced the Thomson Committee, other than their fear of wrongful convictions, was that "there is no evidence that the public regard the system as working unsatisfactorily." THOMSON COMMITTEE, *supra* note 39, ¶ 5.12.

than a two verdict system.”²¹² Thus, in the absence of “a considerable weight of informed opinion against the three verdict system,” the government thought that it should be kept.²¹³ Regarding jurors’ possible “misconceptions” about the verdict, it was suggested that to some extent these would have been corrected by the consultation paper,²¹⁴ although it is perhaps somewhat optimistic to think that the public makes a habit of reading such papers. There was an assurance in the White Paper that the judiciary had taken steps to ensure that juries understand that a verdict of not proven does not lead to a retrial.²¹⁵

J. Appeal: Perversity of Jury’s Verdict²¹⁶

The right to appeal against conviction under solemn procedure was introduced by the 1926 Criminal Appeal Act.²¹⁷ Three grounds were stipulated. The first two were very general: “a wrong decision of any question of law” by the court, and “a miscarriage of justice.”²¹⁸ The third ground was more specific, “the verdict of the jury . . . was unreasonable or cannot be supported having regard to the evidence.”²¹⁹ Despite this wording, the Appeal Court never granted an appeal based solely on the perversity of the jury’s decision, only allowing appeals under this heading where the jury’s verdict was self-contradictory or illogical in some way.²²⁰ Thus, any attempt to argue that the jury could not have reasonably convicted on the basis of the evidence was invariably doomed to failure.

These three grounds of appeal were removed and replaced with a single ground—“miscarriage of justice”—by the 1980 Criminal Justice Act.²²¹ The intention underlying the change was probably to liberalise the attitude of the court, but it did not affect the Appeal Court’s approach to claims that the evidence simply did not sustain the jury’s verdict.²²² In 1984, the Lord Justice General, Scotland’s most senior judge, commented:

Questions of the reliability and credibility of witnesses are essentially, in our law, questions for the jury, and we know of no case in which this court has interfered with any conviction upon the ground that, in its opinion, a jury had been perverse in treating a key witness as both reliable and credible.²²³

212. FIRM AND FAIR, *supra* note 44, ¶ 3.17.

213. *Id.* ¶ 3.19.

214. *See generally id.* ¶¶ 3.15-.19.

215. *See id.* ¶ 3.18.

216. *See* LORD MCCLUSKEY, CRIMINAL APPEALS § 2 (1992) (providing general information on appeals process).

217. *See* Criminal Appeal Act § 2 (1926) (Scot.).

218. *Id.*

219. *Id.*

220. *See* Salmond v. H. M. Advocate, 1992 S.L.T. 156, 157-58 (H.C.J. Sept. 9, 1990) (appeal was allowed when a jury in an attempted murder case found the accused “guilty . . . with extreme provocation,” because this verdict was indisputably incompetent since provocation is not relevant to a charge of attempted murder).

221. Criminal Justice Act § 33 (1980) (Scot.).

222. *See* RENTON & BROWN, *supra* note 15, ¶ 29-07.

223. Rubin v. H. M. Advocate, 1984 S.L.T. 369, 370-71 (H.C.J.).

As the editors of Renton and Brown observe, “the very narrow approach adopted under the old law to factual challenges to jury verdicts has persisted into the new jurisprudence of the court.”²²⁴ It is also useful to note that in his book on appeals, Lord McCluskey, a High Court judge himself, seems doubtful that the Appeal Court will ever “retreat from the notion . . . that the conclusions . . . of the jury . . . are sacrosanct and inviolable whatever the weight and coherence of the evidence.”²²⁵

Various aspects of the appeal procedure were recently examined by the Sutherland Committee, including the question of overturning the jury’s verdict.²²⁶ The Committee agreed with the general principle that the Appeal Court should be very reluctant to interfere with a jury’s verdict reached on the basis of legal sufficiency of the evidence.²²⁷ It did think, however, that there might be a few “exceptional” cases where “any reasonable jury ought to have entertained a reasonable doubt,” and argued that the Appeal Court should overturn the jury’s verdict where that verdict is “unreasonable and has resulted in a miscarriage.”²²⁸ Furthermore, it recommended that this power should be specifically enshrined in statute, presumably because this might help to overcome the court’s notorious reluctance to interfere with the verdict of a jury.²²⁹

