Jury Research in America

Its Past and Future

HOWARD S. ERLANGER – *University of California, Berkeley*

This paper is an attempt to review the body of social science writings of the last four and one-half decades on the petit jury. The major portion of this presentation will be limited to organizing the findings on the jury around the two major themes–competence and representation–which are most often discussed in empirical literature. A concluding section will offer some evaluative comments and present some tentative proposals for a new perspective on the sociological study of the jury.

THE QUESTION OF COMPETENCE

From its inception, the special province of the jury has been the determination of matters of fact. Brought to England by the Norman conquerors, its first use was as an administrative device by which public officers could compel citizens to give, under oath, "a true answer to some question" (Pollock and Maitland, 1898: 138).[1] It was used to obtain information for the Domesday book,[2] to settle land disputes (Holdsworth, 1957: 327-330),[3] to report on the activities of the sheriffs, and to find out who in the community was suspected

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of having committed crimes (Holdsworth, 1957: 312). This latter function of indictment was served by the "presentment jury," forerunner of today's grand jury. In addition to indicting suspected offenders, the presentment jury originally made decisions as to what form of trial (e.g., ordeal, compurgation, or battle) would be appropriate; later it was asked for its verdict as a trial jury; and finally a completely separate petit jury developed, as it was deemed unfair for the accusers also to be the final judges of fact.[4] At first the petit jury was composed of persons who were acquainted with the facts of the case or who could easily obtain them; the jury then used its collective knowledge to reach a conclusion as to the true facts in the case (Holdsworth, 1957: 317). Later the nature of the petit jury changed so that it became the final judge of the true facts based solely on information provided by testimony.[5] With only slight exception, the original emphasis on the determination of fact has been maintained since the inception of the jury; questions of the law have not been considered a proper area for the jury's consideration (see Forsyth, 1852: 8).[6]

This separation of function between judge and jury remains as part of the basic doctrine of how a jury trial is to function,[7] with the restrictive thrust of the maxim directed against the jury rather than against the judge. The responsibility of the judge has been extended to include the determination of what may be admitted as evidence. In addition, he has the power to direct a verdict (see Ginsburg, 1963)[8] or to set aside a verdict which he regards as not one which "twelve reasonable men, if they had apprehended the evidence rightly and applied the law as laid down to them could have returned" (Devlin, 1956: 65).[9] The jury, on the other hand, almost invariably is instructed about its duties and responsibility in the following terms: "The juror takes an oath to decide the case 'upon the law and the evidence.' The law is what the judge declares the law to be. The evidence is the testimony and exhibits introduced in the court room" (Judicial Conference, 1954).[10]

For at least half a century legal commentators have actively debated the actual and intended roles of the jury. The principal question has been whether juries confine themselves to judging issues of fact (including assigned issues of law and fact) as presented to them or whether they depart from the judge's instructions and render verdicts based on their own conception of the law or on purely irrational considerations.[11] A concomitant issue in this debate has been the question of the jury's general competence: whether uninitiated laymen are even able to comprehend the evidence and the instructions, and whether court procedure is not so organized as to diminish rather than increase the possibilities of a rational judgment of the facts.[12] Much (if not most) of the research on the jury represents an attempt to put an empirical foundation to this debate over the competence of the jury.[13]

Understanding of Testimony

There are no conclusive data on the ability of the typical juror to understand court testimony. An early study (Marston, 1924)[14] using simulated juries composed of students, concluded that the judge generally understands a case better than the jury, and that women understand testimony better than men. Subsequent small group studies using simulated juries in a civil case show, however, that external male-female status and behavior patterns are recreated in the jury room (Strodtbeck and Mann, 1956; Strodtbeck, et al., 1957). If Marston's findings are accurate, they may be mitigated to the extent that women do not fully assert themselves in the deliberations. On the other hand, an attempt to replicate the small group studies using a criminal case has yielded conflicting reports of male-female participation. Compare James (1958) with Simon (1967).

Research on the ability of jurors to recall large masses of evidence presented at a trial has emphasized the great difficulties involved (Hoffman and Brodley, 1952)[15], but it also indicates that collective understanding and recall are enhanced by discussion in the jury room (Daishell, 1935).[16] It should be noted, however, that the advantages of collective understanding of the evidence are mitigated by the fact that most jurors do not change their opinions in the jury room, and the majority on the first ballot eventually wins out in about 90% of all cases (Weld and Danzig, 1940; Kalven and Zeisel, 1966: 488; Simon, 1967: 63.)[17] Arguing from inferences, Kalven and Zeisel (1966) conclude that in criminal cases the jury understands the evidence.[18] They cite the following data: The basic amount of agreement between judge and jury is high (75% of all cases); disagreement is highly directional (the jury's disagreement with the judge being almost totally toward leniency) and does not vary with the difficulty of the case (almost all cases are rated as "easy to understand"); it is almost always possible to find other reasons for disagreement with the judge's decision; and juries come back with more questions and deliberate longer in the difficult cases. The authors assume that if disagreement were solely based on misunderstanding of the evidence, there would be no pattern to the divergence. However, for civil juries, although the percentage of agreement is virtually the same (78%), the divergence is *not* directional (Kalven and Zeisel, 1966: Table 16). Data for civil juries on the other aspects are not available at this time. In another study in the Chicago Project, a review of the transcripts from jury deliberations of jurors called to regular jury duty but assigned to hear an insanity defense mock-trial instead led Simon (1967: 175) to conclude that jurors "rely very heavily on the record and review every [sic] piece of evidence presented during the trial."

Psychological Factors

Another facet of research on the competence of the jury to deal with its assigned task has dealt with psychological elements which influence a jury's decision. Several experimental psychological studies have concluded that the order of presentation of arguments (Weld and Roff, 1938; Lawson, 1967),[19] or of witnesses (Weld and Danzig, 1940), has an effect on the outcome of the trial, although there is major dissenting evidence (Hovland et al., 1953; 1957: especially ch. 9). However, none of these studies uses persons representative of those typically on venires, and only Weld's deal with actual trial materials.[20] There are also various studies concluding that the apparent self-confidence of a witness might have more effect on a jury than the logic of the testimony (Marston, 1924), that the prestige of counsel may be influential (Weld and Danzig, 1940), and that juries tend to try the lawyer rather than the litigant (Hoffman and Brodley, 1952; Stanton, 1964). There is also some evidence that friends of counsel will lie about their relationship in order to get on the jury. Once on the jury, they "behave as expected" (Broeder 1965d).

Kalven and Zeisel (1966) report isolated examples of counsel alienating the jury through their tactics; other research from the Chicago Project, based on interviews with jurors just after their service was completed, concludes that a lawyer's behavior during the *voir dire* may affect the outcome of the case (Broeder, 1965d). On the other hand, Kalven and Zeisel (1966: 115n; also chs. 28 and 30) conclude that only about 4% of the observed jury leniency is directly caused by superior defense counsel, while superior prosecution is responsible for about 2% of disagreements in which the jury is harsher than the judge. (Jury leniency compared to the judge's occurred in 16.9% of the cases, while the jury was harsher than the judge in only 2.1% of the cases.) The difficulties with the sample and with the interpretation of the questions about counsel suggest, however, that the precision of the Kalven and Zeisel data ought not to be taken too seriously (Kaplan, 1967).

Judges' Instructions

Perhaps the most sharply drawn issue in the debate over the jury's competence is the question of whether juries: (a) understand the judge's instructions; and (b) if they do, whether they follow them and therefore truly decide only issues of fact.[21] In the earliest available study, done in 1935, Hunter interviewed jurors immediately after several trials and concluded that the instructions had not been applied at all. Similarly, the results of a questionnaire returned by 185 midwestern jurors after they had served showed that about 40% had not understood the judge's instructions (Hervey, 1947), and at least one study found evidence that the jury discussed matters which, according to the law, should not have been considered (Wanamaker, 1937).[22]

Although she does not interpret her findings in this way, Simon's (1967: 94) study of the insanity defense seems to present mixed evidence on jury competence with respect to remembering and applying the judge's instructions. On the one hand, she finds that different instructions result in a different pattern of verdicts.[23] On the other hand, only 73% of the jurors so instructed could remember that a defendant declared not guilty by reason of insanity is put in a mental hospital until in the opinion of the psychiatrists he is cured, while 71% of those told nothing could also give the correct answer. Moreover, of the twelve M'Naghten juries checked, only eight explicitly considered the defendant's ability to distinguish right from wrong, although this criterion is an explicit part of the instructions (1967: 161).

