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HUNG JURIES IN THE CRIMINAL JUSTICE SYSTEM: RESEARCH AND OPTIONS FOR REFORM

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I INTRODUCTION

The jury has come to the forefront of public debate in New Zealand, highlighted recently by a number of hung juries in prominent criminal trials. Hung juries have aroused public interest in the jury, and in particular jury-room deliberations, as the public seeks to understand how and why a jury could not determine the guilt or innocence of an accused, particularly when later juries do return a verdict.

In late November 1995, John Robert Barlow was convicted for the double murder of Gene and Eugene Thomas after two days of deliberation by the jury. There had been two previous hung juries, and the estimated cost of the three trials was for over $400,000 in legal aid and well over one million dollars in police and Crown costs.[1]

On 13 October 1995, after deliberating for more than 18 hours, the jury in the trial of molecular biologist Vicki Calder, accused of attempting to murder her former lover, Professor David Lloyd, declared it was unable to reach a verdict. The case, known as the "Poisoned professor" case, was the second highly publicised trial in the last year where a jury had returned no verdict. Subsequently, Calder was found not guilty by the second jury.

The notorious Peter Plumley Walker trials traversed the range of jury verdicts with three very different results. The first trial in November 1989 resulted in a guilty verdict for both accused after thirteen hours of deliberation. This was overturned by the Court of Appeal six months later due to inadequate direction to the jury by the High Court Judge sitting on the case.[2] A retrial was ordered and commenced in February 1991 but ended in a hung jury, despite further instructions from the judge, after twenty-seven hours of deliberation. The third and final trial started in May 1991, and resulted in acquittal for both accused.

This paper seeks to address the perceived problem of the hung jury in criminal trials, questioning whether the policy of secrecy surrounding jury deliberations is worthwhile. I consider the role of the jury in our justice system, and look at research in regard to what it actually achieves. I discuss some possibilities for reform of the jury to eliminate some of the factors which may contribute to hung juries.

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[1] Kate Coughlan "Death on the Terrace: how Barlow's trials unfolded" *The Evening Post*, Wellington, New Zealand, 25 November 1995, 14.
[2] *R* v *Chignell* [1991] 2 NZLR 257.

II THE JURY IN THE CRIMINAL JUSTICE SYSTEM

A The Origins of the Jury[3]

Trial by Jury is a product of the Norman Conquest of England. The modern day jury is far removed from the original jury which consisted of a body of men from a particular locality sworn to give a true answer (*veredictum,* verdict) to any question of interest to the Crown. In the criminal law, the jury was there to supply information to the court, reporting any criminal acts by members of the community. The subsequent determination of guilt or innocence occurred through trial by ordeal.

Over the centuries the role of the juror has evolved from that of witness to that of adjudicator. Any person who has personal knowledge of the matter under trial is now required to be sworn as a witness and give evidence to the jury.

B The Modern Jury

Juries are now purely arbiters of fact on evidence presented to them. In summing up to the contemporary jury before they begin their deliberations, the judge indicates the differing functions of the judge and the jury in a trial. A sample summation from the District Court of Wellington suggests a statement from the judge to the jury along these lines:[4]

> It is my duty to regulate the conduct of the trial, to rule on questions of evidence and procedure, and to direct you upon the law applicable to the case. I direct you to accept what I tell you about the law.
>
> On the other hand, the sole responsibility for deciding all questions of fact is yours. It is for you to decide what evidence you will accept or reject or what weight you will give to any part of the evidence. If I appear to indicate any view of the evidence or of any witness which does not accord with yours, you disregard what I have said. Findings of fact and decisions on the credit of witnesses are for you, not for me.

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[3] Hon J Bruce Robertson (consulting ed.) *Adams on Criminal Law* (loose-leaf) (Brooker & Friend, Wellington, 1992) Ch 5.1.01; Hon Mr Justice McHugh "Juror's Deliberations, Jury Secrecy, Public Policy and the Law of Contempt" in Duff P. and Findlay M. *The Jury Under Attack* (Butterworths Pty. Ltd., Sydney, 1988) 56-7.

[4] Department of Courts *Sample Summation (criminal trial)* (District Court, Wellington, New Zealand, 1996) sample summation - criminal (model 1), 116.

Juries are often considered better arbiters of fact than judges because of the diversity of experience reflected in twelve different views, the collectivity of the decision-making, and the freshness of approach which jurors have, rather than the potential narrowing of vision that may occur with judges and which could affect their decision-making.[5] As one commentator explains, "historically, the criminal law has accepted that the common sense and popular knowledge of a group of ordinary citizens is more likely to reach an understanding of the truth than might some collection of specialised, professional minds."[6]

C Jury Verdicts

The present law in New Zealand is that in all criminal cases the verdict must be unanimous. This rule, like the secrecy of jury deliberations, derives from the common law. While a jury should always be directed as to the need for unanimity, the absence of such a direction is not held to vitiate the trial.[7] The unanimous verdict in a criminal trial requires like-mindedness on the part of each of the twelve jurors,[8] but does not extend to the reasons on which each individual juror relies.[9]

There are three different categories of verdicts in a criminal case that exist for the jury to return. Delivering a judgment for the Privy Council, Lord Devlin discussed these:[10]

> The first is the general verdict which is of conviction or acquittal upon the whole count. The second is the partial verdict. When at common law or by statute a jury is empowered to convict of a lesser or different crime to that charged in the count, they can be asked to return partial verdicts specifying the crime to which each verdict refers. The third category ... is the special verdict, where the jury ... 'state the naked facts, as they find them to be proved, and pray the advice of the Court thereon'.

The jury's assigned role is as arbiter of facts, yet an interesting contradiction which follows from this is that the jury can give general verdicts on the guilt or innocence of the

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[5] Law Reform Commission: Victoria *Role of the Jury in Criminal Trials* (Australian Government Printing Service, Canberra, Australia, 1989) 42.
[6] M. Findlay, "The Role of the Jury in a Fair Trial" in *The Jury Under Attack,* above n 3, 163.
[7] *R v Potter* [1962] Crim LR 55.
[8] *R v Patterson* [1980] 2 NZLR 97 (CA).
[9] *Thomas v R* [1972] NZLR 34, 41 (CA).
[10] *R v Nasralla* [1967] 2 AC 238, 248-249 (PC).

accused, without stating which facts they find proven or not proven to enable their verdict. The availability of different types of verdicts seems to negate the role of the jury because the special verdict, which seems to complement the fact-finding endeavour most suitably, is a very rare occurrence in any criminal matter.[11]

D The Role of the Jury in Our Justice System

Some writers claim that trial by jury was enshrined as a constitutional right in the Magna Carta, 1215, clause 39, which provided for a "trial by peers".[12] Other commentators hold that the Magna Carta has nothing to do with trial by jury, and that the translation of the Latin "*judicium parium*" in clause 39 implied the right to judgment for the accused by a judge of equal rank, rather than a trial by one's peers.[13]

Whatever the foundations of "the right to trial by jury", the significance that the jury now holds in our society is exceptional. Commentators have considered the jury to be the "palladium" of justice and the "sacred bulwark of the nation"[14], "the lamp that shows that freedom lives"[15], and the "touchstone of common-sense"[16].