However, the Committee did not favour the English Appeal Court’s approach of overturning a jury’s verdict on the basis of a “lurking doubt” or “gut feeling,” because this would debase the original verdict and might lead to the court being “swamped” with appeals.²³⁰ Instead, it preferred a more objective test and ultimately, something very close to its suggested formulation was adopted in the Crime and Punishment Act of 1997.²³¹ This formula retains the approach of creating only one ground of appeal—a “miscarriage of justice”—but specifically includes within this heading the granting of an appeal for “the jury’s having returned a verdict which no reasonable jury, properly directed, could have returned.”²³²

In essence, as the Sutherland Committee observed, the issue of overturning an unreasonable verdict “strikes at the heart of the role of the jury in Scottish criminal procedure.”²³³ In fact, this subject raises fundamental questions about jury trial in every jurisdiction where the institution exists. The main justification for the jury is that it is alleged to be better at finding the facts than the judge(s) acting alone and, consequently, it is very difficult to justify any judicial interference with the verdict of the jury. To overturn the jury’s decision is to

224. RENTON & BROWN, *supra* note 15, ¶ 29-07.

225. LORD MCCLUSKEY, *supra* note 216, at 188.

226. See CRIMINAL APPEALS, *supra* note 149, ¶¶ 2.59-71.

227. See *id.* ¶ 2.66.

228. *Id.* ¶ 2.67.

229. See *id.* ¶ 2.68.

230. See *id.* ¶ 2.69.

231. See Crime and Punishment Act § 17 (1997) (Scot.); see also CRIMINAL APPEALS, *supra* note 149, ¶ 2.70.

232. Crime and Punishment Act § 17 (1997) (Scot.).

233. CRIMINAL APPEALS, *supra* note 149, ¶ 2.66.

demonstrate a lack of faith in the institution, calling its very existence into doubt. That, of course, is why appeal courts in every jurisdiction are much quicker to intervene where there has been some minor procedural hitch than when there is a query over the essential merits of the conviction. Obviously, one can frame the necessary test to review the jury's decision in a variety of ways, but whether one talks of a "lurking doubt," or a "perverse verdict," or "returning a verdict which no reasonable jury could have returned," one is challenging the very *raison d'être* of trial by jury. For this reason, it seems unlikely that the new provision will make much difference to the approach of the Scottish courts.

K. Appeal: Irregularity of Procedure and Prejudice

There is little purpose in listing all the possible irregularities in procedure here. In practice, the most common ground of appeal under solemn procedure is that of misdirection by the judge.²³⁴ It is clear, however, that most such cases stem from a general dissatisfaction with the verdict and the need of the accused's adviser to find an appropriate "peg" on which to hang an appeal.²³⁵ Appeals on the grounds of other types of irregularity affecting the jury are few.²³⁶ Nonetheless, it is worth discussing allegations that the jury was prejudiced in some way because there have recently been several such appeals, and by their very nature, they go to the very heart of jury trial.

The question of possible prejudice following pretrial publicity has already been considered, and as we saw, an appeal has yet to succeed. A more common allegation is that one or two jurors were biased against the accused for some other reason. In this context, the most influential modern case is probably *McCadden*, where, it will be remembered, the Appeal Court took the opportunity to disapprove of any attempt to vet jurors in any way.²³⁷ The appeal was based on the allegation that one juror had made remarks in a social club indicating that he was prejudiced against the accused. The appeal was rejected and while the court stated that "it cannot be held that an appeal based on alleged malpractice by a juror . . . can never be entertained," it was made very clear that it would be extremely difficult for such an appeal to succeed. An inquiry into allegations of juror malpractice would be held only where the court was satisfied that "the evidence placed before it to substantiate the claim is *prima facie* sufficiently substantial, convincing and trustworthy to warrant an inquiry."²³⁸ In the court's view, there were sufficient safeguards—the judicial direction, the jury of fifteen, the majority verdict, *et cetera*—to prevent a miscar-

234. See PETER DUFF & FRAZER MCCALLUM, *GROUND OF APPEAL IN CRIMINAL CASES* 22, tbl. 7 (1996). In a sample of 250 appeals against conviction under solemn procedure, which produced 350 grounds of appeal, 147 of the grounds related to alleged misdirection by the judge. See *id.*

