***The American Jury*. By Harry Kalven, Jr. and Hans Zeisel, with the collaboration of Thomas Callahan and Philip Ennis. (Boston: Little Brown and Co., 1966. 559 pp., $15.00.)**

***Reviewed by: Abraham S. Goldstein, Yale University***

The Chicago Jury Project is the most elaborate of the recent adventures into law and behavioral science. Lavishly financed by the Ford Foundation some fifteen years ago, housed at the University of Chicago Law School and directed by a distinguished lawyer and sociologist, it offered at long last to fulfill the promise of realist jurisprudence. The legal realists, who came of age in the '20s and '30s, had called academic lawyers away from the abstract doctrines announced by appellate courts and had urged them instead to study legal institutions and processes as they functioned in the real world—the behavioral assumptions underlying them, the interactions among them, and the relation they bore to other social phenomena. The call had gone largely unheeded, in considerable part because a depression, a New Deal, and a war had intervened. Since World War II, however, a period of consolidation and appraisal has begun, of the sort calculated to put the realist ideology to the test. The jury project was widely regarded as the effort most likely to succeed. Unlike some of the other ventures—*e.g.* the American Bar Foundation's study of the administration of criminal justice—this one was to be organized around a single complex institution which had long been the gathering point of controversy and folklore as well as of doctrine. The objective was to dig deep so that we might finally know how many of our assumptions about the jury were well-founded and whether it served its legal and social functions at all well.

It is difficult for the non-lawyer, even for the non-academic lawyer, to realize how much faith has been covertly invested in the jury project. Almost from the time it began, it carried with it the assumption that a

---

EDITOR'S NOTE: *This review appeared (with minor differences) in the April 1967, issue of* Commentary. *It is printed here, by agreement with* Commentary, *because of its interest for professional scholars in the field of law and social science.*

good deal more was going on among jurors than met the eye and that all manner of mysteries would soon be uncovered. This sense of anticipation was fed by a steady flow of articles written for professional journals by staff members. Though most of these articles were technical in nature, they took the reader into the hitherto secret world of the jury, its structure and its deliberation processes—but always on a small scale and leaving to another and later stage the rounded presentation of the jury process. In the background, heightening the sense of drama and raising the level of expectation, have been the reports of marvelously skillful research designs—of mock cases presented to mock juries, of a wide variety of small group experiments, even of the "bugging" of jury rooms in one federal district court—culminating in a widely publicized Congressional investigation and a federal statute making it a crime to eavesdrop on jury deliberations.

*The American Jury* is the first of several volumes reporting on the jury project. It is concerned entirely with the jury in the criminal trial and it is to be followed by a volume on the jury and the insanity defense and by one on the civil jury trial. The authors make it plain at the very outset, however, that their title for the current volume is too broad. This book is not a comprehensive study of the jury, or of the jury in criminal cases. Instead it is a detailed report on the extent to which judge and jury disagree with one another in criminal cases, the reasons for the disagreement, and the ways in which highly developed research methodology may be brought to bear on that problem.

The principal research method was a series of mail questionnaires, addressed to 3,500 trial judges throughout the United States, of whom some 550 participated in varying degrees. Reports of approximately 3,500 trials were supplied, each of which told the authors how the jury had decided a given case, how the judge would have decided the same case if he were trying it without a jury, and the judge's statement of the reasons why he and the jury disagreed. On occasion, this fund of information was supplemented by materials learned by the authors from other phases of the study which included interviews of judges and jurors about cases and issues other than those involved in the questionnaires. The details of the research design, and the statistical treatment of the data, are presented with remarkable lucidity. And the limitations of both data and research design are, for the most part, set out with admirable candor.