Trial by jury has been considered by some commentators as an injection of democracy into the legal system. Lord Devlin considers that "Each jury is a little parliament."[17] It is a symbol of participatory democracy, a mechanism for lay participation in the justice system which gives people confidence in its fairness,[18] and educates them in the ways of the law.[19] The jury is upheld as a protector of liberty and a safeguard of democracy, because of its capability to override oppressive laws and protect against political interference in administration of justice. The jury is said to guard against judicial corruption, socially prejudiced judges and police corruption and overeagerness.[20]

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[11] Above n 3, *Adams* Ch 5.15.03.
[12] Sir Patrick Devlin *Trial By Jury* (Hamlyn Lectures, Methuen & Co., London, 1956) 164; Nicholas Blake "The Case for the Jury" in *The Jury Under Attack,* above n 3, 140; New Zealand Law Commission *Juries: Issues Paper* (Wellington 1995) 6-7.
[13] W.R. Cornish *The Jury* (Allen Lane The Penguin Press, London, 1968) 12; Forsyth, *History of Trial by Jury* (1852) 108.
[14] Blackstone, W., *Commentaries,* Vol. IV, 1776, 349.
[15] Above n 12, Devlin, 164.
[16] Campbell, E. "The Secret Chamber of the Law" (1962) 36 ALJ 119, 121.
[17] Above n 12, Devlin, 164.
[18] Above n 13, Cornish, 255.
[19] Above n 16.
[20] Above n 13, Cornish, 137.

The legitimacy of the independence of the jury which has been central to its ideological attractiveness for centuries is said to be ensured by its representativeness of the views of the community. The proposition is that the jury represents the conscience of the community and will perform its functions in line with social morality. The jury is able to dispense fairness and temper law with mercy to enable "justice" through the general verdict, which "preserves the basic legal dogma in appearance and at the same time circumvents it in fact, to the end of permitting that pliancy and elasticity which is impossible according to the dogma, but which life demands."[21]

Lord Devlin, writing extra-judicially in 1981, says:[22]

> The jury is the means by which the people play a direct part in the application of the law.... The interrelation between judge and jury, ... , secures that the law will not be applied in a way that affronts the conscience of the common man [sic]. Constitutionally it is an invaluable achievement that popular consent should be at the root not only of the making but also the application of the law. It is one of the causes of our political stability.

Countering these fervent philosophical views are more practical arguments against the jury. These propose that the jury lacks intelligence and understanding of the issues, that juries may be susceptible to argument and easily swayed and that juries are unfamiliar with legal and fact-finding issues in a trial.[23] It is also argued that complex cases may prove difficult for a jury to comprehend[24] and that the intricacy of jury trial procedure leads to expense and inconvenience for all involved, and is very time-consuming.[25]

The lack of any reasons given by the jury for their decisions leads to uncertainty and unpredictability because of the general verdict. Judges must give reasons for their decisions, yet juries do not have this requirement, and there is no formal responsibility or accountability of jurors for their decisions.[26]

Some of the arguments against the jury raise very serious and relevant criticisms. However, because juries deliberate in secret, legal debates about jury functioning and

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[21] Jerome Frank *Law and the Modern Mind* (Anchor Books, New York, 1963) 184.
[22] *The Judge* (Oxford University Press, Oxford, 1981) 127.
[23] Glanville Williams *The Proof of Guilt* (Hamlyn Lectures, 3 ed., Stevens & Sons, London,1963) 271.
[24] *R* v *Van Beelen* (1972) 6 SASR 534, as cited in Law Reform, above n 5, 65.
[25] Law Reform, above n 5, 42-43,

arguments for and against the jury have relied heavily on anecdote and have been founded mainly upon speculation of what goes on inside a jury room during deliberations.

III JURY SECRECY AND THE COMMON LAW

The traditional and firmly established rule is that a court will not receive evidence of what occurred during a jury's deliberations. This rule is not founded upon any statute but has arisen from the common law.[27]

The New Zealand Court of Appeal in 1979 in *R v Papadopoulos* stated:[28]

> For centuries the Courts have declined to receive affidavits from jurors purporting to disclose what took place during their deliberations in the jury room or the jury box. The rule dates from at least the time of Mansfield CJ, who would not look at an affidavit of two jurors swearing that the jury were divided and reached a verdict by tossing up: *Vaise v Delaval* (1785) 1 TR 11; 99 ER 944.

More recently the New Zealand Court of Appeal in *Solicitor-General* v *Radio New Zealand Ltd* has indicated that not only is evidence from jurors unacceptable but has emphasised the confidential nature of jury deliberations; upholding that "conduct which may undermine the jury system, or public confidence in it, is capable of constituting contempt [of court],".[29]

There are some exceptions to this rule; as an appeal court may receive evidence that a juror was not qualified to serve as a juror.[30] A court may also receive evidence about "matters extrinsic to the deliberations", for example, where jurors have undertaken their own investigations outside the courtroom, or where there is evidence that a juror was biased.[31] Recently the New Zealand Court of Appeal suggested that in an extreme case the court may receive evidence of what occurred during deliberations, for example where one juror threatens the others with a gun. In the same case, the Court held that

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[26] Above n 3, McHugh, 65-66, above n 5, 42-43.
[27] *R* v *Papadopoulos* [1979] 1 NZLR 621; *R* v *Coombs* [1985] 1 NZLR 318; *R* v *Norton-Bennett* [1990] 1 NZLR 559; *R* v *Tawhiti* [1994] 2 NZLR 696; *Ellis* v *Deheer* [1922] 2 KB 113; 38 TLR 605; *Boston* v *W S Bagshaw & Sons* [1967] 1 WLR 1126.
[28] [1979] 1 NZLR 621,626 per Cooke J.
[29] *Solicitor-General* v *Radio New Zealand Ltd* [1994] 1 NZLR 48, 55.
[30] *Ras Behari Lal* v *King-Emperor* (1933) 50 TLR 1.
[31] *R* v *Tinker* [1985] 1 NZLR 330 (CA); *R* v *Riley* [1982] 1 NZLR 1 (CA); R v *Bates* [1985] 1 NZLR 326 (CA); *R* v *Harbour* [1995] 1 NZLR 440; *R* v *Coombs* [1985] 1 NZLR 318; *R* v *Norton-Bennett* [1990] 1 NZLR 559;

members of the jury should not be approached by counsel without leave of the Court or agreement of the prosecution.[32]

A Why Has This Rule Developed Through The Common Law?

The rule upholding secrecy of jury deliberations is considered essential in the public interest and is based on strong public policy grounds.[33] Lord Denning MR accounted that "the reasons are twofold: first, to secure the finality of decisions arrived at by the jury; secondly, to protect the jury themselves and to prevent them from being exposed to pressure or inducement to explain or alter their views."[34]

The New Zealand Court of Appeal considers that the protection of the jury system requires finality of jury verdicts, candour and full participation of jurors in jury deliberations, and privacy for the jurors.[35] *R* v *Papadopoulos* examines the reasons for the common law position on jury secrecy in New Zealand:[36]

> One reason is the need for finality in decisions; the uncertainty that would prevail if it were always open to a juror to say afterwards that he or she had not really agreed is obvious. It is also vital that jury discussions should be free and frank; no juror should be deterred from expressing his or her independent opinion by the fear of victimisation or undesired publicity if that opinion could later be disclosed. Public confidence in the jury system could be shaken and jurors could be distracted from doing their duty conscientiously if individual members of the jury were free to publicise their own versions of debates in the jury room. Jurors should not be exposed to importuning on behalf of the accused or by litigants or to any temptation to capitalise on disclosures.

