

Is modern crime too complicated for the modern jury?

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Over the course of time, human activity has become increasingly complicated as we have acquired the means to address our daily needs in more sophisticated ways. Our more complex approach to every day problems manifests itself in everything from the way we prepare our food to the manner in which we travel from one place to another. Our increasing sophistication was soon reflected in more complex ways of interacting with others and more complex ways of regulating that interaction. By necessity, law must address the relationships of citizens and must evolve over time as those relationships change and take on new dimensions. In many ways, our criminal justice system has reflected just such an evolution. More and more activities have become prohibited over time and thus law becomes a more difficult proposition for the layman. In response to this reality, the criminal justice process soon came to be dominated by lawyers who represented both the victim (and eventually the state) as well as the accused. Soon, it became de rigueur for criminal defendants to be represented even if they were financially unable to retain representation.

Just as lawyers were a natural reaction to a more complex criminal justice system, so too was the advent of the more professional judiciary. Judges and magistrates with formal legal training soon came to preside over nearly all criminal proceedings. The days of the lay judiciary were nearly over. Yet, as the participants to the process and the laws applied in the process continually evolved over time to reflect the more sophisticated and complex nature of human interaction, perhaps the most important participant of all - the jury - stayed the same. The jury

that makes the ultimate findings of fact in criminal trials is in most respects no different now than it was over 200 years ago. While it is true that the composition of the jury pool has evolved over time to reflect the more diverse nature of our population and the process of selecting a jury has changed to more fairly choose a jury representing a fair cross section of the community, the circumstances in which the jury is the method of fact-finding have not changed. It is the static nature of our criminal jury process that is the subject of this paper.

Clearly, the trial by jury in criminal cases is one of the bedrock constitutional rights afforded criminal defendants in the United States. As the Constitution states, “The trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . .”¹ Yet, the Constitution is a living document that has been interpreted and amended over time to reflect the changed circumstances of a growing and expanding United States. Why, then, is it that the use of the jury in criminal cases has not evolved as well. Surely, the case for such a change can easily be made. As law in general has become more complex, so too has criminal law.² White collar crime involving elaborate financial dealings and misdeeds poses serious questions as to the ability of a jury to

¹United States Constitution, Article III, Section 2, Paragraph 3. The Sixth Amendment to the Constitution also requires that, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . .” United States Constitution, Sixth Amendment.

²A simple measure of criminal complexity may be the sheer number of criminal offenses on the books. In 1789, the first Federal criminal statute identified approximately twenty criminal offenses (including the common offenses of murder, manslaughter, stealing, forgery, etc.). 1 Stat. 112-119 (1789-1799). Now, Federal offenses number in excess of 3000. Erik Luna, *Overextending the Criminal Law*, 25 CATO POLICY REPORT 14, 15 (Nov./Dec. 2003).

sort out the truth. Are juries, which arose in a world in which the criminal code was dominated by crimes of violence and theft, able to achieve accurate results in the modern world dominated by stock fraud, wire transactions and e-mail? The question of jury competence in complex civil trials has been repeatedly asked over the course of many years in the United States³, yet similar questions have not been asked with respect to the criminal jury. One suspects that this reluctance reflects the inhibitions imposed by the express terms of the Constitution.

Yet, such inhibitions do not exist in the United Kingdom and its government has, since the late 1990s, sought to revise the manner in which complex criminal fraud trials are conducted. After lengthy and acrimonious debate, the British government ultimately obtained authority to suspend the right to a jury trial for those accused of complex criminal fraud - an authority they chose not to exercise. While such debate may not surprise the savvy observer who understands the vagaries of the British Constitution and the ability of Parliament to amend it by a simple legislative act, the more surprising aspect is the fact that the society in which the jury trial was born and nurtured should now turn its back on its offspring. Perhaps the arguments and reasoning contained in these debates in the United Kingdom, undertaken at a very high level of import and skill, will inform American observers on the issue. Is it time for the United States to seriously reexamine the use of the jury trial for all criminal cases?

³See e.g., Comment, *The Constitutionality of a Complexity Exception to the Seventh Amendment*, 73 CHI.-KENT L. REV. 865 (1998); Comment, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775 (1978); Patrick Lynch, *The Case for Striking Jury Demands in Complex Antitrust Litigation*, 13 THE REVIEW OF LITIGATION 3 (1980); Joseph Sanders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of Adversarial Processes*, 48 DEPAUL L. REV. 355 (1998);

This investigation will commence with a brief examination of the historical arguments in favor a jury trials in criminal cases. A thorough overview of the content of the debates in Britain will follow. Next, we will explore the possibility that these arguments, even if theoretically valid, are perhaps inapplicable to the United States. This paper will postulate that certain structural aspects of the American criminal jury enable it to avoid the pitfalls observed in the United Kingdom. This postulate will then be supported by anecdotal evidence of jury success in several recent high profile white collar criminal trials in the United States.