The findings provide an interesting tour through the criminal jury trial in a degree of detail and precision which is to be found nowhere else. We learn, for example, that a jury trial is a very rare occurrence because most defendants plead guilty and many waive jury trial so that they may be tried by a judge. The cases left for the jury tend, therefore, to be those in which defendants and their lawyers not only think there is a fairly good chance of acquittal but also that the chance is better than before a judge. Even so, judge and jury agree in 75 per cent of the cases. In those cases in which they disagree, the original prophecy coming from jury folklore seems to be fulfilled: juries are more lenient than judges—because they are readier than judges to nullify unpopular laws and legal doctrines, because they are more likely to permit value preferences to shape their appraisal of the evidence, particularly in close cases, and because they tend to be more moved by sympathy for the defendant who takes the stand and who has a previously unblemished record. It emerges very clearly, however, that jurors are not simple souls manipulated by wily lawyers or confronted by evidence too complex for them. The judges report that the jury follows the evidence and understands the case—perhaps because 86 per cent of the cases are "easy to comprehend" and only 2 per cent are "very difficult." Nevertheless, the judges find the jury decision to be "without merit" in one-third of the cases in which judge and jury disagree.

The heart of the difference between judge and jury is not that the jury favors defendants but rather that it is less rule-minded than the judge. Where the judge is bound by his role and by legal training, the jury is bound only by the larger culture and by the pressures for consensus. As a result, jurors view a great many cases as largely private disputes to be governed by a wide variety of equities which the judge puts aside because "the law" says they are irrelevant. The jury, for example, is much moved by whether the victim in a sex case did anything to induce the assault, or whether the parties were drunk, or whether the defendant has already been "punished enough," or whether the conduct charged is relatively innocuous or widely practiced. In short, as the authors point out in closing, the jury in practice is very much like what we have long believed it to be, a politically viable method for involving laymen and their perspectives in the administration of criminal law.

Unfortunately, there may be an important flaw in the data and in the conclusion. The core of the study is to be found in the "reasons for disagreement" between judge and jury. Yet, however much they are

disguised in statistical descriptions, these depend almost entirely upon the trial judge's characterizations of what jurors think. Unlike other portions of the project, this one utilized jury interviews hardly at all. As a result, when the trial judge says that jurors voted to acquit because they do not like gambling laws, or voted to convict because they do not like homosexuals, it is impossible to tell whether the judges are doing any more than attributing to jurors the feelings and sentiments that judges expect jurors to have. As a result, the risk is very great that the entire research design is confined by a stereotype borrowed by the judges from the lawyer-culture.

Even more fundamentally, we have no way of knowing whether the judges who say they would decide a case in a particular way would actually have done so. Unlike the jurors who were deciding an actual case, the judge is simply expressing his attitude toward decision, under circumstances where he remains psychologically free to affirm the legal norm because he does not have the actual responsibility to decide. This gap between attitude and decision is, of course, a common research problem and there is always a risk that the search for perfection will paralyze even the most enterprising. Nevertheless, it is surprising that the authors discuss the problem so little. Moreover, they report little or no effort to corroborate their conclusions. They might, for example, have examined a body of judge-tried cases, even if they were not the identical cases tried by juries; or they might have tried to determine whether jurors would have been more rule-oriented if they were expressing attitudes about cases tried by judges alone. It is difficult to avoid the feeling that the jury may come out in predictable form because trial judges see it that way, not because the jury actually follows the form.

Within its terms, as an exploration of the intricacies and hazards of research into a complex legal institution, this is a graceful and sophisticated book. And as a first entry into serious empirical research on the jury, it is a work of unquestioned importance. Nevertheless, a great deal more remains to be done if the authors are to achieve their objective, which was "to find out as carefully as we could how the jury actually performs." For example, this volume leaves out entirely any consideration of the jury's internal decision-making processes or the relation between background characteristics of individual judges and jurors and the decisions they reach. But other volumes are scheduled to follow; this one has succeeded in pointing the way toward the sort of ongoing research enterprise which should, in time, unlock the mysteries of jury behavior.

It is regrettable, however, that the authors' purpose "was not to evaluate." The result is a book which presents no major thesis, which challenges no sacred cows, and which presses on to very few generalizations. "It will be time enough," they tell us, after the report on the civil jury is done, "if then, to confront the larger significances of our lengthy inquiry into the jury. . . . The tracing of connections between this study of jury behavior and various theories of judicial behavior will have to await another day." Yet, without such confrontation and tracing, this book is merely a building block, albeit a significant one, in the larger structure envisioned by the legal realists.