The Honourable Mr Justice McHugh discusses in depth the policy behind jury secrecy, summing up that "the policy of the law is to prevent the deliberations of jurors being used for the purpose of attacking the verdict."[37]

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[32] *R* v *Taka* (1992) 2 NZLR 129,131.
[33] Above n 27, *R* v *Papadopoulos.*
[34] *Boston v W S Bagshaw & Sons* [1967] 1 WLR 1126, 1135n, per Lord Denning MR.
[35] Above n 29, *Solicitor-General* v *Radio New Zealand Ltd.*
[36] Above n 27, *R* v *Papadopoulos.*
[37] Above n 3, McHugh, 61.

The English courts in *Attorney-General* v *New Statesman and Nation Publishing Co. Ltd.* held that in order to establish that publication after a trial of a juror's disclosure of jury-room secrets was a contempt of court it was necessary to show that the disclosure tended or would tend to imperil the finality of jury verdicts, or to affect adversely the attitude of future jurors and the quality of their deliberations.[38]

There have been several judicial statements to the effect that jury-room discussions are to remain secret. At the end of the first "Poisoned Professor" trial, which concluded in a hung jury, Justice Tipping warned the jurors that any attempts to interview them should be resisted and told the media that anyone who sought comment from the jurors on the case or on their deliberations would be held in contempt of court.[39] His Honour's reasons for this were indicated in his address to the media where he stated that the case was still alive and that nothing should be said, either orally or in writing by the media, that could prejudice a retrial.[40]

McHugh canvassed arguments in favour of the jury secrecy rule and arguments in favour of disclosure of jury verdicts, yet he concluded that what is required is greater knowledge of the workings of the jury room:[41]

> What is needed is scientific, thorough research into the system carried out by those competent to do it. Only knowledge of that kind will let us know whether the system needs improvement or abandonment. At the moment trial by jury is being increasingly condemned without the jurors being heard. The critics tell us that juries are of no use in cases concerning scientific or accounting or any complex form of evidence. Verdicts by judges, we are told, are better because they are reasoned and more predictable....
>
> It may be that the abandonment of secrecy, far from destroying the system, may be all that will save it. The jury system will only survive in the end if the community accepts that it is in the public interest that it should survive.

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[38] [1981] QB 1.
[39] "Hung jury in Lloyd poison case" *The Christchurch Press*, 14 October 1995, 1.
[40] Above n 39.
[41] Above n 3, McHugh, 70-71.

IV HUNG JURIES

Hung juries are the result of a jury not being able to reach a unanimous decision in delivering a verdict of either guilty or not guilty. In most jurisdictions, juries hang in less than four per cent of cases approximately.[42] Hung juries have been discussed as being undesirable in terms of cost, delay and the effect on the accused in particular.[43]

Section 374 of the Crimes Act 1961 provides that a jury may be discharged once it has been deliberating for more than four hours and has not reached a verdict. No definite time limit should be imposed on a jury's deliberations, although a judge may inquire whether there is any likelihood of the jury reaching a verdict or whether he or she can be of any assistance to them. This is allowed provided it is made clear to the jury that they are not under any pressure.[44]

The New Zealand Court of Appeal in *R v Accused* indicated that a direction along the following lines would be appropriate in New Zealand when a jury reported difficulty in agreeing and sought guidance from the judge:[45]

Members of the Jury:

> I have been told that you have not been able to reach a verdict so far. That sometimes happens, and it is no reflection on any of you. I have the power after you have been in retirement for 4 hours to discharge you from giving a verdict, but not unless and until I am satisfied that it should be done. Judges always hesitate to discharge a jury, because it usually means that the case has to be tried again before another jury and experience has shown that juries are often able to agree in the end if given more time.
>
> Each of you has sworn or affirmed that you will try the case to the best of your ability and give your verdict according to the evidence. It is important that you do your best to accept that responsibility and not pass it over to another jury. You are here as representatives of the community with the responsibility on behalf of the community of trying to reach a collective decision of all of you.

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[42] This is accepted as the standard proportion in various jurisdictions in Australia, England and the United States: W. J. Brookbanks "Hung Juries or Majority Verdicts: the Jury on Trial" [1991] NZLJ 188, 189; Kalven and Zeisel, *The American Jury* (Little & Brown, Boston, 1966); *New Zealand Royal Commission on the Courts* (1978).

[43] NZ Law Commission, above n 12, 12; John Pike "Majority Verdicts: The Barlow Trial in Retrospect" New Zealand Bar Association *Papers Presented at the Auckland Conference* (Auckland, 9 March 1996) 53-55.

[44] *R v George* [1984] 1 NZLR 272, 278 (CA).

> One of the strengths of the jury system is that each member takes into the jury room his or her individual experience and wisdom and is expected to judge the evidence fairly and impartially in that light. You are expected to pool your views of the evidence and you have a duty to listen carefully to one another. Remember that a view honestly held can be equally honestly changed. So, within the oath, there is scope for discussion, argument, and give and take. That is often the way in which in the end unanimous agreement is reached.
> But of course no one should be false to his or her oath. No one should give in merely for the sake of agreement or to avoid inconvenience. If in the end you honestly cannot agree, after trying to look at the case calmly and objectively and weighing carefully the opinions of others, you must say so. If regrettably that is the final position, you will be discharged and in all probability there will have to be a new trial before another jury.
> Therefore I am asking you, as is usual in such a case, to be good enough to retire again and see whether you can reach a unanimous verdict in light of what I have said.

This recommended direction by the Court of Appeal indicates several good reasons why the jury has endured as an institution within the justice system.

Hastie, Penrod and Pennington's study[46] has drawn the conclusion that the hung jury is actually important to the legal system:[47]

> Hung juries have a conceptual and symbolic significance that is far greater than their frequency of occurrence would indicate. This is because they signal a failure of the jury institution to produce its desired result of a clear and unequivocal decision. However, the label of "failure" is misleading, for the hung jury is "a valued source of integrity" and has been interpreted as a sign that anti-defendant bias was not present.

The jury has provoked much comment recently, especially as a direct result of the introduction of new legislation which allows television filming inside the courtroom. The Calder trial was one of the cases involved in the media pilot, and Justice Tipping, the

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[45] [1988] 2 NZLR 46.
[46] Hastie, Penrod and Pennington *Inside the Jury* (Harvard University Press, Cambridge, 1983).
[47] Hastie, above n 46, 165-166 in reference to Kalven and Zeisel, above n 42, 453.

presiding judge, questioned whether the increase in hung juries recently related to the detailed media coverage that the two Barlow trials and the "Poisoned professor" cases received.[48]

A Possible Reasons Why Juries Cannot Reach Unanimous Verdicts

The first major study of juries, conducted by Kalven and Zeisel, suggested that the most likely reason for a hung jury was a response to genuine difficulties in the case, and that this may be a reflection on the clarity with which the issues of fact and law are submitted to the jury.[49]

Because jury deliberations are secret and juries do not have to give reasons for their verdict, there is no adequate empirical basis from which to determine why juries are hung. This factor raises questions as to whether they hang because of (1) judicial misdirection, or (2) ambiguous communications between judge and jury or between counsel and jury, or (3) simply because there is genuine disagreement amongst the jurors.

