

Do we need juries?

Professor Leslie Thomas KC

A romanticised institution

“No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land” - Clause 39, Magna Carta



Jury trial today

- Juries decide only a small proportion of criminal cases in England today - many are tried in the magistrates' courts without a jury, or are pleaded out
- The right to jury trial in civil cases in England is now very limited.
- English coroners' inquests are conducted with a jury in certain cases, e.g. deaths in custody and deaths caused by the police.
- Jury trials have been abolished altogether in some common law jurisdictions, such as India and Singapore, and are very limited in others, such as Hong Kong.
- The country most associated with jury trials today is the United States.

Key questions

- Are juries biased?
- Are juries getting the answers right?
- Are the alternatives better?



Near this Site

WILLIAM PENN *and* WILLIAM MEAD

were tried in 1670

for preaching to an unlawful assembly

in Grace Church Street

This tablet Commemorates

*The courage and endurance of the Jury Thos Vere, Edward Bushell
and ten others who refused to give a verdict against them although
locked up without food for two nights, and were fined for their final
Verdict of Not Guilty*

*The case of these Jurymen was reviewed on a writ of Habeas Corpus
and Chief Justice Vaughan delivered the opinion of the Court
which established "The Right of Juries" to give their Verdict
according to their Convictions*

Juries in England

- Juries are an ancient institution.
- The independence of the jury has long been asserted, e.g. in *Bushell's Case* (1670) 1 Freeman 1.
- The general right to a civil jury trial was removed in the early 20th century, except for some specific torts. Now it only remains for cases involving fraud, malicious prosecution or false imprisonment. Most jury trials today are in criminal cases.
- Women allowed to serve on juries from 1919, but property qualifications only abolished by the Juries Act 1974.
- Majority verdicts allowed for the first time by the Criminal Justice Act 1967.

What does the jury do?

- In a criminal trial, the jury finds the defendant guilty or not guilty.
- Juries have no role in sentencing, which is the province of the judge.
- The judge decides whether evidence is admissible and should be put before the jury.
- The judge gives the jury directions on the law.
- The judge sums up the evidence before the jury retires.
- Jurors are subject to punishment for contempt of court if e.g. they discuss the case on social media or carry out internet research about the case.
- But the judge cannot compel the jury to convict the defendant against their wishes.

The alternatives to jury trials

- Professional judge sitting alone
- Professional judge sitting with expert assessors
- Bench of lay magistrates

Jury selection

- Peremptory challenges were abolished by the Criminal Justice Act 1988.
- But the parties can challenge jurors for cause, and the judge has power to stand down a juror.
- The judge has no power to select a racially representative jury (*R v Ford* [1989] QB 868).

The American experience

- Equal Justice Initiative, “Race and the Jury: Illegal Discrimination in Jury Selection,” 2021.
- Evidence of racial disparities at all stages of jury selection.
- Jury pools underrepresent people of colour.
- Peremptory challenges and challenges for cause used disproportionately to exclude Black jurors and jurors of colour.
- Difficult to prove racial bias in appellate courts.
- Cites evidence from multiple studies suggesting that all-White juries are biased against Black defendants.

Cheryl Thomas' research (part 1)

- Cheryl Thomas, “Diversity and Fairness in the Jury System” (2007).
- Across 84 Crown Courts, the number of BAME jurors summoned reflected the BAME population in the court catchment area in all but two courts. No disparities when broken down by ethnic group.
- But all-White juries are statistically likely in areas where the BAME population in the court catchment area is under 10% - even though some of these courts have pockets of high BAME population in their catchment area.
- Proportion of BAME people serving on juries generally representative of court catchment area, in all but three courts.

Diversity and Fairness in the Jury System

Cheryl Thomas
with Nigel Balmer

Cheryl Thomas' research (part 2)

- Case simulation study using real jurors at Blackfriars Crown Court.
- Case facts remained the same, but race of defendant and victim changed.
- Case study was one which in real life resulted in a hung jury.
- Outcomes for the defendants were remarkably similar regardless of race - almost all resulted in a hung jury or a majority verdict of not guilty.