235. See *id.*

236. In the sample of 350 appeal grounds, only four related to alleged jury irregularity. See *id.*

237. See *McCadden v. H. M. Advocate*, 1985 J.C. 98, 102.

238. *Id.*

riage of justice. Further, there were obvious “dangers to the administration of justice which would result from a too facile resort” to such inquiry.²³⁹

The importance that the courts attach to the effect of the judicial direction to consider the case dispassionately, as a counterweight to possible prejudice, can hardly be overstated. In the recent case of *Gray v. H. M. Advocate*, the Appeal Court summed up its approach: “It has repeatedly been observed that it *must* be assumed that jurors will comply with the directions given to them by the presiding judge.”²⁴⁰ In that case, the judge had stressed that the jury should ignore everything but the evidence of the witnesses given in court.²⁴¹ Despite strong indications that there had been contact during the trial between two jurors and a co-accused, against whom charges were withdrawn, the individuals who were ultimately convicted had their appeal rejected.²⁴²

One further case is worth citing in this context. In *Pullar v. H. M. Advocate*,²⁴³ one of the jurors had been an employee of one of the two main prosecution witnesses. He had informed the clerk before the ballot but, on being questioned, had stated he did not know the accused or any of the circumstances of the case.²⁴⁴ The clerk took no further action, and the juror was selected.²⁴⁵ After proceedings had begun, the prosecution witness also informed the clerk of the relationship, and the clerk assured him that the juror had disclaimed any knowledge of the case.²⁴⁶ Hearing an appeal against conviction, the Appeal Court accepted that the clerk should have passed this information to the judge and that, if this had happened, the juror would have been excused, or at least could have been challenged, because of the possibility of bias.²⁴⁷ It rejected the appeal however, because this irregularity did not automatically invalidate the verdict and there was no evidence that the juror was biased or that a miscarriage of justice had occurred.²⁴⁸ The accused then unsuccessfully appealed to the European Court of Human Rights, under Article Six of the Convention, on the ground that the jury was not “independent and impartial.”²⁴⁹ The European Court of Human Rights observed that there was no evidence of bias nor any likelihood in the circumstances that the juror was more likely to believe his employer than the defence witnesses.²⁵⁰ Further, the integrity of the jury was protected by various safeguards, primarily the existence of fourteen other ju-

239. *Id.* It is fair to say that in this case the two witnesses who had allegedly overheard the juror's remarks in the social club were unconvincing; they were not of good character, and they were friends of the accused's brother.

240. 1994 S.L.T. 1237, 1243 (H.C.J.) (emphasis added).

241. *See id.* at 1241.

242. *See id.* at 1244.

243. 1993 S.C. (J.C.) 126. Here, the court took the opportunity to establish the procedures for ensuring that jurors do not know the parties to the case.

244. *See id.* at 130.

245. *See id.*

246. *See id.*

247. *See id.* at 133.

248. *See id.* at 134.

249. *See Pullar v. United Kingdom*, 1996 S.C.C.R. 755.

250. *See id.*

rors, the jurors' oath to assess the witnesses dispassionately, and the judicial direction.²⁵¹

IV

CONCLUSION

This account of the Scottish criminal jury has, I hope, fulfilled two purposes. First, it has furnished a full description of the institution, and in particular, emphasised its peculiarities—principally its size, the existence of the bare majority verdict, and the rather illogical three verdict system. Second, it has also attempted to challenge, in passing, various common preconceptions about the nature of jury trial. For instance, it should have become clear that the institution of trial by jury does not necessarily require that the accused should have any “right” to have his case put to a jury. Nor need it involve a complex selection procedure, with both sides having plentiful opportunities to challenge potential jurors on the ground of possible bias. Nor, finally, does conviction require unanimity on the part of the jury, or a heavily weighted majority, contrary to what is often thought.

As we have seen, the Scottish jury has existed for a long time, and without serious challenge, despite the absence of such features which are often regarded elsewhere as integral parts of jury trial. It is quite easy to perceive a particular aspect of jury trial in one's own jurisdiction as a matter of logical necessity or fundamental principle, rather than realising it is the product of mere historical accident. The benefit of this type of collection is that it ought to allow the reader to avoid such ethnocentrism and to appreciate the full range of the institution of trial by jury.

251. *See id.*