The Crown carries the burden of proving their case to the jury against the accused "beyond reasonable doubt". This phrase is fraught with difficulties. The courts have consistently declined to assign any percentage, or any percentage range to the level of proof required.[50] In comparison, the civil law burden of proof, which is "the balance of probabilities", requires proof to 51 per cent. Courts sometimes allow the synonym "sure" or allow the explanation that a "reasonable doubt" is "a doubt which you decide is reasonable in all the circumstances.[51]

Detailed jury studies conducted in the 1970s and 1980s seem to indicate that jurors have real difficulty in understanding what the standard of proof actually means.[52] It has been articulated that jurors have differing interpretations as to what is "reasonable", with one case comment expressing that "the existence of dissent does not necessarily demonstrate that either the majority was wrong or that the dissenters were acting

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[48] Justice Tipping "Television in Court", Bar Association, above n 43, 85.
[49] Kalven and Zeisel, above n 42, 201 as cited in Jan Caunter "Hung Juries in Light of the Plumley Walker Trials" (1992) 7 AULR 54, 79.
[50] Hon. Justice McGechan & Arthur Tompkins "Evidentiary Issues" (New Zealand Law Society Seminar, Butterworths, July-August 1996) 3.
[51] *R v Kaki* Unreported, 29 March 1993, Court of Appeal, CA394/92; *R v Speakman* (1989) 5 CRNZ 250, 260; *R v Brown* (1990) 5 CRNZ 606, 609; *R v Routh* [1992] 1 NZLR 290.

unreasonably: both may agree that the defendant is probably guilty, and differ only as to whether a doubt that they share is "reasonable"."[53]

The Hastie study analysed the complete pattern of communication in mock juries, and found that little or no time was spent discussing the standard of proof during deliberations. It was suggested by the researchers that this may mean jurors fail to understand when to apply the standard of proof.[54] The authors stated:[55]

> When a probabilistic issue, such as the possible identification of the perpetrator of a crime as the defendant, is the focus of the trial, then discussion of the standard of proof is prominent in deliberation. However, when the standard of proof is applied to intuitively less probabilistic elements of the crimes charged, such as the defendant's state of mind, then the jury fails to heed the trial judge's instruction that each element of a crime must be established beyond a reasonable doubt to return a guilty verdict.

In Barber and Gordon's account of juror experiences[56], difficulties with jurors often applying the burden of proof to the civil standard of "the balance of probabilities" rather than the criminal standard of "beyond a reasonable doubt" were evident. Many of the jurors felt their job was simply to ask whether or not the defendant committed the crime, and thus convicted on the balance of probabilities. A law lecturer's published account of her experiences as a juror in the United Kingdom included juror comments such as "I'm saying guilty but I don't believe those police".[57]

The standard of proof beyond reasonable doubt is crucial to maintain the element of fairness in criminal trials. It is a safeguard, along with the unanimous verdict, which exists to ensure that the verdict is reached with the highest possible level of certainty. These difficulties appear to have some influence over the verdicts of juries but it is difficult to know because of the secrecy surrounding the deliberations.

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[52] Van Dyke *Jury Selection Procedures* (Ballinger, Cambridge, Massachusetts, 1977) 204.
[53] Case Comment, "Unanimous Criminal Verdicts and Proof Beyond a Reasonable Doubt" (1964) 112 U Pa L Rev 769, 772, as discussed in Caunter, above n 49, 59.
[54] Hastie, above n 46, 97.
[55] Hastie above n 46, 87, Caunter, above n 49, 60.
[56] Barber & Gordon (eds.), *Members of the Jury* (Wildwood House, London, 1976) as discussed in Caunter, above n 49, 60.
[57] Darbyshire, "Notes of a Lawyer Juror" (1990) 140 New LJ 1264, 1266 as discussed in Caunter, above n 49, 60.

V RESEARCH ON JURY DECISION-MAKING

Robert J. MacCoun[58] discusses jury decision-making, stipulating that there are two different phases; cognitive processing during the trial, and deliberation in the jury room.[59] He states that "because jury deliberation is cloaked in secrecy, legal policymakers have made important decisions about the scope and conduct of jury trials on the basis of untested intuitions about how juries reach their verdicts."[60]

In the 1950s, researchers at the University of Chicago covertly recorded the deliberations of several federal juries for the purposes of research. Despite the court's co-operation this endeavour was aborted by a congressional inquiry, resulting in legislation prohibiting attempts to observe or record jury deliberation.[61] Since then, researchers have resorted to other strategies to study jury behaviour particularly archival analyses, post-trial interviews and mock jury experiments.

A Kalven and Zeisel's Jury Study

One of the largest and most influential studies of juries ever conducted was by Kalven and Zeisel in the 1960s. The study examined the verdicts of 3576 trials in the United States, comparing systematically the judge's view of the evidence and of what they thought the verdict should have been to what the jury actually decided. In 64.2 per cent of the cases, juries voted to convict, with judges in agreement in 96 per cent of those cases. Agreement on acquittals was very different, with judges voting to convict 604 of the 1083 persons (57 per cent) that juries would have acquitted. This is less surprising in light of the fact that judges would have returned a guilty verdict on 83.3 per cent of all defendants.

In effect, Kalven and Zeisel's work suggests that if the judges' views are to be the criterion against which the validity of jury decision-making is evaluated, then juries are very poor performers, and vice versa.[62]

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[58] A social psychologist in the Behavioural Science Department at The RAND Corporation, Santa Monica, CA.
[59] Robert J. MacCoun "Experimental Research on Jury Decision-Making" (1990) 30 Jurimetrics Journal 223, 223.
[60] MacCoun, above n 59.
[61] Enid Campbell "Jury Secrecy and Contempt of Court" (1985) 11(4) Monash Uni LR 169.
[62] Kalven and Zeisel, above n 42, as discussed by Geoffrey M. Stephenson *The Psychology of Criminal Justice* (Blackwell Publishers, Oxford, 1992) 180-181.

No-one knows for sure why the juries disagreed with the judges so markedly, but the judges themselves attributed their disagreement with the juries they instructed to the following factors:[63]

	per cent
Sentiments on the law (equity)	29
Sentiments on the defendant	11
Issues of evidence	54
Facts only the judge knew	2
Disparity of counsel's abilities	4
	100

Stephenson comments on these statistics, acknowledging that they represent only the judges' informed guesswork; "If we applaud juries for disputing the law's appropriateness (29 per cent), and forgive them for not knowing facts only known to the judge (2 per cent) or being swayed unusually by one counsel's superior abilities (4 per cent), that leaves 54 per cent of cases of disagreement between judge and jury, in which juries misinterpreted the evidence, and 11 per cent in which jurors let their private feelings about the defendant influence their decision."[64]

B Baldwin and McConville's Research

Baldwin and McConville carried out a study of jury performance of nearly 1000 cases in Birmingham and London Crown Courts, looking at the extent to which juries' verdicts accord with the views of judges, police, and experienced trial lawyers. They found that perverse convictions and acquittals were a feature of jury decision-making. Serious doubts by at least two parties from the judge, police, prosecuting barrister and defending barrister, occurred in 36 per cent of all acquittals and 10 per cent of all convictions by the jury.[65]

