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## JURY REFORM AND LIVE DELIBERATION RESEARCH

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### **Abstract**

Researchers face perennial difficulties in studying live jury deliberation. As a result, the academic community struggles to reach a consensus on key matters of legal reform concerning jury trials. The hurdles faced by empirical jury researchers are often legal or institutional. This note argues that the legal and institutional barriers preventing live deliberation research should be removed and discusses two forms that live deliberation research could take.

**Keywords:** jury research; jury trial; criminal procedure; live deliberation research; rape myths.

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The jury has a storied legal history, with some memorable highlights. The evolution of trial by jury served as a ward against the oppressive reach of the monarch, judiciary and other agents of the state in periods where freedom of expression, assembly and conscience were threatened. Juries played a valuable role in nullifying criminal laws accompanied by excessively harsh punishments, especially the mandatory death penalties for trivial crimes found in English law for great portions of the last 500 years. There have also been some terrible low points. These range from the morally execrable (such as racist juries in the Jim Crow-era United States) to the absurd (such as juries consulting Ouija boards to determine culpability for murder).<sup>1</sup> But throughout all of this, the jury has for centuries been a cornerstone of a broadly functioning criminal justice system in many states; surviving wars, pandemics and wholesale change in the constitution and content of the criminal law.

Recently, the jury is facing a new challenge. It has been argued that the use of jury trial is (partly) responsible for the problematically low conviction rate for sexual offences. The figures are stark: according to a recent report, the complaint to conviction ratio in the United Kingdom (UK) is below 2 per cent.<sup>2</sup> This cannot simply be chalked up to insensitive

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<sup>1</sup> On the latter, see Gans (2017).

<sup>2</sup> For example, see HM Government (2021).

policing or reluctant prosecutors—the rate of acquittals at trial for rape charges (involving adult women victims) is particularly high, with a 15-year average acquittal rate of around 50 per cent. The first tentative moves towards challenging the role of the jury as the arbiter of guilt for the most serious crimes are already underway, with the Scottish Government (at the time of writing) fighting against sustained protest from the legal profession to approve a pilot test of judge-only trials for rape offences. (It has already proposed the abolition of the unique Scottish third “not proven” verdict on similar grounds, believing that it encourages juries to shirk their duty to make the hard choice of convicting those accused of rape). Such pilot schemes are problematic in their own right, given that one of the only plausible criteria for success is an increased rate of conviction. This comes close to a “conviction target” for sexual offences—a controversial idea that can create perverse incentives for those involved in such trials. This is a deeply important debate. But here, I want to ask an even more basic question. Scrapping the jury for one of the most serious crimes on the books is a radical shift in how we administer criminal justice. So, one might wonder, what type of evidence justifies the supposed efficacy of such a change?

Despite the long history of the jury, we still debate against the backdrop of considerable ignorance about the internal workings of British juries, and indeed juries globally. It is currently not possible to study real juries whilst they engage in live deliberations, nor even to study transcripts of live jury deliberations. The roadblocks are both legal and institutional. Legally, revealing the content of jury deliberation in the UK risks being in contempt of court.<sup>3</sup> Institutionally, there is little enthusiasm for real jury research. Both legal and institutional support are necessary; in other jurisdictions where such research is in principle permitted, it is not feasible without the active support of institutional gatekeepers.<sup>4</sup>

In place of live deliberation research, inventive researchers have attempted to devise work-arounds.<sup>5</sup> These work-arounds vary wildly in their value. At the lamentable end of the spectrum, studies exhibit the worst flaws of social psychology—for example, asking unrepresentative samples to read short written scenarios and then, without any deliberation, offer an opinion on what should happen. Such studies differ so substantially

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<sup>3</sup> In the UK, see s 20D of the Juries Act 1974 and s 8 of the Contempt of Court Act 1981.

<sup>4</sup> On institutional barriers, see Horan & Israel (2016).

<sup>5</sup> Post-trial surveys of real jurors have been an influential and important tool informing policy debate in England and Wales, see eg Thomas (2010; 2020). However, it is not permitted to ask jurors details about their deliberations. And, even it were, this would only provide the subjective impression of the juror about their deliberations rather than objective evidence.

from the conditions of real jury deliberation that it is perfectly legitimate to question what relevance they have for debates about the actual jury system—especially since social psychology has recently been undergoing a “replication crisis” where vast numbers of studies have been claimed not to provide generalizable results. It is on the basis of such studies that the Scottish Government has formed the view that real jurors are systematically susceptible to “rape myths”, making them less accurate when judging accusations involving sexual offences.<sup>6</sup> Other attempts to study real juries indirectly are much more valuable. For example, a small number of “mock jury” studies exhibit much higher degrees of realism by extending over multiple days, inducing real judges to take part, paying actors to simulate other roles like those of accused, victim and lawyers, as well as including ample room for deliberation among the mock jury.<sup>7</sup> However, genuinely valuable mock jury studies are extremely expensive. As a result, gold-standard mock jury studies are uncommon and involve small sample sizes.