In *The American Jury*, the only work on the jury taking a systematic approach to this question, Kalven and Zeisel (1966: 115) conclude that on a weighted basis in criminal cases, about 54% of all judge-jury disagreements are attributable to "issues of evidence," about 29% to "sentiments on the law," about 11% to "sentiments on the defendant," and about 6% to other factors.[24] Thus it is clear that juries do more than deal merely with issues of fact. What remains to be determined, however, is what calls the sentiments into play. The authors do not present any data on the jurors' understanding of the judge's instructions, but the general thrust of their argument is that the jury does understand them but then "yields to [its] sentiments in the apparent process of resolving doubts as to evidence" (1966: 165). The argument is, then, that much of the disagreement[25] between judge and jury is due to the jury's giving recognition to "values which fall outside the official rules."

Part of this juror standard of equity is merely composed of feelings about the litigants. For example, 56% of the defendants arousing the sympathy of the jury (as contrasted to 27% of those classified as average, and 13% of those classified as unattractive) received more lenient treatment than they would have from the judge. Although Kalven and Zeisel do not report it as such, there is some evidence that these feelings are discriminatory against Negroes.[26]

Understanding of the Law

The remaining part of the juror standard of equity concerns sentiments on the law. Kalven and Zeisel conclude that jurors have an expanded view of what constitutes self-defense, have introduced a broader notion of contributory fault, have introduced a *de minimis* notion to reduce the charge when damage (or injury) is slight, and outwardly reject a small number of crimes (mostly with regard to sumptuary laws). They also tend to show leniency when the defendant has been punished enough (e.g., was hurt in the com-

mission of the crime, has had great family misfortune since then, and the like), when the punishment threatened is "too severe," when another party involved in the crime and equally responsible received preferential treatment or was not charged,[27] when the crime occurred in a "subculture,"[28] or, in some cases, when the police have used improper methods.

There is also some evidence of "pro-prosecution equities," particularly on narcotics offenses, child neglect, and certain sexual offenses. In these cases, the judge would tend to reduce the charge in cases with marginal evidence, but the jury does not. Similarly, Simon (1967: 144, 146) found that jurors are on guard against abuse of the insanity plea, and many see a prison sentence in such cases as a useful deterrent to potential offenders.

The Chicago Project companion volume to *The American Jury* dealing with civil cases has not yet been published. There have, however, been a few summary articles and a series of articles by Broeder, who followed a federal judge on circuit in the Midwest and interviewed most jurors after the cases were completed.[29] There is definite evidence that the civil jury considers extralegal factors when assessing both liability and damages, the most frequently cited example being the replacement of the rule of contributory negligence with one of comparative negligence. Data to be published by the Chicago Project show, however, that the rule of comparative negligence cannot be taken as a principle of "jury law," although it is often operative (Kalven, 1964).[30] Nonetheless, it is clear that civil juries are quite concerned with doing a kind of substantive or individual justice, as against strictly applying legal rules in deciding questions of fact in negligence cases. For example, they consider the plaintiff's family status (Broeder, 1965b), any collateral benefits mitigating the loss (Kalven, 1958),[31] and the defendant's ability to pay (Broeder, 1959).[32] In addition, awards are known to vary by regional custom (Broeder, 1959) and general economic conditions (Hartshorne, 1949). On the other hand, although the monetary loss for a child negligently killed is low, the jury will make a substantial "pain and suffering" award (Kalven, 1958). Also, the damage award will generally vary with the strength of evidence of liability, rather than only with evidence of loss (Broeder, 1959).[33] At least one study, however, concludes that "neither plaintiff nor defendant secures an advantage in respect to the amount of recovery by demanding a jury" (Sunderland, 1937).[34]

Two other questions addressed by the Chicago project are the jury's treatment of the defendant's insurance and lawyer's fees. As might be expected, insurance is an element often considered by the jury in doing individual justice. In general, it seems that if the defendant is insured, the award will be greater, although insurance may have its greatest effect in doubtful cases, providing a basis for the allocation of awards to plaintiffs even though responsibility is open to question. If insurance is mentioned in the pro-

ceedings, and the judge then instructs the jury to disregard the statement, the result is often an increased award because the matter has now been especially called to the jury's attention (Kalven, 1958; Broeder, 1959).[35] Treatment of lawyers' fees is not as direct, although "jurors often discuss lawyers' fees, and see no impropriety in doing so," most often it is as a point of argument to get a low juror to raise the amount he is willing to award (Kalven, 1964).

REPRESENTATION

Originally, the competence and legitimacy of the jury were predicated on its being representative of the community. Wells (1911: 355) concludes that in the early eleventh century the petit jury replaced the older forms of proof (e.g., the ordeal) because it represented "the common voice, or the common sense, of the community." Litigants "put themselves" upon it, and in a very real sense were binding themselves to a "verdict of the country." It is not clear exactly what classes constituted the community represented by the jury, but Wells (1911: 354, 356) reports:

> While the presentment jury was sufficiently representative to present an indictment, it might not be representative enough to give fairly and adequately the voice of the country in regard to the real guilt or innocence of the accused.

Because of this, the size of the jury was increased, in order to widen the sphere of participation.[36] The emphasis here on community representation may seem in conflict with the principle of trial by a jury of one's peers in criminal cases. *Judicium parium* (judgment by peers) has a long continental history, dating at least from the eleventh century, and in England was established by chapter 39 of the Magna Carta, although it also has an earlier history in England (Keeney, 1949: chs. 1 and 2). The principle apparently owes part of its origin to feudal suits; vassals were granted judicium parium in suits between them and their lord, because the peers of the vassal "knew better than anyone else the condition of the relationship between lord and vassal concerned, [knew] the law of the fief, [and] in many cases must also have been familiar with the facts of the point in dispute" (Keeney, 1949: 6).[37] But the practice was not uniform, and in some cases there was only token representation of the vassal's peers. At any rate, the evidence is fairly clear that persons serving in the courts acted as judge and not as jurors (Forsyth, 1852: 108-114). Moreover, chapter 39 is now generally accepted as stating a purely baronial privilege to be judged by fellow barons when charged with a high crime (Pollock and Maitland, 1898: Vol. 2, 409; Keeney, 1949: ch. 3).

Because of a blurring of the historical origins, judicium parium has been inextricably associated with the right to trial by jury. Blackstone was one of the first to mistakenly equate the two (Forsyth, 1852: 109), and the connection is now firmly established as legal doctrine (In re Grilli, 1920; Black, 1968). The criterion of communitywide representation rather than judgment by peers has been dominant with respect to the composition of the jury venire because of the democratic ethic which denies class distinctions and asserts that all citizens are peers.[38]

Composition of Jury Venires

Much of the research on the composition of jury venires has been done specifically for court briefs (see cases cited in Ulmer, 1962; Swain v. Alabama, 1964). Most of these cases report extremely wide divergences between the relevant universe defined by statute and the composition of the jury venire, especially with respect to race, but also with respect to occupation. There have been several attempts to apply statistical tests of significance to the differences between the universe defined by statute and the sample of persons appearing on the venire. Ulmer (1962) concludes that the Supreme Court is using something like the .05 level of significance (see also Finkelstein, 1966). Mills (1962) shows that professional and technical workers, managers, officials, and proprietors are heavily underrepresented on venires, at levels of significance less than .0001. However, one should guard against overemphasis on tests of significance; a very small empirical difference can be statistically significant if the sample is sufficiently large (Blalock, 1960: 126). In addition, it should be noted that even if no divergence existed as defined here, certain population groups will be underrepresented because of the statutory provisions excluding ex-convicts, certain occupations, and so on (Calif. Procedure; pars. 197-200).[39]

One might argue, of course, that extreme cases are more likely to be used for purposes of a court test. Yet other inquiries, apparently done independently of pending cases, corroborate these findings (Vanderzell, 1966; Holbrook, 1956)[40], and there is apparently no study (or any argument) which concludes that such divergences do not exist.[41] The primary cause of the divergence is, of course, the sources used for the venire, which may be merely the leaders of local service organizations, and at best are voter registration lists or the telephone directory.[42] There are also administrative procedures which further exacerbate the problem.[43]