The preference for juries

While the jury trial has evolved over a fairly lengthy period of history, many have engaged in an after the fact justification of it as the most appropriate means for undertaking trials in general and criminal trials in particular. These justifications break down into four broad categories: those who favor the jury for its benefit to the governmental structure of society, those who favor it because of its fairness and tendency to combat the arbitrary power of the state and the judiciary, those who favor it because of its tradition and public approval, and those who favor it because of its effectiveness.

The broadest justification for the jury trial is that it advances the overall cause of republican government. This argument is best advanced by Alexis De Toqueville in his class *Democracy in America*.⁴ De Toqueville observed that,

The institution of the jury can be aristocratic or democratic, according to the class from which the jurors are taken; but it

⁴ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* (Folio Society ed. 2002)(1835).

always preserves a republican character, in that it places the real direction of society in the hands of the governed or in a portion of them, and not in those who govern.⁵

The jury furthers republican government also by the manner in which it allows ordinary citizens to become actively involved in the process of government. Juries are expected to not only deliberate but also learn from the process and thus become better members of society. Juries not only inject democracy into the judiciary, but also act as a form of political participation for its members.⁶

A second justification for the jury trial is that only the jury may ensure fairness in the process by preventing the tyranny of government (and perhaps also of the masses themselves). This is a justification held by both Americans and by our British cousins. An early articulation of this principle is by Blackstone, who notes that the jury, “preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens.”⁷ Similarly, William Forsyth in his *History of Trial by Jury* observed that,

“...the very essence of the jury trial is its principle of fairness. The right of being tried by his equals, that is, his fellow-citizens, taken indiscriminately from the mass, who feel neither malice nor favor, but simply decide according to what in their conscience they believe to be the truth, gives every man a conviction that he will be dealt with impartiality, and inspires him with the wish to mete out to others the same measure of equity that

⁵*Id.* at 260.

⁶Akhil Reed Amar, *The Bill Of Rights; Creation And Reconstruction* 94-96 (1998).

⁷Sir William Blackstone, *Commentaries On The Laws Of England* Book Iii 380-381 (1765-1769).

is dealt to himself.”⁸

Forsyth goes on to claim the criminal jury trial affords great protection against arbitrary action by the government (in his case, the crown).⁹ Sir Patrick Devlin famously stated that,

Each jury is a little parliament. The jury sense is the parliamentary sense. I cannot the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject’s freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.¹⁰

Finally, this justification is perhaps best articulated in the American criminal context by Justice Story in his *Commentaries on the Constitution*, in which he stated that, “The great object of a trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people.”¹¹ Thus, this justification stands for the rather simple proposition that fairness for the defendant demands a method of trial wherein the finding of facts and the application of law is not undertaken by either the state, which has a vested interest in a particular result, or by the masses, who may not be fully informed or sufficiently patient as to allow for a fair adjudication of a criminal charge.

A third justification for the jury is less theoretical, but perhaps more imminently practical - that it is traditional and immensely popular. In the United States, the jury has been the

⁸William Forsyth, *History Of Trial By Jury* 354 (1875).

⁹*Id.* at 363.

¹⁰Sir Patrick Devlin, *Trial By Jury* 161 (1956).

¹¹Joseph Story, *Commentaries On The Constitution* 657 (1858).

predominant trial mechanism since the inception of the republic. This permanence has led to nearly universal expectations on the part of the public that a jury trial will be the method of trial for all criminal cases. As Dillon observed, “In criminal cases there is no substitute for the jury that would be acceptable to the profession or endured by the people.”¹² Perhaps a more cynical view of the justification of the jury because of its popularity is that expressed by Jerome Frank. Frank writes much on the failure of the jury as a effective fact finding and law applying tool, yet contends that,

The point is that the jury, once popular thanks to its efficacy as a protection against oppression, has become embedded in our customs, our traditions. As matters traditional are likely to be regarded as inherently right. Men invoke all sorts of rationalizations to justify their accustomed ways.¹³

Thus, this view of the jury is one that is also very susceptible to the argument that discussions regarding the modification of the right to trial by jury in criminal cases are pointless given the jury’s constitutional status. Tradition and the status quo justify the retention of the jury under this theory.

Finally, some commentators actually justify the continued use of the jury in criminal cases based simple on its efficacy.¹⁴ Blackstone asserts that, “a competent number of sensible

¹²John F. Dillon, *The Laws And Jurisprudence Of England And America* 124 (1895).

¹³Jerome Frank, *Courts On Trial: Myth And Reality In American Justice* 139 (1949).