Cheryl Thomas' research (part 3)

- Cheryl Thomas, "Are juries fair?", 2010
- Repeated case simulation study from earlier research, but with all-White juries at Nottingham and Winchester.
- All-White juries were not more likely to convict a BAME defendant than a White defendant, and this held true for both Black and Asian defendants.
- In Nottingham (a more diverse area) but not Winchester (a less diverse area), jurors had more difficulty reaching a verdict where there was a BAME victim, and were more likely to convict a White defendant if the victim was BAME.
- A problem: jurors who know they are participating in a study might be less inclined to display racial bias than jurors in a real case.

Cheryl Thomas' research (part 4)

- Large-scale analysis of jury verdicts - all Crown Court cases from 1 October 2006 to 31 March 2008.
- White and Asian defendants both had a 63% jury conviction rate, Black defendants had a 67% jury conviction rate.
- Updated for the Lammy Review (2017) with analysis of 390,000 jury decisions between 2006-2014. White, Black, Asian and mixed race defendants were all convicted at rates of between 66% and 68%.
- Contrasted with evidence of racial bias among judges and magistrates - Black defendants 240% more likely to be sentenced to imprisonment for a drugs offence.
- Lammy called juries “a success story of our justice system”.



Criticisms of the Thomas/Lammy approach

- As there is massive racial disproportionality at earlier stages of the criminal justice system, wouldn't a truly fair trial process acquit Black defendants at higher rates than White defendants? See Lee Bridges (2017), "The Lammy Review: Will It Change Outcomes in the Criminal Justice System?" *Race & Class* 59.3, 80—90.
- Data also possibly confounded by the fact that BAME defendants are more likely to plead not guilty, and more likely to be committed to the Crown Court for trial.
- Case simulations have limitations because jurors in a study may be more conscious of not appearing racist than jurors in a real case.

Are juries getting the right answers?

- Not the same question as whether juries are biased. If a jury makes its decision by using a Ouija board (*R v Young* [1995] QB 324) or by “*hustling half-pence in a hat*” (*Langdell v Sutton* (1736) Barnes 32) the results may not be biased on the basis of race etc., but will also not be reliable.
- Jurors may be influenced by personal considerations. Hallett LJ recounted a 2003 case at Southwark Crown Court where “*a female Juror sent to prosecuting counsel a bottle of champagne and an invitation to a dinner date with the question ‘what does a lady need to do to attract your attention?’*”
- Jurors may be thought to be more influenced by adverse publicity, or by feelings of disgust (e.g. in a child sexual abuse case), or by disdain for a technical defence: see Penny Darbyshire (2014) Jury reform in England and Wales - unfinished business. In: *The Third International Conference on Empirical Studies of Judicial Systems: Citizen Participation Around the World*; 5-6 Sep 2014, Taipei, Taiwan

Considering the alternatives

- We're not comparing trial by jury with trial by oracle.
- Judges and lawyers often assess credibility in unreliable ways, e.g. by wrongly assuming that inconsistency in a witness' testimony means they are more likely to be lying: see Hilary Evans Cameron (2010), "Refugee status determinations and the limits of memory," 22(4) *International Journal of Refugee Law*, 469-511; David Neale and Jennifer Blair, "Bridging a Protection Gap: Disability and the Refugee Convention," Helen Bamber Foundation, 2021.
- Or by wrongly drawing inferences from a witness's demeanour when giving evidence, where a seemingly inappropriate emotional affect might be explained by e.g. PTSD, autism or cultural differences.
- Cameron cites research showing that, in distinguishing truth from falsehood, professionals such as judges and police officers don't perform any better than lay people.

Replacing juries with artificial intelligence?

- There is evidence that AI can replicate human biases: see e.g. New York Times, “Who Is Making Sure the A.I. Machines Aren’t Racist?” 15 March 2021.
- A courtroom AI trained by humans might well replicate human biases, e.g. by labelling someone a liar based on their demeanour or affect.

Conclusion

- We don't know with certainty whether juries are biased on the basis of race; Thomas and Lammy say no, but there are valid criticisms of their work and more research is needed.
- Nor do we know with certainty whether juries are getting the answers right.
- But trial by judge is not necessarily a better alternative. A legal education does not give a person the wisdom of Solomon, and we know that judges are affected by biases and false assumptions.
- Instead of replacing trial by jury, consider changes to the trial process and the rules of evidence, e.g. allow admission of psychological/psychiatric evidence to help jurors assess witness credibility.