Given that the venire is often not representative of the community, an important question is the effect of the imbalance on the verdict. There is evidence that social characteristics of jurors affect both the individual's decision and the process through which the jury comes to its collective

verdict. An early finding of the Chicago Project is that in criminal cases persons with German or British backgrounds are more likely to favor the government, while Negroes, Slavs, and Italians are more likely to acquit (Broeder, 1959; 1965a). Simon's study (1967: 111) of the insanity plea shows, however, that persons of British and Scandinavian origin are slightly more likely to vote not guilty by reason of insanity than all other groups except Negroes. The most recent study, directed specifically to the social characteristics of the "scrupled juror" in capital punishment cases, shows that race is a very good predictor of opposition to the death penalty, and that among whites there is also a sharp differentiation by sex (Zeisel, 1968).[44] Religion and age have only a slight influence,[45] and age and education are operative primarily among males, where wealth predisposes a man to favor the death penalty, and college education tends to mitigate approval.[46] With respect to the insanity defense, Simon (1967: 108) concludes that college education, high income, or high status occupation predisposes a juror to conviction.[47] Another study has isolated eleven social characteristics influencing a juror's opinion.[48]

Evidence on the relationship of a juror's verdict to his opinions on other matters is mixed. Opposition to capital punishment, which tends to make one more likely to vote for acquittal on the question of guilt[49], is apparently related to a "liberal syndrome," but scales like "humanitarian approach to the mentally ill," "liberal views on forms of sexual behavior," or "knowledge of psychiatry" were found to be unrelated to verdicts of not guilty by reason of insanity in an incest case (Simon, 1967: ch.7). A juror's verdict is also known to be related to his prior experiences.[50]

Status of Jurors

There have been a few experimental studies of the influence of the status of jurors on their role in the deliberation process. Participation in the deliberation in both civil and criminal trials is highly related to occupational status, and persons with high status occupations are more likely to be chosen as foremen (Strodtbeck, et al., 1957; Simon, 1967: 116). High status persons also tend to sit at the head of the table, a position which is independently related to high participation and to being picked as foreman (Strodtbeck and Hook, 1961). However, an experiment using confederates of different status and leadership characteristics planted as foremen reached inconsistent findings on the question of whether prestige was a factor (Bevan et al., 1958). It should be noted, however, that these mock juries were composed of college students and community volunteers. Furthermore, evidence from an insanity trial indicates that participation also varies with length of education (James, 1958). There is also a tendency for persons with a high school education to

be more influential than either the grade school or college educated, and for businessmen and skilled laborers to be more influential than members of other occupations, particularly unskilled laborers or housewives (Simon, 1967: 117). It is difficult to speculate on the implications of these findings for the actual verdicts, but most likely they point toward a greater number of convictions. At any rate, the trend of the evidence on predispositions and on influence in the deliberations clearly indicates that trial by one's peers is likely to have a different outcome than a trial by a "cross-section of the community."[51]

Finally, let us briefly consider the research bearing on the effects of participation on a jury. Writing a century ago, de Tocqueville (1945: 295) argued that such participation was an important element of the education of the populace and for the preservation of democracy:

> The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions.

In his view, jury service generates a respect for the decisions of the law, the self-confidence necessary for political virtue, and a feeling of responsibility. In addition, de Tocqueville argued that jury service is responsible for "the practical intelligence and political good sense of the Americans." On the other side, realist critics of the system argue that jury service is more likely to alienate the participant and make him skeptical about the administration of justice (Frank, 1950: 135; Broeder, 1954).

Research on this issue is limited and is directed to the narrow question of the effect of participation on the juror's view of the jury system, rather than on any broader effects such as on jurors' political sophistication. Very few people (6%) actually serve on a jury, but many more (55%) know someone who has. Participation greatly decreases one's resistance to serving on a jury (from 48% to 3%) [Broeder, 1959]. It also tends to polarize opinion for or against the jury, decreasing the already low percentage of persons preferring a judge in criminal cases (from 10% to 5%) and increasing the preference for a judge in civil cases from 28% to 55% (Broeder, 1959). Analysis of data from experimental juries indicates that face to face experience causes upper-class jurors to raise their evaluation of lower-class jurors (Strodtbeck et al., 1957), and that jury service tempers one's confidence in his ability to reach an equitable decision (Bevan et al., 1958). At least one survey has indicated that jurors find service "generally agreeable" (Moffat, 1945).[52]

SOME COMMENTS ON THE CHICAGO PROJECT

Although it was preceded by the numerous scattered studies reported above, *The American Jury* represents the first truly systematic attempt to

analyze the competence of the jury. The study concentrates on assessing empirically the range and relative importance of the extralegal considerations affecting jury functioning. Assuming that the sources of the data (judges' inferences of jury reasoning) are valid, the work makes a monumental contribution to knowledge about the jury.

One important phenomenon documented by Kalven and Zeisel (1966: 111) is that of "jury legislation," which may be defined as the jury's rational modification of the law to make it conform to community views of what the law ought to be. Jury legislation (or jury sentiments on the law) is a factor in fully 50% of the disagreements between judge and jury, making it the most important factor (except for evidence disputes) in the explanation of the divergence. Kalven and Zeisel have also isolated what might be called "principles of jury law," (see above, p. 21) but they do not have sufficient data to deal with the factors surrounding the implementation of those principles. Future studies may consider this process in more detail. In particular, one could try to determine the extent to which latent sentiments about the defendant (e.g., sentiments related to social status characteristics of the defendant, such as race) are involved in the process. Some light may be shed on the question by examining the cases in which the same circumstances (e.g., "contributory fault" in rape or assault cases) exist, but in which the jury did not show leniency. Kalven and Zeisel's (1966: 33) data show that in 22% of the cases in which sentiments on the law had an effect on the divergence, no additional factors could be identified as being operative; the question suggested by this finding is why the sentiments were not powerful enough to affect cases which fell under the same principles but resulted in convictions.[53] The analysis of convictions would also generate data showing the percentage of cases of a given type in which the jury chooses to legislate (i.e., the *magnitude* of the legislation).

Social characteristics of jury members may play an especially important role in the determination of the verdict in cases falling under one of the principles of jury law. Besides being associated with a general predisposition favoring either the state or the defendant, social variables are probably also related both to belief in the principles of jury law and to a willingness to implement these principles (in general or in specific cases) in spite of instructions not to.

Thus far, research on the social characteristics of jurors has consisted almost entirely of small group studies of the influence of a juror's social status on the deliberations. Although there may be some difficulty with the indicators used,[54] these and other experimental studies[55] have yielded a good deal of knowledge about the interactional influences on the verdict. However, the importance of these types of studies is diminished by the finding, reported above, that in over ninety percent of all cases, the decision is in effect made

before the jury enters the jury room. As Kalven and Zeisel (1966: 488) note, deliberations "do not so much decide the case as bring about consensus."[56]

Future study of the influence of status on the verdict should move away from the jury room and consider the status attributes which predispose jurors to particular verdicts.[57] Such research could also involve a study of the administrative behavior, political process, and legal procedure surrounding jury selection, from the assembly of the venire to the selection of the panel. In addition, especially with respect to criminal trials, it should include social psychological study of what might be called the "social distance phenomenon"; i.e., can a middle- or upper-class person understand the culture of the lower-class defendant, and can he even set aside his general prejudices against certain (e.g., Negro) defendants?[58] In this and other inquiries, it would also be profitable to study judges' attitudes as a comparison, if cooperation of judges could be obtained.

Another major publication of the Chicago Project, *Delay in the Courts* (Zeisel et al., 1959) also makes an important contribution to the understanding of the jury and the courts in general. The authors use statistical procedures to "evaluate the relative strength of the various proposals designed to remedy delay in the courts"; one of the primary findings is that if the jury trial were abandoned in New York, the saving would be only 1.6 judge-years. Unfortunately, the magnitude of the undertaking was such that the authors could not extend their analysis to consider the effect of delay on the process of adjudication (e.g., effects on the type of case and the type of litigant coming to trial) or the organizational dynamic involved.

The most recent monograph published is *The Jury and the Defense of Insanity* (Simon, 1967), which adds a good deal of depth to the understanding of the deliberation process through its reports of the actual content of the deliberations of (experimental) juries. It also contains the evaluation of status variables reported above. However, much of the design is concerned with bringing data to bear on certain policy issues arising out of the Durham decision.[59] Other findings, from which Simon freely generalizes to the "criminal jury," may only be applicable to insanity trials, which constitute only two percent of all criminal trials.