¹⁴An interesting twist on this notion is that advanced by De Lolme. He looks at the efficacy of the jury compared to that of a judge and concludes, “If a juryman does not possess that expertness which is the result of long practice, yet neither does he bring to judgement that hardness of heart which is, more or less, the consequence of it.” cited in Maximus A. Lesser, *The Historical Development Of The Jury System* 161 (1894).

and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth and the surest guardians of public justice.”¹⁵ Forsyth contends that, “With respect to the jury system as a means of protecting innocence, it may safely be averred that it is the rarest of accidents when an innocent man is convicted in this country.”¹⁶ This faith in the ability of the jury to make the correct decision is explained, to some extent, by James Gobert, who claims that, “All aspects of the jury experience combine to raise the quality of decision-making of people whose competency, seen in a different context, might seem questionable.”¹⁷ What is interesting is the paucity of support for this proposition in comparison to the other three. Many, many commentators have pointed to the jury as a bastion of democracy and a location of civil education. Many other practical observers support it based on their recognition of the overwhelming importance the public at large places on the jury trial right. Far fewer spend any time at all arguing, from the practical perspective of effective and efficient fact finding, that the jury is the best way to proceed. More often, the support for the jury in this context is anecdotal at best - occasionally it is merely an assertion with nothing to support it.¹⁸

Not all commentators revere the jury to this extent. There are a myriad of criticisms of jury trials in the context of complex civil litigation.¹⁹ The broader criticisms of juries are often

¹⁵Blackstone, *supra* note 6, at 380.

¹⁶Forsyth, *supra* note 7 at 366.

¹⁷James Gobert, *Justice, Democracy And The Jury* 67 (1997).

¹⁸*See e. g.* Dillon’s comment on juries that, “when acting under the guidance of a capable judge, their verdicts are almost always right.” Dillon *supra* note 10.

¹⁹*See supra* note 3.

with respect to juries in general, and not necessarily with respect to juries in criminal cases.

Jerome Frank pointedly noted that,

“It is inconceivable that a body of twelve ordinary men, casually gathered together for a few days, could, merely from listening to the instructions of the judge, gain the knowledge necessary to grasp the true import of the judges words. . . The jurors are usually as likely to get the meaning of those words as if they were spoken in Chinese, Sanskrit, or Choctow.”²⁰

Frank further disputes the fact-finding ability of jurors by asserting that, “The jury . . . are hopelessly incompetent as fact-finders” and cannot be trained to be more efficient finders of fact than judges can.²¹ The concern over competence of the jury is not merely a modern one, however. A mid-17th century pamphleteer in England contended that, “There is not a competent number of understanding and fit men to be had in the lesser division of a County, for tryall of all causes upon all occasions.”²² Dean Edwin N. Griswold of Harvard Law School observed that, “The jury trial at best is the apotheosis of the amateur. Why should anyone think that 12 persons brought in from the street, selected in various ways, for their lack of general ability, should have any special capacity for deciding controversies between persons?”²³

De Toqueville offers an explanation for the seeming inconsistency between general approval for jury trials and the more biting comments of the modern critics. He observed that,

²⁰Frank, *supra* note 11 at 116.

²¹Jerome Frank, *Law And The Modern Mind* 194 (1970).

²²Henry Robinson, *Certain Considerations In Order To A More Speedy, Cheap, And Equall Distribution Of Justice Throughout The Nation* 2 (1651).

²³1962-1963 Harvard Law School Dean’s Report, Pp. 5-6 As Cited In Harry Kalven, Jr. And Hans Zeisel, *The American Jury* 5 (1966).

“The institution of the jury had its birth in a society barely advanced in which one scarcely submitted any but simple questions of fact to the courts; and it is not an easy task to adapt it to the needs of a very civilized people, when the relations of men among themselves have singularly multiplied and have taken on a learned and intellectual character.”²⁴

De Toqueville also commented on criminal jury trials, but in so doing revealed the disparity in view between civil and criminal cases at the time. He observed that, “criminal cases rest entirely on simple facts that good sense easily comes to appreciate. On this terrain, judge and juror are equal . . .”²⁵ Clearly, those days have gone, and criminal case complexity may be just as much of a problem as civil case complexity. It is this notion of complexity that has been used as a justification for a revolutionary proposal for jury reform in the United Kingdom.

Criminal fraud in the United Kingdom

Focus on the use of a jury for complex criminal fraud cases commenced in 1983 with the creation of the Fraud Trials Committee, chaired by Lord Roskill. The report by the committee, issued in 1986, recommended that “serious and complex fraud cases should be tried by a special Fraud Trials Tribunal consisting of a judge and a small number of specially qualified lay members, instead of using a jury.”²⁶ In 1993, the Royal Commission on Criminal Justice led by Lord Runciman also looked the use of juries for complex cases, but concluded that no accurate information really existed because of existing laws prohibiting post-trial interviews with jurors

²⁴De Toqueville *Supra* Note 3, At 258.