There are serious flaws with a comparison of jury verdicts to the judiciary's or any legal experts' opinions of how a case should be determined. Baldwin and McConville

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[63] Kalven and Zeisel, above n 42, 115; Stephenson, above n 62, 181.
[64] Stephenson, above n 62, 181.
[65] John Baldwin & Michael McConville *Jury Trials* (Clarendon Press, Oxford, 1979) 37.

acknowledge that high levels of agreement between juries and judges tell us little about how well or how badly the jury is functioning. They felt that the comparison did provide a useful yardstick by which a jury's performance can be measured, holding that "it is certainly arguable that, where the judge and jury agree, a defensible verdict is likely to have been reached."[66]

C The McCabe and Purves Study

This was an experiment in the UK which used shadow juries composed of prospective jurors selected from the electoral register in the same fashion as regular jurors. These shadow juries were established for each of thirty Oxford Crown Court trials. They were put into the public galleries of the court to listen, and when the real jury went out to deliberate, these juries were withdrawn from the court and undertook their own discussion of the case before bringing in a verdict. Their discussions were recorded and transcribed.

It was found that when a shadow jury took a vote at the start of deliberations, the vote rarely changed by more than two moves in either direction. Those votes which were initially 9:3 became 10:2, and most which started at 11:1 became unanimous. This may simply have been because only a majority of 9:1 or 10:2 or 10:1 is required in the UK in criminal cases,[67] but it was evident from the content analysis of the taped discussions that jurors' opinions which were formed during the trial tended to crystallise quite early in the deliberations.

The study also showed that the jurors took their task extremely seriously and were not prepared to let "hunches" lead to conviction, but instead looked determinedly for evidence upon which the conviction could be based.

Perhaps the most significant result of the study was the subjects' emphasis on the importance of the judges' directions to the juries. The shadow jurors made it clear that they considered the judge to be more influential than anyone else in helping the jurors come to an understanding of the facts and the relevant law in the case. Their deliberations often referred to these directions and they frequently recalled the instruction

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[66] Above n 65, 37.

that their verdict was only to be based on the evidence presented in court, especially when the deliberations went astray.

The study concluded that further jury research needed to focus on a comparison between a transcript of the judge's summation and the jury deliberations following it.

The standard of proof proved to be a problem for the jurors, especially where the evidence was circumstantial or inferential. This difficulty was most apparent when a case turned on the finer points of *mens rea* (criminal intent).[68]

If the jury is a reliable instrument for measuring guilt, then there should be substantial agreement between the "real" and "shadow" juries. Stephenson comments that while there is a statistically significant association between the verdicts of the two sets of juries, there are clear discrepancies. Three (23 per cent) of the 13 defendants that real juries found guilty would have been acquitted by the shadow jury, and six (38 per cent) of the 16 found guilty by shadow juries were acquitted by the real juries.[69]

D The Hastie Study[70]

Subjects were recruited from the Superior Court jury pools in three counties of Massachusetts and were shown a re-enactment of a murder trial. The subjects were then assigned to one of three groups:

(i) unanimous verdict, (12:0)
(ii) majority verdict, (10:2)
(iii) majority verdict, (8:4).

The research focused on the effects of varying the type of jury verdict required and the types of behaviour displayed during deliberation. A pattern emerged as to the way in which jurors attacked their deliberations. They tended to begin with a discussion of the agenda for deliberation or voting, where the groups fell into either an evidence-driven deliberation, or a verdict-driven deliberation. The former method reviewed the evidence

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[67] Section 17 of the Juries Act 1971 (UK).. Majority verdicts only allowed after two hours deliberation and the foreman must state in open court that the jury is deadlocked and the number of jurors who respectively agreed to or dissented from the verdict.
[68] Latin translates roughly to English as "guilty mind".
[69] Stephenson above n 63, 183-4.

quite broadly and assessed it, looking for a general account of the events, with voting ballots taking place quite late in the deliberations. The latter method began with a ballot so that numbers for guilty, not guilty and undecided could be ascertained immediately, with the pattern of polling continuing to be quite frequent throughout the deliberations.

Measurements were taken on the formal voting rates in each of the groups. On average, the unanimity groups took a head count every 23.4 minutes, the 10:2 majority every 15.4 minutes and the 8:4 majority every 19.7 minutes. The inference drawn from these differences was that a unanimity requirement induced "an integrative, evidence-driven deliberation style" while the majority verdicts favoured the verdict-driven style.

Another significant finding of the Hastie study was the in-depth analysis of the deliberations in the period following a majority of eight being reached in the unanimity and 10:2 groups. It was discovered that crucial events happened at this point in the deliberations. For example in twenty-seven per cent of the cases there were requests for more direction from the judge, and in thirty-seven per cent of the cases discussion centred on the standard of proof at this time.

Contrary to popular belief, a majority of eight did not necessarily mean the final verdict had been determined. The authors concluded that "In unanimous decision rule juries a number of important events, including reversals of the most popular verdict choice, substantial portions of the discussion, and requests for further instructions, occurred during the period after the largest faction exceeded eight members. This and other findings in the analysis of deliberation content strongly imply that the unanimous decision rule should be preferred over majority decision rules."

E The Wrightsman Study[71]

This research involved the use of controlled mock juries in which groups of six deliberated on the facts of a case involving first degree murder. The study focused on the deliberation process in regard to unanimous and two-third majority verdicts and were videotaped without the subjects' knowledge.

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[70] Hastie, above n 46, 98 as discussed in Caunter, above n 49, 67.
[71] Wrightsman, Kassin and Willis *In the Jury Box: Controversies in the Courtroom* (1987) 251, as cited in Caunter, above n 49, 68.

It was found that the jurors tended not to deliberate to unanimity unless they were forced to do so. The researchers' impressions were that majority juries will never reach consensus, that they are less effective in convincing all members that the verdict is the appropriate one, and that the deliberations were shorter and less robust that those than those where a unanimous verdict was required.

The findings of the Wrightsman study were held to lend great weight to the comments of US Justice William Douglas who stated "It is said that there is no evidence that majority jurors will refuse to listen to dissenters whose votes are unneeded for conviction. Yet human experience teaches that polite and academic conversation is no substitute for the earnest and robust argument necessary to reach unanimity."[72]

F Problems with Jury Research Methods

In an archival analysis, jury verdicts are sampled from court records or court reporting services and analysed statistically to describe trends and identify relations between case characteristics and jury verdicts. However archival sources omit a great deal of potentially relevant information and only document what juries have done, not how or why they did it.[73]

Post-trial interviews examine actual jurors on how they reached their decisions. This method has serious difficulties with reliability and validity because juror' retrospective accounts are vulnerable to memory loss and distortion, and juror interviewing also raises ethical and legal concerns.[74]

Mock juries are used for most experiments with research participants asked to reach judgments regarding a simulated legal trial. The mock jury approach has the added advantage of permitting replication across juries within the context of a single trial, and there is no legal barrier to observing deliberation.[75]

Differences between these experiments and actual trials have led some observers to question whether generalisable conclusions about actual jury behaviour can be reached