Any further research along the lines suggested here will have to face the problem of collection of data. Jury bugging is, of course, not legal (Kalven and Zeisel, 1966: ch. 1). However, it seems that the solution adopted by Strodtbeck and Simon is quite workable. A jury drawn from a "real" venire, instructed by a judge, and listening to tapes in a court environment, is probably a good simulation of the real thing. The additional advantage, of course, is that different juries can try the same case. (The disadvantage of hearing, rather than seeing, the trial can perhaps be remedied through the use of video tapes.) The attitudinal and social data, as well as information about thoughts during the trial and deliberations, can be elicited through questionnaires.

As noted above, many of the studies not associated with the Chicago Project are based on experiments with college students. These are helpful in a preliminary way, especially insofar as they indicate the difficulties that even *educated* persons have in understanding a trial or following instructions. However, it seems that their basic contribution has been made, and that future study should concentrate on approximations to real juries.

THE FUTURE: A BROADER PERSPECTIVE

It is the purpose of the present section to outline in very preliminary form some of the broader theoretical questions which might profitably be considered in future research on the jury. The common bond of these proposals is that instead of looking at the internal operation of the jury itself, they consider the jury as part of a system of interrelated institutions and practices concerned with adjudication and try to define the role of the jury in that system.

One salient fact about the jury is the widespread variation in its use. In England only about two to three percent of all civil cases go to the jury (Devlin, 1956: 132), while in the United States the figure is much higher. Its use has declined over the years in both countries,[60] but the pattern of decline has been uneven. In England the right (but not the possibility) of jury trial has been removed in all civil cases except where personal issues are involved, and these cases comprise about one-half of all jury trials.[61]

It seems that a fruitful area of study would be the causes of this decline in the use of the jury. The central concern of such a study would be the changing role of the jury in the system of adjudication.[62] It would attempt to set out the original functions of the jury and the process by which these have been antedated or replaced by other institutions in the system. The study would attempt to discover what the effect of the decline has been on substantive justice. Have judges replaced jury law with judicial legislation? If so, what patterns has such legislation taken?[63] If not, what techniques have evolved for doing substantive justice while still maintaining the integrity of the judicial decision in the case, and what have been the consequences for the authority of the court?[64]

At the same time, special emphasis would be placed on the areas in which the use of the jury trial has remained high, and a sphere of jury competence or utility would be delineated. For example, Wyzanski (1952) suggests that defamation suits are society's substitute for the brawl, and that the anonymity and finality of the jury's verdict is a key element in the settlement of the dispute.

A study of the criminal jury might be developed along similar lines, as the decline of the jury in this area has been parallel to, although not as marked

as, that of the civil jury. But the concerns of this study should broaden somewhat because of the punitive nature of the criminal prosecution.[65] A particularly striking difference in the administration of criminal justice in the United States and England is in the use of the negotiated plea. Kalven and Zeisel (1966: 18) estimate that in the United States 75% of all felony prosecutions are disposed of by a plea of guilty, 10% by bench trial, and 15% by jury trial; it seems reasonable to assume that virtually all guilty pleas are negotiated. In England, by contrast, 85% of all indictable offenses (roughly equivalent to felonies) are tried summarily by the magistrates, and 15% are sent for jury trial, of which two-thirds are disposed of with guilty pleas (Devlin, 1956: 130, 176n; Karlen et al., 1967: 155). Again, an important question raised by this comparison concerns the relationship of the jury trial to the entire system of the administration of criminal justice. Is the American pattern such that the only effective choice is between a plea of guilty and a jury trial? What is the role of the jury in a system in which the overwhelming majority of criminal trials are dealt with by negotiated pleas? Does a different type of case come to trial? Do outcomes differ? How is the jury perceived by the various participants in the two systems? Such a study should also investigate the causes for the difference in the two systems. Presumably, at one time in both systems most criminal cases were envisioned as going to the jury. What led to the triumph of the system of negotiation, which presumes guilt, in a system based on the presumption of innocence? On the other hand, are the differences between the negotiated plea and the summary trial matters of kind or only of degree? The impressionistic account of Bedford (1963: 33-57) suggests that most defendants in a summary trial plead guilty and have their cases adjudicated quite rapidly. Is it the case, then, that the jury trial has simply become impractical, and the only remaining issue is what bureaucratic form will arise to replace it?[66]

Issues related to these questions turn on Blackstone's warning (1791: 350), issued two centuries ago, that the jury is the safeguard of the liberties of Englishmen, and that trial by magistrate, though convenient, would undermine the basic freedoms. Has the decline of the jury had this result, or have other institutions moved in to protect these liberties? Or is the crucial element simply the existence of trial by jury, rather than its widespread use? In America, does the jury protect the citizen, or has the negotiated plea established a new form of despotism, doing mass justice, but increasing the risks of conviction of the innocent?[67] How does the summary trial differ from the negotiated plea with respect to protecting the innocent? Is the emphasis on efficiency at the expense of individuality (and possibly also at the expense of justice) symptomatic of a deeper trend in all governmental institutions, as Blackstone predicted?

Another provocative set of data is concerned with the widespread variations in the use of the criminal jury trial among the various states. The Southern

states have an average of over 70 trials per 100,000 population, against the national average of 34 per 100,000 (Kalven and Zeisel, 1966: 502-3).[68] Given what is known about Southern justice from other sources (Friedman, 1965), it is unlikely that the jury trial is a bastion of liberty, especially for black people; on the other hand, jury justice may be fairer than the other alternatives. It seems that an important area of inquiry would be the reasons for the variations in use of the jury, with emphasis on the possibility that under different social conditons the jury may have different functions both politically and in relation to other forms of adjudication.

The methodological problems surrounding these proposals are rather different from those discussed above. For the most part, they will involve use of official documents and records and the observation of operating judicial systems. The former will be complicated by the fact that, particularly for the United States, adequate statistics on trials have not been collected (Kalven and Zeisel, 1966: 501). Most likely, data will have to be pieced together from scattered court records and various additional sources, including interviews with practicing lawyers and judges, and historical materials such as newspaper accounts, journal articles, commentaries, novels, and the like.

At present, there do not seem to be any serious problems involved in gaining access to courts for observation, and officials seem willing to talk about their activities and share information with researchers. However, there may be some difficulty gathering data in areas which involve a great amount of discretion, especially with respect to the prosecutor's office. Sometimes the necessary information can be elicited from other sources, such as the public defender or judges. In any event, the main problems seem to be the general ones with the observational method: the sample, and the systematic collection of data.

NOTES

1. The groundwork may have been laid in advance by some English institutions, but the consensus of authorities is that the jury should date its history from 1066. See also Holdsworth (1957: 312). On the early history and development of the jury, see also Thayer (1892, 1898). For a discussion of early American origins, see Busch (1949). The Constitution guarantees trial by jury in most civil and criminal cases under federal law, but there is some debate over whether the states are required to guarantee that right. For an overview, see Hood (1967). The decision in Palko v. Connecticut suggests that the states may be able to eliminate the jury trial, but this view is challenged by Justice Brennan (1963).

2. A record of ownership and value of land, used for purposes ot taxation. See Holdsworth (1957: 155 ff.).

3. The modern civil trial, however, is said to be an outgrowth not of this early use but rather of a special adaptation of the criminal trial. See Kempin (1963: 26, 29).

4. For a fairly comprehensive discussion of the development of the petit jury, see Wells (1911). On the origins of the general verdict, the secrecy of deliberations, and the requirement of unanimity, see Holdsworth (1957: 317) or Pollock and Maitland (1898: 625-626). In essence, the general verdict was a replacement of older forms of formal proof and was to give the jury an oracle-like character.

5. For a complete discussion of the petit jury's evolution from a quasi-witness to a quasi-judicial character, see Holdsworth (1957: 318-320, 332-337), Pollock and Maitland (1898: 622-628).

6. Maitland (Pollock and Maitland, 1898: 139-140) also notes that jurors "deliver no judgment; they come to 'recognize,' to declare, the truth." Justice Arthur Vanderbilt (1956: 58-59) reports that until 1895, because of the dearth of trained judges and lawyers and the emphasis on popular democracy, United States federal judges sometimes instructed juries that they were the judges of both the law and the facts. Also some states had either constitutional or statutory provisions guaranteeing this function to the jury. Juries are still constitutionally the judge of the law in Georgia, Indiana, and Maryland, although the provisions have been limited in their application. See also Pound (1930). A further discussion of the changing role of the American jury can be found in Yale Law J. [Note] (1964).