There is a partial solution to the economic problem of good mock jury research—one that combines the realism of a real trial with the use of mock juries. Mock jurors could be allowed to watch (either live or recorded) *real-life* trials and then be asked to deliberate before giving a verdict, just as the actual jury does.<sup>8</sup> (Recording trials is something that once faced a great deal of resistance but has since been done without issue.) This would bypass some of the expense of setting up high-quality mock jury studies, since the trials would be occurring anyway—the need for actors and scripts would be otiose, although participants would still have to be paid. Such an approach would also allow the retention of some of the virtues of mock jury studies, namely allowing experimenters to change certain features of the mock jury—such as its composition, like gender balance or size—in order to test targeted hypotheses. This type of “real trial, mock jury” research has not featured at all in the debate about the contemporary performance of juries because such studies are not being conducted. Yet, they are possible. Over half a century ago, a successful proof-of-concept study of this nature was supported by the Ministry of Justice and conducted by the Oxford University Penal Research Unit.<sup>9</sup>

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<sup>6</sup> The Scottish Government cites Leverick’s recent review article (2020) in support of its reform proposal: while the review is extremely useful, the studies it unearths do not replicate the conditions of a real trial, with almost none involving time for deliberation or re-enactment of the trial process.

<sup>7</sup> See Scottish Government (2019).

<sup>8</sup> Of course, the mock juries who deliberate in parallel would not interact in any way with the actual trial jury who attend court in person.

<sup>9</sup> See McCabe & Purves (1974).

That study did not address serious sexual assault trials and had some shortcomings, but the basic *approach* was sound. Resuscitating valuable research methods like this would go some way to improving the quality of evidence we have on jury deliberation, by allowing us to see how mock juries respond to realistic trial scenarios.

However, there remains a basic philosophical objection to any variety of mock jury research, regardless of its methodological credentials. This point applies even to mock juries who are asked to watch real-world trials. The concern is simple: *mock juries are not making decisions of any real-world importance*. Mock juries know that they are not really being asked to make a decision that will have any consequence, beyond having a tiny influence on an academic study. If we think it plausible to suppose that people approach high-stakes decisions (like those where the risk of error might lead to an innocent person being wrongfully imprisoned, or a rapist mistakenly set free) differently from low-stakes decisions (like the merely intellectual task of a mock juror) then there will always be a question mark over any extrapolation from mock juries to the real thing.

So, one might wonder why we do not allow researchers to study live jury deliberation. After all, there are various unobtrusive ways in which this research could happen, with the least disruptive being that live jury deliberations are transcribed and made available for academic researchers after the conclusion of the trial. Immediate concerns to do with the privacy of the jury or the potential for interference in ongoing legal proceedings (eg appeal processes) could be addressed by anonymizing the transcriptions and only releasing them some time—even years—after the conclusion of the original trial. Yet, the prohibition on live deliberation research is rarely challenged.<sup>10</sup>

I do not find any of the standard objections to this research convincing. For example, one worry is that real jury research would ruin public confidence in the jury, as its failings would be highlighted for all to see.<sup>11</sup> But public confidence is already being undermined by mock jury studies being cited in the press as “proving” that juries make widespread mistakes due to their belief in rape myths. And, surely, we do not want public confidence in the jury to be based on false premises. Would it not be better to have a mature debate about the future of the jury in full possession of the evidence? Other critics might worry that jurors would behave differently if they knew that their deliberations were being transcribed.

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<sup>10</sup> One notable exception is that there has been a successful instance of real jury research—on the use of juries in *civil* trials—in Arizona. See Diamond & Ors (2013).

<sup>11</sup> Eg Zander 2013.

This is an awkward line to press if you think that mock jury studies are themselves an instructive method of research, since these are also being recorded. Indeed, the recording of mock jury research is altogether more conspicuous; participants have willingly and self-consciously signed up to take part in an academic study. Real jurors, by contrast, are in an already unfamiliar situation where the high-stakes demands of the trial are likely to be more salient than any incidental transcription of their deliberation. Any distorting influence that observation might have is actually a much greater threat to the validity of mock jury studies.

We should, of course, be very cautious about introducing state oversight into the jury room. After all, we began this note by observing that the jury can serve as an essential counterweight to the power of the state. But my proposal is not to introduce any mechanism for overturning or regulating jury deliberation. The idea is simply to study the way that deliberation proceeds, after the decision of the jury has been made final. In any case, given that the centrality of the jury is already being challenged with an eye to its removal for serious offences, it cannot seriously be suggested that allowing the study of live jury deliberation is a greater challenge to the independence of the jury!

The benefits of live jury deliberation are obvious, since it would provide us with gold-standard evidence on how juries deliberate. The materials would be plentiful. Since trials must happen anyway, the cost would not be prohibitive in the same way as (high-quality) mock jury research. There would be reduced methodological and philosophical concerns about the mismatch between what experimental participants do and what happens in a real jury room. Given that the reform of legal processes is a slow business and reforms tend to stay in place for a long time, we should view this current moment as an opportunity. We are deciding on how to administer criminal justice for decades and likely centuries to come. Reforms will affect the lives of many thousands of people: accused and victims, as well as wider society. Any decision we do make should be informed by the best evidence possible. In my view, this requires live jury research.<sup>12</sup>

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<sup>12</sup> For a fuller defence of this idea, see Ross (2023).

### About the author

**Lewis Ross** is a faculty member of the Department of Philosophy, Logic and Scientific Method at the London School of Economics. His current research focuses on issues concerning legal proof, criminal justice and non-state approaches to law and order. He also works on general philosophical issues in epistemology, politics and moral philosophy.

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## Legislation, Regulations and Rules

Contempt of Court Act 1981

Juries Act 1974