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[72] *Johnson v Louisiana* 406 US 356 (1972) 389, as cited in Caunter, above n 49, 68.
[73] MacCoun, above n 59, 224.
[74] Norbert L. Kerr and Robert M. Bray (eds.) *The Psychology of the Courtroom* (Academic Press, New York, 1982) 297.
[75] MacCoun, above n 59, 224.

by studying the behaviour of mock juries reacting to written, audiotaped, or videotaped trial re-enactments.[76] Experiments comparing mock jurors with subjects who thought they were actually trying a case have been inconclusive.[77] But overall mock jurors do not appear to reach decisions by a fundamentally different process than actual jurors.[78]

VI OPTIONS FOR REFORM

A Open Deliberations

1 Arguments for open deliberations

There are some excellent arguments for removing the secrecy of verdicts which would allow research into how juries make their decisions, enabling reform which may assist in preventing hung juries. "Sunshine laws" and freedom of information acts sustain the operative assumption that knowledge about how our institutions work results in either confidence in those institutions or discovery that they do not deserve our confidence and need correction.[79]

The (UK) Supreme Court Act 1981, s 67, states that "Our Constitution has been found to be best guaranteed by the open administration of justice." However, the secrecy surrounding jury deliberations keeps important information, such as the reasons for a given verdict, from the general public as well as the accused and so does not promote the open administration of justice. Jeremy Bentham stressed the *imperative need for public justice*, stating that "The grand security of securities is publicity - exposure - the completest exposure of the whole system of procedure - whatever is done by anybody, being done before the eyes of the universal public."[80]

Open deliberations would reveal any problems that occur in jury deliberations and decision-making which are shielded by secrecy, where there could be means of facilitating jury decision-making, by judges or counsel, that is essential to assist in justice occurring.

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[76] Kerr and Bray, above n 77, 287.
[77] MacCoun, above n 59, 224
[78] Hastie, above n 46; Kerr and Bray, above n 77; MacCoun, above n 59, 224.
[79] Abraham S. Goldstein "Jury Secrecy and the Media: The Problem of Post-Verdict Interviews" (1993) 2 Uni Illinois LR 295, 297.
[80] Jeremy Bentham "Principles of Judicial Procedure" in *The Works of Jeremy Bentham* Vol II (John Bowring ed., William Tait Publishers, Edinburgh, 1982).

Disclosure would also make juries more accountable, and since the public cannot elect or dictate to jurors, it is argued at least the jury ought to know that the public is watching its performance. This may also limit any possible prejudices that may affect a verdict, and by leaving the deliberations open to public scrutiny there is opportunity to see whether the rules of evidence were correctly followed, thus allowing injustices to be cured. Disclosure would also enable more certainty and predictability in the law by allowing perusal of how and why a jury came to a certain decision.[81]

Jury disclosures in other jurisdictions, including attempts to solicit or obtain jury deliberations, have been converted from being a contempt of court at common law to being a statutory offence.[82] Goldstein , in his discussion on post-verdict interviews, feels that jury impartiality and the defendant's right to a fair trial are threatened by media disclosure.[83]

Justice McHugh maintains; "I think that public confidence in the jury system will be undermined by more being known about jury deliberations only if the system deserves to be undermined. If juries habitually disregard the legal directions or the evidence or are incapable of understanding them or if they decide cases by prejudice or extraneous matters, then surely it is in the public interest that the system be brought to an end. If those who think that the trappings of trial by jury are a cloak for an elaborate farce are right, it would be better if verdicts were reached by a less expensive and a less time-consuming procedure.....12 unelected people should not have the power to suspend the law."[84]

2 Open deliberations for the purposes of research

Jury deliberations could be allowed to be disclosed or observed on a controlled level for the purposes of research. The research that has been performed relating to jury deliberations attempts to replicate real trial conditions, but clearly nothing can substitute for reality. The problem with this option is that it is possible that disclosure would stifle and inhibit free and open discussion amongst jurors during their decision-making, thus

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[81] McHugh, above n 3, 65-67.
[82] Section 8 of the Contempt of Court Act 1981 (UK); Section 576.2 of the Canadian Criminal Code; Rule 606B of the Federal Rules of Evidence (USA); Section 69A of the Juries Act 1967 (Victoria, Aust.).
[83] Goldstein, above n 82, 307 & 310.
[84] McHugh, above n 3, 70.

affecting the verdict and creating a false situation which would result in corrupt data being collected.

The jury could be videotaped, but this method could make jurors very self-conscious and inhibited. There is always the possibility that juries could be videotaped without their knowledge in order to secure a realistic and accurate data source, but this raises ethical concerns.[85] A less intrusive option would be audiotaping, with juror knowledge, as, in my opinion, a tape-recorder on a desk is far less intimidating than a video camera, and jurors may be able to forget its presence.

Goldstein holds that assumptions that jurors will not perform their historical function of protecting against arbitrary government effectively if deliberations are no longer secret may be incorrect. "It is not at all clear why the fact that their [the jury's] conversations in the jury room ... may come to be known will make them less courageous. Moreover, jurors may become accustomed to the presence of the media. This may make them *more* independent, ... , rather than less so."[86]

B Research to facilitate the decision-making role of the jury

Judicial misdirection has been suggested as a possible cause of hung juries or problems with juries' decision-making.[87] Jury misunderstanding and failure to comprehend the judge's directions on the law are also a problem. Juries are expected to make decisions on the basis of mainly oral evidence which they must remember, although they are permitted to take notes.[88] At present, jurors may take exhibits but not the transcript of the trial into the jury room. If the jury has any questions about the evidence, they must return to the court and ask the judge who may read extracts from the transcript to the jury.

The focus of research to facilitate jury decision-making would be on ways to present evidence and structure the trial in order to maximise the jury's understanding and retention of evidence. Post-verdict questionnaires would be the most effectively method of researching problems that juror's had in making their decisions, especially where jurors may indicate what they would have found helpful in assisting them in their task.

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[85] See, Enid Campbell above n 51 for discussion on ethical concerns relating to secret observation of jury.
[86] Goldstein, above n 82, 313.
[87] Caunter, above n 49, 74.
[88] NZ Law Commission, above n 12, 11.

Factors which may facilitate the jury's decision-making involve the jury being able to ask any questions of the judge or either counsel to clarify their understanding, most likely after the trial before enclosure, or at the beginning of each session in court. It might also include written opening addresses being provided to the jury at the beginning of the trial, and the use of flowcharts and summaries to assist in comprehending the law which they must apply.

The Juror's Oath concludes "...and give your verdict according to the evidence."[89] The evidence is the admissible evidence which the judge determines. Therefore the division between the judicial and jury functions is important because if evidence is ruled inadmissible then the jury learns nothing of it.

Evidentiary rules seek to exclude irrelevant or prejudicial evidence which does not assist in proving whether or not the accused committed the crime charged. This practice has been criticised by Lord Justice Phillips of the English Court of Appeal who has stated that if juries are not trusted to choose commonsense, and are therefore not told all the relevant evidence then there is no point in having juries as opposed to judges as triers of fact.[90]

His Lordship considers the English adversarial system pays lip service to the concept of the jury as arbiter of fact: the jury is not given evidence which may show a propensity of the accused to committing such a crime, because it is assumed that the jury will place too much weight on the evidence. Lord Justice Phillips questions these rules, holding that the jury should know all the relevant evidence in order to make an informed assessment of the case and he points out that the inquisitorial system does allow past convictions to be put before the jury.[91]

Juries should also have full access to transcripts of the trial during deliberation, since they are entrusted with the role of determining the facts. Arguments that their character assessment of the witnesses will be lost do not hold, because the words of the witnesses is likely to trigger the jurors' memory of their impressions as to whether the witnesses was credible or not.