7. For theoretical discussions of the functions of judge and jury, see James (1949), Broeder (1954), De Sloovere (1933). For an earlier discussion, see Forsyth (1852: 282-290).

8. In criminal trials, the judge can only direct a verdict for the defendant. In many jurisdictions, the judge also has the option of commenting to the jury as to the weight of the evidence and its implications. For the contemporary American practice on instructions, outlining the variations among the states, see Wright (1953). For an Anglo-American contrast, showing the greater powers of the English judge, see Wright (1954). On the ambivalent approach of federal and Supreme Court decisions regarding the judge's power to direct verdicts, see Cavitch (1949). On the differing views of the function of the instructions as perceived by the different participants in the adjudication process, see Farley (1932).

9. Originally judges did not question jury verdicts, because of the oracle-like character of the jury. However, the loser could challenge the jury for perjury, and the jurors would be tried by an attaint jury. As the jury moved from witness to quasi-judicial functions, the judge was given the power to set aside verdicts. Yet, once a jury verdict is rendered final, impeachment is difficult; for example, a juror's testimony about improper practices in the jury room is not admissible. See University of Chicago Law Rev. [Comment] (1958), and Manchester (1968). For a detailed discussion of judicial interference with the jury as judges of fact, see Devlin (1956: 61-125).

10. However, the existence of legal issues in apparent questions of pure fact submitted to the jury has long been recognized. Maitland, for example, notes that primitive juries dealt with more than questions of fact in cases in which they decided which party had *mere dreit* (Pollock and Maitland, 1898: 639). Similarly, when the modern jury decides whether a party conducted himself with "reasonable care," it is defining the law (for the purposes of the case) as well as determining the empirical facts (see Wedgewood v. Chicago N.W.R.R. Co.). For a detailed discussion of the "qualities of the reasonable man in negligence cases," see James (1951). For the jury's role in defining the law in defamation cases, see Tretter (1957) and Wyzanski (1952). Although no commentator denies that questions which mix issues of law and fact often arise, there is considerable

debate in the literature over whether they ought to be resolved by the jury as questions of fact, as is present practice. Forsyth (1852: 290-292), for example, argues that most such questions can and should be resolved into their components, with only strict questions of fact going to the jury. (See, in the same work, his discussion of libel cases: 259-282). A contemporary argument for having such questions resolved by the judge, in order to create precedents, may be found in Broeder (1954). A rather unique solution was proposed by Holmes (1881: 123-124) who thought that cases with a particular mixed question should be submitted to the jury until a precedent had been established, with the precedent then being adopted by the court. A discussion of issues in which English judges historically found it necessary to rule on mixed questions in order to create precedents may be found in Devlin (1956: 99-103).

11. The debate is extensively discussed in note 21, below.

12. One of the most systematic indictments of the competence of the jury may be found in Frank (1950) in his opinion in Skidmore v. Baltimore & Ohio R.R. Co.

13. In general, the discussion will not differentiate between the civil and criminal trials, except when research is specifically directed to one or the other type.

14. Part of the experiment also demonstrated the unreliability of human observation as a fact-finding tool.

15. The data are from a mock trial at Yale Law School (the jury was composed of working people from New Haven) and from interviews with jurors from three municipal court juries. The work was supervised by Justice Frank.

16. Students from a psychology class were asked to describe an incident which occurred during a class lecture, without being informed until after the lecture that an experiment was being run. A jury of students listened to the stories and then each wrote out his understanding of what happened, and the jury as a whole wrote out a collective report. The group report was less complete, but more accurate. Analysis of the witnesses' descriptions again showed the unreliability of human observation.

17. The Weld and Danzig data are based on three juries of psychology students observing a moot court trial. The Kalven and Zeisel data are from 1,500 questionnaires returned by judges, reporting on cases tried in their courts, with their inferences as to the reasons for juror divergence from the verdict they thought appropriate, when such divergences occurred. The data are from criminal trials only. For a review symposium on Kalven and Zeisel, and a discussion of the likelihood of the applicability of the findings to English juries, see Griew et al. (1967).

18. Kalven (1965) reports similar findings for civil juries.

19. Note, however, that the data are based on individual verdicts rather than on collective jury verdicts, and that the subjects are college students.

20. For additional references on psychological studies relevant to the study of the jury, see the bibliographies in Joiner (1962) and in Kelly and Thibaut (1954). For a general discussion of psychological tests of jurors to determine their fitness to serve, see Emerson (1968) and Yale Law J. [Note] (1956).

21. A large part of the debate, in which most noted legal scholars have participated, is concerned with the question of whether juries *ought* to depart from the law. Pound (1910), in a widely cited article, argues that the tradition of Anglo-American law is to change the meaning of the law rather than the law itself, and that so-called "jury lawlessness" is the "great corrective of law in its actual administration." (His position is modified somewhat in 1933 and 1954). A position similar to Pound's 1910 article is taken by Wyzanski (1952) and by Botein (1952). Devlin concludes that "each jury is a little parliament . . . the jury sense is the parliamentary sense" (1956: 164). Even Forsyth (1852: 430-431), who at one point asserts that the survival of the jury as an institution is largely a result of its restriction to questions of fact, finally concludes that juries often

forget their charge and "usurp the prerogative of mercy," and that this is "an error at which humanity need not blush." Commentators on the other side stress the arbitrariness and unpredictability of jury lawlessness, as well as the incongruity of judges' allowing juries to disregard the instructions, but then allowing appeals based on the content of those instructions. See Frank (1950); Green (1930); Broeder (1954). On the contradictions and irrationalities of the jury system in general, see also Arnold (1935: ch. 6). The usual reform proposal is the special verdict; see, e.g., Sunderland (1920) or Frank's opinion in Skidmore v. Baltimore and Ohio R.R. Co. (1948). On the debate generally, see Foster et al. (1956). In general the same objections are raised to the civil and criminal trials. However, most commentators are less harsh on the criminal jury because the issues dealt with by the jury are less complex, and because the principle of protecting the innocent makes some of the costs more palatable. An additional factor is that the criminal jury is more firmly entrenched. For a defense of the civil jury in particular, see Kalven (1964). A volume has also been prepared for the International Academy of Trial Lawyers: see Joiner (1962).

22. Data for the Wanamaker study based on questionnaires returned by 843 of 2,250 jurors surveyed in Summit County, Ohio, in 1933.

23. The pattern was as follows: Uninstructed jurors: 4 not guilty-insanity, 4 hung, 14 guilty; M'Naghten instruction: 0 n-g-i, 1 hung, 19 guilty; Durham instruction: 5 n-g-i, 6 hung, 15 guilty. The psychiatric testimony was varied slightly with the different instructions (1967: 72). It should be noted that the percentage of hung juries is unusually high in this experiment, compared to actual court figures.

24. The percentages are based on a weighted average of citation of reasons; all reasons appeared most often in combination with others. For example, an issue of evidence was the sole factor in only 43% of the cases where it appeared; sentiment on the law was the sole factor 22% of the times it appeared; sentiment on the defendant was the sole factor 8% of the times it appeared (113). Evidence alone was the factor in 34% of the cases, while evidence combined with one or more sentiments was operative in 79% of the cases (116).

25. Kalven and Zeisel's estimate is 66%, the residual of the 34% cited (1966).

26. Nineteen percent of the defendants were classified as sympathetic, sixty-four percent as average, and seventeen percent as unattractive. Classification varied widely by age, race, and sex, with the highest net sympathetic over unattractive going to minors (net of seventeen percentage points) and women (eleven points). Negroes were the only group with a net unattractive rating (minus seven, as compared to plus six for whites). Leniency was fairly constant across demographic groups when the sympathy category was held constant. In cases in which the jury was harsher than the judge, the primary effect of a defendant's unattractiveness was on his credibility (377). For additional discussion on the attitude of white jurors towards Negro defendants (and jurors), see Broeder (1965a). Unfortunately, the categories included items which are directed to varying notions of equity. A sympathetic defendant may be one who was good-looking or who cried while testifying, or, apparently, one who was white.

27. See also Broeder (1966a).

28. This sentiment is, however, often merely a reflection of prejudice; e.g., "Our juries are loathe to hold colored people to as high standards as white people" is the explanation given by the judge for one discrepancy (Kalven and Zeisel, 1966: 341).

29. However, most of Broeder's articles do not deal with his entire sample. Instead, he deals with a selected point and discusses cases which bear on it. The advantage of his data is that it is drawn from the jurors themselves rather than from judges' inferences of juror attitudes.

30. No empirical data are available at this time. Sometimes the principle of comparative negligence may operate in a curious manner with other extralegal considerations. In a case discussed by Strodtbeck (1962), the jury extralegally imputed negligence to the plaintiff child from his mother but then applied comparative negligence to grant an award.

31. For example, the attractive young widow is expected to remarry, and a widow's adult children are expected to support her.

32. This is a report of the survey findings of the project, not of Broeder's own observations. The finding here is that jury awards are about twenty to thirty percent higher than judges' awards when the defendant is a corporation, a city or a state, or a railroad.

33. Broeder's (1966a) own studies have shown that if a nonlitigating third party shares liability, the damage award will be reduced.

34. The data are primarily drawn from court records of Wayne County, Michigan.

35. The tendency of a jury to disregard the judge's instructions to ignore a statement previously made is also noted by Hoffman and Brodley (1952).

36. The example cited is that of enlargement by addition of more bills. This may not have resulted in broader class representation, but it did apparently make for a less prejudiced verdict.

37. An additional factor was that the lord would have their support in the enforcement of the judgment.

38. The standard of communitywide representation was firmly established by a series of cases in the 1940s. See, e.g., Thiel v. Southern Pacific Co. (220) "The American tradition of trial by jury . . . contemplates an impartial jury drawn from a cross section of the community." See also Glaser v. U.S., and Ballard v. U.S. The decisions also held that, in the federal courts, it does not matter whether the litigant was in any way prejudiced by the wrongful exclusion or whether he was a member of the excluded classes. In its rulings with respect to cases tried in state courts, however, the Supreme Court has defined its jurisdiction more narrowly (see Yale Law J. [Note] 1965a). In these cases the notion of peers in the sociological sense has become partially operative. The Court has held that if the defendant is a member of the excluded group (i.e., if his peers have been excluded), the venire must be quashed. However, if he is not a member of the group he must show that the outcome was prejudiced by the exclusion. See, e.g., Fay v. New York and Scott (1949). Thus, in general, a Negro cannot complain about the exclusion of whites, a man cannot complain about the exclusion of women, or a white cannot complain about the exclusion of Negroes. (See citations in Yale Law J. [Note] 1965a: 920n. Most cases involved grand juries, but the same principle applies to petit juries.) In all cases, the Court has held that the right to a "representative jury" only applies to the venire and not to the individual jury. See, e.g., Thiel v. Southern Pacific Co. and Hoyt v. Florida.

39. The English jury is drawn from a venire even more restricted than the American. See Devlin (1956: 17-25).

40. An early study which gained wide repute presents findings on the Los Angeles County Grand Jury (see Robinson, 1950). This study also presents an early argument for the use of statistical tests.

41. A separate but related question is communitywide representation on an individual petit jury. (See also note 38, above). Although the right to a representative petit jury is not guaranteed, a new trial can be ordered if the state uses its peremptory challenges in a discriminatory manner over time. Again, the major source of data is court briefs; see, e.g., Swain v. Alabama, Whitus v. Georgia

42. For a catalog of the variety of ways in which the master list from which the venire is drawn is established in California, see Stanford Law Rev. [Note] (1953). In smaller counties (less than 60,000 population), for example, the role of "personal knowledge" of the members of the county board of supervisors in either establishing the list or selecting the venire from it is crucial. On the use of various nonrandom methods of selection, and their biases, see Lindquist (1967) and Yale Law J. [Note] (1965). The judicial Conference of the United States (1967) proposes legislation which would "insure non-discrimination" through random selection from voter registration rolls. But compare defendant's "Motion to Quash the Entire Master Panel and Jury Venire," in People v. Newton, arguing that unsupplemented voter registration lists (the system employed in Alameda County) are not representative of the community.

43. For one California county, the following information was obtained from the jury commissioner. Although a random method of drawing names from the voter registration lists is supposedly employed, the jury commissioner does not use a recognized random method, but rather "makes up numbers in his head." Also, some precincts are skipped because "there are more precincts than names needed to fill the list." Moreover, after interviews with prospective jurors, the list is adjusted for "occupational balance." It is not clear, however, whether these adjustments are made with intent to discriminate. Some apparently neutral administrative procedures used in this county may work against certain classes of persons, especially the poor. First, of course, poor people are less likely to have registered to vote. Moreover, prospective jurors are summoned by postcard, and if there is no response, a second card is sent, but there is no further follow-up. Poor persons are, however, less likely to respond (because they move more, are less likely to leave a forwarding address, and are generally less likely to answer mail) and are more likely to have transportation problems both here and with respect to actual service. Also, until recently, an intelligence test was administered, heavily biased towards middle-class values and vocabulary and requiring a very high (84%) score to pass. Moreover, anyone not completing the 25 questions in ten minutes automatically failed the test, even though this time limit was not announced in advance. The failure rate was 14.5% for prospective jurors from a high income area and 81.5% for persons from the ghetto area. The use of this test was successfully challenged in the courts in 1968, but the judge in the case has been severely criticized for this action by prosecutors.

On the subtle means through which apparently nondiscriminatory behavior favors certain classes, see Kuhn (1968: 268 ff., 307 ff.). Compare the arguments for psychological tests in note 20, above, and in Frank (1950).

44. The data are drawn from various public opinion surveys, and show the following rates of opposition to capital punishment: white males, 45%; white females, 58%; Negro males, 65%; Negro females, 69% (Zeisel, 1968: 12). Replications show that although response levels vary somewhat with the wording of the question, the relationship among the four groups does not.

45. Negroes under 29, however, have a very low rate of approval (twenty percent).

46. The trend is somewhat reversed for women, but with fewer marked differences.

47. The anomalous finding with respect to education is not erased by controlling for occupation. Also, women are more prone to vote not guilty by reason of insanity, except for housewives deciding an incest case, who were very conviction-prone, possibly because they felt threatened.

48. Reported briefly in *New York Times*, August 5, 1963: 31.

49. This association between scruples against the death penalty and tendency to acquit corroborates an earlier conclusion that "blue ribbon" jurors in New York, who were disqualified if they had scruples, were more prone to vote for conviction (Broeder, 1959).

50. In civil cases, decisions on liability and damages have been found to be related to the previous trial experience of the jurors. For example, a juror will use previous trials extralegally as a bench mark (Broeder, 1965c). Jurors also compare the plaintiff's situation with their own experiences and injuries and those of their friends and relatives. This may be the basis for a rational evaluation or for punitive or vindicative judgments (Kalven, 1958). The vicinage requirement has been found to have an effect on decisions, as jurors extralegally use their knowledge of the area in which the tort occurred (Broeder, 1966b).

51. It is difficult, however, to speculate on the exact content of the difference. In general, it is argued (and will be argued below) that a defendant's peers will be more likely to be sympathetic to his situation. Defendants are also more likely to be lower-class, and lower-class jurors are generally more lenient. On the other hand, the defendant's peers would be harsher if he had violated a subcultural norm, e.g., if the defendant were a Baptist charged with violation of a sumptuary law.

52. Based on answers to a questionnaire submitted to 1,500 jurors who served on civil cases in Utah in 1941. (Return rate is not specified.)

53. This figure is considerably higher than for any other category except that of direct evidence disputes. The observations of Broeder, although not as systematic as those of Kalven and Zeisel, lend themselves to the same type of further analysis. The proposal for the analysis of convictions does not deny that we are only dealing with probabilities and will never have a total explanation or total prediction of all jury behavior. It does seem, however, that the process of adjudication will be further illuminated by the method outlined. Kalven and Zeisel (1966: 475), on the other hand, argue that agreements between the judge and the jury need not be studied, because "agreement is caused by the absence of whatever causes disagreement."

54. Except for Simon's work, which analyzes the composition of groups which are in the minority on the first ballot but eventually triumph, the studies rely on the relative participation of jurors or on the number of sociometric votes received. As discussed above, the various studies and indicators have yielded somewhat conflicting results.