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[89] Form 2 in First Schedule, s 22, Jury Rules 1990, Juries Act 1981.
[90] Lord Justice Phillips of the English Court of Appeal, "The Jury", speech given at Victoria University of Wellington Law School, 27 March 1996.

C Jury Verdicts

1 Majority verdicts

The issue of majority verdicts is closely linked with the issue of the length of jury deliberations and hung juries. There have been periodic calls for the introduction of majority verdicts, but jury research suggests that juries which begin with an overwhelming majority in either direction are not likely to hang, and that it requires a massive minority of four to five jurors at the first vote to develop the likelihood of a hung jury.[92]

Kalven and Zeisel used post-trial juror interviews to reconstruct the initial ballots in 225 criminal jury deliberations. Of the 146 juries with a non-unanimous majority at first ballot, only seven reached the verdict advocated by the minority faction. Kalven and Zeisel suggested that "with very few exceptions the first ballot decides the outcome of the verdict."

That said, Hastie's study found that the atmosphere in the majority rule juries tended to be quite adversarial, while the unanimous rule juries were more deliberate and laborious in their task. It was suggested that "Larger factions in majority rule juries adopt a more forceful, bullying persuasive style because their numbers realise that it is not necessary to respond to all opposition arguments when their goal is to achieve a faction size of only eight or ten members."[93]

The results of the faction analysis which was part of the Hastie study are contrary to all the evidence previously advanced in favour of the majority verdict. The faction sizes of the guilty, not guilty and undecided groups proved to be very influential on the deliberating process. For those jurors in large factions, the likelihood of moving from that faction was very remote. However, in the majority verdicts, it was less likely that a juror would leave the smaller faction. The most dramatic changes occurred in the last moments of deliberation, when jurors looked seriously at other options and a move towards a more lenient verdict often eventuated.

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[91] Above n 94.
[92] Napley, D. "The Jury System" [1967] NZLJ 132, 133, as cited in Brookbanks, above n 42.
[93] Hastie, above n 46, 260, Caunter, above n 49, 70.

Those advocating majority verdicts have maintained that under a unanimity requirement the "holdout" juror has too much influence. In *R* v *Walhein* the Court of Criminal Appeal made the observation that "... it makes for great inconvenience and expense if jurors cannot agree *owing to the unwillingness of one of their number to listen to the arguments of the rest.*"[94] According to one commentator, the statement in italics identified one of the principal arguments in favour of the majority verdict; "It is often supposed that juries disagree not because of the objective situation of the case, but rather because once in a while an eccentric juror will refuse to play his proper role (the lone juror holding out for acquittal)."[95] The Hastie study concluded, however, that there were "substantial numbers of holdout jurors in non-unanimous juries."[96]

One writer warned that majority verdicts will result in the conviction of the innocent unless the majority is always right.[97] Judicial statements have been made to the effect that majority verdicts could destroy the right of all groups in the community to participate in the judicial process,[98] and that the doubts of even a single juror are evidence that the government has failed to carry out its burden of proving guilt beyond a reasonable doubt.[99] Cornish has summed up the dilemma eloquently: "The real strength against the majority system lies in the possibility of a jury in which only one or two members can see a real obstacle to conviction, but the majority is unable to appreciate the force of their objection."[100]

Majority verdicts have often been linked with questions of the burden of proof "beyond reasonable doubt". Professor Michael Freeman argued 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. If one or two jurymen conscientiously feel strongly enough to dissent from the majority view that demonstrates to my satisfaction that there is reasonable doubt as to the guilt of the accused."[101]

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[94] (1952) 36 Cr App R167.
[95] Napley, D. "The Jury System" [1967] NZLJ 132, 133 as cited in Brookbanks, above n 42.
[96] Hastie, above n 46, 106; Caunter, above n 49, 67.
[97] Molomby, Letter to the editor, [1989] 13 Crim. LJ 198, as cited in Brookbanks, above n 42, 189.
[98] Justice Brennan in *Johnson v Louisiana* , above n 81, 396.
[99] Justice Marshall in *Johnson v Louisiana*, above n 81, 403.
[100] Cornish, above n 13, 259.
[101] As cited in Gerry Maher "The Verdict of the Jury" *The Jury under Attack*, above n 3, 40.

2 *Special verdicts...General verdicts...Do we need reform?*

A very significant rule of jury conduct is the right of a jury, at its option, to return either a general or a special verdict. However, it is doubted that this procedure has ever really been followed in New Zealand,[102] and it is not presented by the judge in summing up as an option for the jury to take in giving their verdict.[103] In *R* v *Storey* it was held that a "jury cannot be compelled to answer specific issues."[104]

A general verdict has been criticised in that it may conceal error in the jury's understanding of the law, in its application of the law, or in its determination of the facts of the case.[105] Professor Sunderland is particularly critical of the scope which the general verdict gives for the jury to misunderstand or misapply the law in reaching its verdict, saying that "... twelve men [sic] can easily misunderstand more law in a minute that the judge can explain in a hour."[106]

Those who criticise general verdicts urge the case for the special verdict, which leaves the final decision as to guilt to the Court. Mark Brodin, who advocates the "fact" verdict, holds that "the impenetrable general verdict ensures that meaningful review of the jury's decision-making process by appellate courts or the public is virtually impossible."[107] However, in New Zealand appellate courts should overturn jury convictions where the verdict of the jury "is unreasonable or cannot be supported having regard to the evidence."[108] Brodin holds that the use of the general verdict "sacrifices the strengths of the jury to its weaknesses" and that the special verdict "can serve to focus the jurors' attention on the critical fact issues in dispute and to record precise findings with regard to each..., return[ing] the jury to its original historical role, that of reporter of facts."[109]

In the United States, where secrecy surrounding jury deliberations is not as strict as New Zealand and United Kingdom, a jury gave an acquittal for conspiracy to smuggle cocaine despite video-taped evidence of the accused with a suitcase full of drugs. The accused

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[102] Above n 3, Adams, Ch 5.15.03.
[103] Sample summation, above n 4.
[104] [1931] NZLR 417, 441 per Myers CJ.
[105] McHugh, above n 3, 57.
[106] ER Sunderland "Verdicts, General and Special" (1920) 29 Yale LJ 253, 258 as cited in McHugh, above n 3.
[107] Mark S. Brodin "Accuracy, Efficiency, and Accountability in the Litigation Process - The Case for the Fact Verdict" (1990) 59 Uni Cincinnati LR 15, 20.
[108] Section 385(1)(a) of the Crimes Act 1961.
[109] Brodin, above n 110, 21.

appeared to have been framed by an undercover government informant, who had been caught with drugs himself a year earlier and had since joined the government's anti-drug campaign. One juror interviewed on the nature of the verdict said "We weren't trying to make policy or send messages, but there is a message here ... It's that our citizens will not let our government go too far. We just looked at the evidence, and I for one saw that the government had gone too far in this case."[110] This situation is indicative of the jury performing its traditional role as protector of liberty and safeguard of democracy, as well as protecting against police over-eagerness.