55. Strodtbeck and Hook (1961) conclude that the number of sociometric votes received by a juror is inversely related to the square of a measure based on table length and width and visual accessibility. An article and a reply deal with the relationship of the size of juror factions to the total amount of argument and the amount of argument per juror; see Hawkins (1962) and Zeisel (1963).

56. Kalven also reports that in civil cases the damage award often equals the average of the original sums suggested by the jurors, but through the process of group dynamics rather than through conscious averaging (Kalven, 1958).

57. Although there are data on the propensity of persons of different status to convict or acquit, there is no systematic study of how this propensity varies by type of case or by characteristics of the defendant (or plaintiff).

58. Kalven and Zeisel's data showing a low frequency of sympathetic image evoked by Negro defendants (above, note 26) suggest that the answer to this query may well be negative.

59. For a fairly extensive comment on Simon's research design, see the review by Scheff (1968).

60. Devlin reports that in 1913 the jury was used in 55% of all civil cases in England.

61. The issues are libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise to marry, and fraud (in which the right is only for the accused). In general, the decline in use antedates the parliamentary legislation, and requests for the jury where it is not guaranteed are few.

62. On a still broader level, a study might pursue the analysis of de Tocqueville and consider the relationship of trial by jury to the maintenance of democratic institutions.

63. For example, has it been more even-handed than jury law, which may be invoked or not, depending on the subjective factors in the case?

64. In addition, it may be fruitful to explore the consequences of the decline of the jury on the general authority of the office of the judge. De Tocqueville (1945: 297) suggests that in an active jury system the "moral power" of the judge is greatly enhanced, so that even when he sits alone his judgment has "almost as much authority as the community represented [by the jury]." It has also been suggested that the existence of the jury makes the office of judge more authoritative, because the judge can avoid difficult decisions by submitting them to the jury.

65. On the additional prerequisites of the criminal trial, see Pound (1907).

66. Moreover, the Anglo-American jury could profitably be compared to other forms of lay participation, such as the Swedish Nämad, the German Schöffen, Soviet Peoples' Courts, and Roman lay judges.

67. On this point, see Blumberg (1967).

68. Arkansas and Louisiana are exceptions to the generalization, with fourteen and thirteen trials per 100,000 respectively. Kalven and Zeisel do not present data on the frequency of offenses, but it is unlikely that the explanation lies there.

CASES

BALLARD v. U.S. (1946) U.S. 329: 187.
FAY v. NEW YORK (1947) U.S. 332: 261.
GLASER v. U.S. (1942) U.S. 315: 60.
In re GRILLI (1920) N.Y.S. 179: 795.
HOYT v. FLORIDA (1961) U.S. 368: 37.
PALKO v. CONNECTICUT (1937) U.S. 302: 319.
PEOPLE v. NEWTON (1968) Superior Court, Alameda County, California, Petition 41266, 6/7/68.
SKIDMORE v. BALTIMORE AND OHIO R. R. CO. (1948) F. 2d 167: 54 (2nd Cir.).
SWAIN v. ALABAMA (1964) U.S. 380: 202.
THIEL v. SOUTHERN PACIFIC CO. (1946) U.S. 328: 217.
WEDGEWOOD v. CHICAGO N.W.R.R. CO. (1878) Wisconsin 44: 44.
WHITUS v. GEORGIA (1966) U.S. 385: 545.

REFERENCES

ARNOLD, T. W. (1935) Symbols of Government. New Haven: Yale Univ. Press.
BEDFORD, S. (1963) The Faces of Justice: A Traveller's Report. New York: Simon & Schuster.
BEVAN, W., R. S. ALBERT, P. R. LOISEAUX, P. N. MAYFIELD, and G. WRIGHT (1958) "Jury behavior as a function of prestige of the foreman and the nature of his leadership." J. of Public Law 7 (Fall): 419-449.

BLACK, H. C. (1968) "Judgment by peers," in Black's Law Dictionary. St. Paul: West.
BLACKSTONE, W. (1791) Commentaries on the Laws of England. Volume IV. Oxford: Clarendon.
BLALOCK, H. M. (1960) Social Statistics. New York: McGraw-Hill.
BLUMBERG, A. (1967) Criminal Justice. Chicago: Quadrangle.
BOTEIN, B. (1952) Trial Judge. New York: Simon & Schuster.
BRENNAN, J. (1963) "The Bill of Rights and the states," in E. Cohn (ed.) The Great Rights. New York: Macmillan.
BROEDER, D. W. (1966a) "Impact of the scapegoat in jury trial cases." Duquesne Law Rev. 4, 4: 513-525.
——— (1966b) "The impact of the vicinage requirement: an empirical look." Nebraska Law Rev. 45 (January): 99-118.
——— (1965a) "The Negro in court." Duke Law J. 1965 (Winter): 19-31.
——— (1965b) "Plaintiff's family status as affecting juror behavior." J. of Public Law 14, 1: 131-141.
——— (1965c) "Previous jury trial service affecting juror behavior." Insurance Law J. 1965 (March): 138-143.
——— (1965d) "The voir dire examination: an empirical study." Southern California Law Rev. 38 (Summer): 503-528.
——— (1959) "The University of Chicago jury project." Nebraska Law Rev. 38 (May): 744-760.
——— (1954) "Functions of the jury." Univ. of Chicago Law Rev. 21 (Spring): 386-424.
BUSCH, F. X. (1949) Law and Tactics in Jury Trials. New York: Bobbs-Merrill.
CAVITCH, Z. (1949) "Federal courts: directed verdicts in civil actions." Michigan Law Rev. [Comment] 47 (May): 974-984.
University of Chicago Law Rev. [Comment] (1958) "Impeachment of jury verdicts." 25 (Winter): 360-372.
DAISHELL, J. F. (1935) "Experimental studies of the influence of social situations," in C. Murchison (ed.) Handbook of Social Psychology. Worcester, Mass.: Clark Univ. Press.
DE SLOOVERE, F. (1933) "The functions of the judge and jury in the interpretation of statutes." Harvard Law Rev. 46 (May): 1086-1110.
DE TOCQUEVILLE, A. (1945) Democracy in America. Volume 2. New York: Vintage.
DEVLIN, P. (1956) Trial by Jury. London: Stevens.
EMERSON, C. D. (1968) "Personality tests for prospective jurors." Kentucky Law J. [Note] 56 (Summer): 832-854.
FARLEY, R. J. (1932) "Instructions to the jury." Yale Law J. 42 (December): 194-225.
FINKELSTEIN, M. O. (1966) "The application of statistical decision theory to the jury discrimination cases." Harvard Law Rev. 80 (December): 338-376.
FORSYTH, W. (1852) A History of Trial by Jury. London: J. W. Parker.
FOSTER, S. F., C. R. RUNALS, D. W. PECK, and J. H. HUGHES (1956) "The jury trial on trial: a symposium." New York State Bar Bull. 24 (October): 322-351.
FRANK, J. (1950) Courts on Trial. Princeton: Princeton Univ. Press.
FRIEDMAN, L. (1965) (ed.) Southern Justice. New York: Pantheon.
GINSBURG, R. (1962) "The jury and the namad: judicial control of lay triers in civil proceedings in the United States and Sweden." Cornell Law Q. 48 (Winter): 253-273.
GREEN, L. (1930) Judge and Jury. Kansas City, Mo.: Vernon.
GRIEW, E., R. CROSS, T. R. HEALD, and B. MacKENNA (1967) "Symposium: behavior of the jury: a review of the American evidence." Criminal Law Rev. 1967 (October): 553-586.

HARTSHORNE, R. (1949) "Jury verdicts: a study of their characteristics and trends." Amer. Bar Assn. J. 35 (February): 113-117.
HAWKINS, C. (1962) "Interaction rates of jurors aligned in factions." Amer. Soc. Rev. 27 (October): 689-691.
HERVEY, J. C. (1947) "Jurors look at our judges." Oklahoma Bar Assn. J. 18 (October 25: 1508-1513.
HOFFMAN, H. M. and J. BRODLEY (1952) "Jurors on trial." Missouri Law Rev. 17 (June): 235-251.
HOLBROOK, J. C. (1956) A Survey of Metropolitan Trial Courts in Los Angeles. Los Angeles: Univ. of Southern California Press.
HOLDSWORTH, W. S. (1957) A History of English Law. London: Methuen.
HOLMES, O. W. (1881) The Common Law. Boston: Little, Brown.
HOOD, J. T. (1967) "Recent developments: trial by jury." Alabama Law Rev. 20 (Fall): 76-88.
HOVLAND, C. I., I. L. JANIS, and H. H. KELLEY (1957) The Order of Presentation and Persuasion. New Haven: Yale Univ. Press.
——— (1953) Communication and Persuasion. New Haven: Yale Univ. Press.
HUNTER, R. M. (1935) "Law in the jury room." Ohio State Law J. 2 (December): 1-19.
JAMES, F., Jr. (1951) "Qualities of the reasonable man in negligence cases." Missouri Law Rev. 16 (January): 1-26.
——— (1949) "Functions of judge and jury in negligence cases." Yale Law J. 58 (April): 667-690.
JOINER, C. W. (1962) Civil Justice and the Jury. New York: Prentice-Hall.
Judicial Conference of the United States (1967) "Report of the committee on the operation of the jury system." Federal Rules Decisions 42: 353-386.
——— (1954) Proposed Handbook for Petit Jurors. Committee on the Operation of the Jury. U.S. District Courts. Washington, D.C.
KALVEN, H., Jr. (1964) "The dignity of the civil jury." Virginia Law Rev. 50 (October): 1055-1075.
——— (1958) "The jury, the law, and the personal injury damage award." Ohio State Law J. 19 (Spring): 158-178.
——— and H. ZEISEL (1966) The American Jury. Boston: Little, Brown.
KAPLAN, J. (1967) "Review of Kalven and Zeisel, *The American Jury*." Univ. of Pennsylvania Law Rev. 115 (January): 475-481.
KARLEN, D., G. SAWER, and E. M. WISE (1967) Anglo-American Criminal Justice. New York: Oxford.
KEENEY, B. C. (1949) Judgment by Peers. Cambridge, Mass.: Harvard Univ. Press.
KELLEY, H. H. and J. E. THIBAUT (1954) "Experimental studies of group problem solving and process," in G. Lindzey (ed.) Handbook of Social Psychology. Reading, Mass.: Addison-Wesley.
KEMPIN, F. G., Jr. (1963) Legal History, Law, and Social Change. Englewood Cliffs, N.J.: Prentice-Hall.
KUHN, R. S. (1968) "Jury discrimination, the next phase." Southern California Law Rev. 41 (Winter): 235-338.
LAWSON, R. G. (1967-68) "Order of presentation as a factor in jury persuasion." Kentucky Law J. 56 (Spring): 524-555.
LINQUIST, C. A. (1967) "An analysis of jury selection procedures in United States District Courts." Temple Law Q. 41 (Fall): 32-50.
MANCHESTER, G. M. (1968) "Misconduct of jurors—impeachment of verdict—new trial." Case Western Reserve Law Rev. [Comment] 20 (April): 776-781.

MARSTON, W. M. (1924) "Studies in testimony." J. of Amer. Institute of Criminal Law and Criminology 15 (May): 5-31.
MILLS, E. S. (1962) "A statistical study of occupations of jurors in a (Maryland) United States district court." Maryland Law Rev. 22 (Summer): 205-214.
MOFFAT, D. W. (1945) "As jurors see a law suit." Oregon Law Rev. 24 (April): 199-207.
POLLOCK, F. and E. MAITLAND (1898) History of English Law. Cambridge, Eng.: Cambridge Univ. Press.
POUND, R. (1954) Introduction to the Philosophy of Law. New Haven: Yale Paperbacks.
--- (1933) "The jury," p. 492 in International Encyclopedia of Social Sciences. New York: Macmillan.
--- (1930) "Judicial office in America." Boston Univ. Law Rev. 10 (April): 125-137.
--- (1910) "Law in books and law in action: historical causes of divergence between the nominal and actual law." Amer. Law Rev. 44 (January-February): 12-36.
--- (1907) "Inherent and acquired difficulties in the administration of punitive justice." Amer. Pol. Sci. Assn. Proceedings.
ROBINSON, W. S. (1950) "Bias, probability, and trial by jury." Amer. Sociological Rev. 15 (February): 73-78.
SCHEFF, T. (1968) "Review of the jury and the defense of insanity." Amer. Sociological Rev. 33 (June): 484-486.
SCOTT, A. W., Jr. (1949) "The Supreme Court's control over state and criminal juries." Iowa Law Rev. 34 (May): 577-604.
SIMON, R. J. (1967) The Jury and the Defense of Insanity. Boston: Little, Brown.
--- (1958) "Status and competence of jurors." Amer. J. of Sociology 64 (May): 563-570.
Stanford Law Rev. [Note] (1953) "Jury selection in California." 5 (February): 247-273.
STANTON, T. F. (1964) "Conscious and unconscious mechanisms in jury deliberations suggesting psychological factors in opening and closing statements." Federation of Insurance Counsel Q. 15 (Winter): 57-70.
STRODTBECK, F. L. (1962) "Social process, the law, and jury functioning," in W. M. Evan (ed.) Law and Sociology. New York: Free Press.
STRODTBECK, F. L. and L. HOOK (1961) "Social dimensions of a twelve-man jury table." Sociometry 24 (December): 397-415.
STRODTBECK, F. L., R. M. JAMES, and C. HAWKINS (1957) "Social status in jury deliberations." Amer. Sociological Rev. 22 (December): 713-719.
STRODTBECK, F. L. and R. D. MANN (1956) "Sex role differentiation in jury deliberations." Sociometry 19 (March): 3-11.
SUNDERLAND, E. R. (1937) "Trial by jury." Univ. of Cincinnati Law Rev. 11 (March): 120-131.
--- (1920) "Verdicts, general and special." Yale Law J. 29 (January): 253-267.
THAYER J. (1898) Preliminary Treatise on Evidence. Boston: Little, Brown.
--- (1892) "The jury and its development." Harvard Law Rev. 5 (January, February, and March): 249-273. 295-319, and 357-388.
TRETTER, F. E. (1957) "Functions of judge and jury in defamation cases in New York." Cornell Law Q. 43 (Fall): 80-95.
ULMER, S. (1962) "Supreme Court behavior in racial exclusion cases, 1935-1960." Amer. Pol. Sci. Rev. 56 (June): 325-330.
VANDERBILT A. (1956) Judges and Jurors: Their Functions, Qualifications, and Selection. Boston: Boston Univ. Press.
VANDERZELL, J. H. (1966) "The jury as a community cross section." Western Pol. Sci. Q. 19 (March): 136-149.

WANAMAKER, L. (1937) "Trial by jury." Univ. of Cincinnati Law Rev. 11 (March): 191-200.

WELD, H. P. and E. R. DANZIG (1940) "A study of the way in which a verdict is reached by a jury." Amer. J. of Psychology 53 (October): 518-536.

WELD, H. P. and M. ROFF (1938) "A study of the formation of opinion based upon legal evidence." Amer. J. of Psychology 51 (October): 609-628.

WELLS, C. L. (1911) "Origins of the petty jury." Law Q. Rev. 27 (July): 347-361.

WRIGHT, C., Jr. (1954) "Instructions to the jury: summary without comment." Washington Univ. Law Q. [Note] 1954 (April): 177-212.

——— (1953) "The invasion of the jury: temperature of the war." Temple Law Q. 27 (Fall): 137-164.

WYZANSKI, C. E. Jr. (1952) "A trial judge's freedom and responsibility." Harvard Law Rev. 65 (June): 1281-1304.

Yale Law J. [Note] (1965a) "Defendant's challenge to a racial criterion in jury selection: a study in standing, due process, and equal protection." 74 (April): 919-941.

——— (1965b) "Fair jury selection procedures." 75 (December): 322-334.

——— (1964) "Changing role of the jury in the nineteenth century." 74 (November): 170-192.

——— (1956) "Psychological tests and standards of competence for selecting jurors." 65 (February): 531-542.

ZEISEL, H. (1968) Some Data on Juror Attitudes towards Capital Punishment. Chicago: Center for the Study of Criminal Justice, University of Chicago.

——— (1963) "What determines the amount of argument per juror?" Amer. Sociological Rev. 28 (April): 279.

——— H. KALVEN, Jr., and B. BUCHHOLZ (1959) Delay in the Courts. Boston: Little, Brown.