Darbyshire criticises the praise juries have received as defenders against oppressive laws and dispensers of fairness and justice due to the general verdict. She holds that "Baldwin and McConville found little evidence of the romantic notion of jury equity. Unexpected verdicts apparently occurred at random. Personal accounts of ex-jurors indicate that they will sometimes acquit or convict, for a variety of extraneous reasons which have nothing to do with replacing the law with their own sense of fairness or equity."[111]

Brodin holds that the special verdict removes the major obstacles to proper jury decision-making, which is the difficulty of correctly comprehending, remembering and applying the trial judge's substantive instructions on the law.[112] The special verdict seems "tailor-made for taking advantage of the impressive fact-finding abilities of juries while avoiding the distortions that occur between the judge's instructions on the law and the bringing of the general verdict."[113]

James Bradley Thayer noted that the matter is more complicated and justified the general verdict in these terms:[114]

> [While] logic and neatness of legal theory have always called loud,..., for special verdicts,... considerations of policy have called louder for leaving the jury a freer hand. The working out of the jury system has never been shaped merely by legal or theoretical considerations. That body always represented the people, and

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[110] Brill, "Inside the DeLorean Jury Room" (1984) American Lawyer 94, 105, as quoted in Caunter, above n 49, 58 (footnote 15).
[111] Penny Darbyshire "The Lamp that shows that Freedom Lives - Is it Worth the Candle?" [1991] Crim LR 740, 748.
[112] Brodin, above n 110, 46.
[113] Brodin, above n 110, 50.

> came to stand as the guardian of their liberties; so that whether the court or the jury should decide a point could not be settled on merely legal grounds; it was a question deeply tinged with political considerations. While it would have always been desirable, from a legal point of view, to require from the jury special verdicts and answers to special questions, that of course would have given more power to the king and less to the people.

One proposal for reform urges that the jury give reasons for their general verdicts, and this option is related to special verdicts. When a judge decides a case there will be a written opinion finding facts and applying the controlling law. Law application thus becomes law declaration and establishes principles applicable to future cases.[115]

Lack of understanding of the issues could interfere with jury decision-making, as comprehension is affected by variables such as intelligence, familiarity with a field of knowledge and complexity of a subject. When reasons for a decision are given, comprehension can be evaluated and tested, without such reasons (as for juries) testing is difficult.[116]

In either scenario, with special verdicts or with general verdicts where the jury states their reasons, we will be asking jurors to be like judges, and as Goldstein points out; "we do not give jurors the robes, the tenure, the professional training, and the perquisites to make it either fair or appropriate to ask them to perform such a public role."[117]

VII CONCLUSION

MacCoun asserts that "... in an evaluation of the jury's merit as a legal institution many dimensions must be considered - judgmental thoroughness and accuracy, legal competence, impartiality, representativeness, consistency, efficiency, and perceived legitimacy - only some of which can be assessed by mock jury research."[118] He goes on to state that "the critical questions for public policy are (i) under what conditions can jury

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[114] James Bradley Thayer *Preliminary Treatise on Evidence* (1898) 218-219 as cited in McHugh, above n 3, 71-72 (footnote 7).
[115] Brodin, above n 110, 35.
[116] Law Reform, above n 3, 61ff.
[117] Goldstein, above n 82, 314.
[118] MacCoun, above n 59, 231.

performance be enhanced, and (ii) how does the jury perform relative to other legal decision-makers?"[119]

The second question MacCoun raises the issue of whether it is desirable to compare jury decision-making to legal decision-making. Bankowski points out that the main trend has been to verify the accuracy of the jury by the opinion of legal experts,[120] yet the legitimacy of this kind of measure for evaluating jury performance is not established. Bankowski argues that the implication of the methodology of using legal experts to show whether acquittal rates are too high or too low is that the good juror is one who is a good lawyer, namely "one who accepts the prevailing courtroom norms of legal rationality and who is willingly incorporated into the social order of the courtroom and the trial."[121]

It is evident that questions such as the jury's role in the justice system come into play when looking at how to evaluate the jury's performance. Bankowski and many other commentators assert that the jury has a role to play in the formulation of new norms for society. He cites Professor Freeman, upholding that the jury has acted in defiance of established norms; "... juries may and do infuse "non-legal values" into the trial process. They are the conscience of the community; they represent current ethical conventions. They are a constraint on legalism, arbitrariness and bureaucracy."[122] The involvement of jurors as non-legal participants in the justice system is an extremely significant factor in supporting not only the maintenance of the general verdict, but the actual institution of the jury as well.

In *R* v *Larkin*[123] the judge questioned the jury as to their reasons for manslaughter rather than murder verdict. The foreman responded with two inconsistent answers; "accident" and "provocation". The Court of Criminal Appeal criticised the questioning, stating that "No one has ever suggested that a jury is composed of persons who are likely at a moment's notice to be able to give a logical explanation of how and why they have arrived at a verdict."[124] This statement by the Court aptly replies to the suggestion of juries giving special verdicts or reasons for their general verdicts by indicating that it is simply impractical.

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[119] MacCoun, above n 59, 231.
[120] Zenon Bankowski "The Jury and Reality" in *The Jury Under Attack*, above n 3.
[121] Above n 34, 20.
[122] Above n 34, 20.
[123] [1943] KB 174.
[124] Above n 121.

Jury research is a very important area which has been affected because of the limits that jury secrecy place on how research can be undertaken. As we have seen, jury research methods that are currently available are all problematic. According to Robert MacCoun, empirical research on jury functioning is gradually replacing the reliance on anecdotes and speculation in the legal policy domain. "Much is now known about cognitive processing at trial and the dynamics of jury deliberation,"[125]

Bray and Kerr disagree with the notion that there exists an optimal research method, stating: "The investigator who chooses the field setting to maximise realism must sacrifice experimental control and opportunity for observation. The investigator who chooses the standard simulation buys control, opportunity to observe, and affordability, but at a cost of realism."[126]

The statement by the Court in *Larkin*[127] indicates a view that post-verdict interviewing of jurors is not a very accurate form of jury research. If research is to be undertaken at all actual deliberations by real juries cannot be substituted for. Research based on actual juries and jurors is necessary to assist legal policy makers before any reform on the scope or conduct of jury trials should be undertaken.

As Goldstein points out, "We are constrained greatly in changing the jury because its several functions are so interconnected and so integrally related to historical doctrines, practices and institutions. We proceed at our peril, therefore, both constitutionally and functionally, when we challenge one of the jury's core characteristics."[128]

In light of the jury research that has been done on jury decision-making, albeit with imperfect test methods, this comment by Lord Devlin seems appropriate to follow until we know why and how the jury works or if the jury lives up to the standard that we wish it to achieve: "Since no-one really knows how the jury works or indeed can satisfactorily explain to a theorist why it works at all, it is wise not to tamper with it until the need for alteration is shown to be overwhelming."[129]

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[125] MacCoun, above n 59, 231.
[126] Bray and Kerr, above n 77, 313.
[127] Above n 121.
[128] Goldstein, above n 82, 314.
[129] Devlin, above n 12, 57.

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