²⁵*Id.* at 263.

²⁶THE *CRIMINAL JUSTICE BILL*: JURIES AND MODE OF TRIAL, HOUSE OF COMMONS

regarding their comprehension of a particular case.²⁷ Lord Runciman called for a change in that law to allow for comprehensive collection of data.²⁸ While neither of these reports led to significant reform legislation, subsequent events intensified the debate. In 1996, Kevin and Ian Maxwell (sons of the infamous Robert Maxwell) were acquitted after a prolonged and expensive trial for conspiracy to defraud employee pension funds.²⁹ In 1999, Sir Robin Auld was commissioned to inquire into,

the practices and procedures of, and the rules of evidence applied by, the criminal courts at every level, with a view to ensuring that they deliver justice fairly, by streamlining all their processes, increasing their efficiency and strengthening the effectiveness of their relationships with others across the CJS, and having regard to the interest of parties including victims and witnesses thereby promoting public confidence in the rule of law.³⁰

The resulting Auld Report, *Review of the Criminal Courts of England and Wales* was published in 2001.³¹

The Auld Report make many pointed observations as to the efficacy of jury trials for

²⁷Michael Zander QC, *Jury Research and Impropriety: A Response to the Department of Constitutional Affairs' Consultation Paper, March, 2005*, 1 available at <http://www.lse.ac.uk/collections/law/JURYRES.doc>.

²⁸*Id.*

²⁹Sally Lloyd-Bostock and Cheryl Thomas, *Decline of the "Little Parliament": Juries and Jury Reform in England and Wales*, 62 LAW & CONTEMP. PROBS. 7, 18 (1999).

³⁰*Justice for All*, Cm 5563, Home Office, July 2002, p. 4 found at http://cjsonline.org.uk/library/pdf/CJS_whitepaper.pdf.

³¹*Review of the Criminal Courts of England and Wales*, by the Right Honorable Lord Justice Auld, September 2002, found at <http://www.criminal-courts-review.org.uk/ccr-00.htm>.

complex criminal cases. The Report first noted that, “if jurors are truly to be regarded as the defendant’s peers, they should be experienced in the professional or commercial discipline in which the alleged offense occurred.”³² Auld further commented that, “the volume and complexities of the issues and the evidence, especially in specialist market frauds, may be too difficult for them to understand or analyse . . .”³³ Finally, with respect to jury competence, Auld observed that, “judges, with their legal and forensic experience, and/or specialist assessors would be better equipped to deal justly and more expeditiously with such cases.”³⁴ Ultimately, the Auld Report recommended that, “we should wait no longer before introducing a more just and efficient form of trial in serious and complex cases.”³⁵ While the British Government did utilize the Auld report as a basis for some legislation in 2000 - the *Criminal Justice (Mode of Trial) Bill* - it dealt only tangentially with the right to trial by jury in complex criminal cases.³⁶ Ultimately, both versions of the *Criminal Justice (Modes of Trial) Bill* were defeated in the House of Lords

³²*Id.* at 202.

³³*Id.*

³⁴*Id.*

³⁵*Id.* at 204 .

³⁶The *Criminal Justice (Mode of Trial) Bill* and the *Criminal Justice (Mode of Trial)(No 2) Bill*, introduced in 1999 and 2000 respectively, dealt with restricting the defendant’s right to claim a jury trial in “either way” cases. Either way cases are those which fall between “summary” offenses which are the least serious and tried only before a magistrate and the most serious cases which must be tried before the Crown Court. Either way offenses may be tried in either Magistrates Court or Crown Court and the defendant is given the right to chose a trial in crown court. The aforementioned bills would have taken that right from the defendant and vested the decision in the magistrate. See Lloyd-Bostock & Thomas, *supra* note 29 at 15 and The *Criminal Justice Bill supra* note 26 at 8.

and the Government then chose other avenues to pursue the Auld recommendations.³⁷

In July, 2002, the British Home Office issued a White Paper entitled *Justice for All* in which it spelled out its intentions with respect to complex criminal fraud trials.³⁸ In the White Paper, the Government made the following observations:

A small number of serious and complex fraud trials, many lasting six months or more, have served to highlight the difficulties in trying these types of cases with a jury. Such cases place a huge strain on all concerned and the time commitment is a burden on juror's personal and working lives. As a result it is not always possible to find a representative panel of jurors.³⁹

One would think, after reading this paragraph, that the prime motivation for the change was a concern for the welfare of the juror, given the demands of a complex fraud case. However, in the following paragraph, the White Paper discusses the more controversial notion of juror competency. It notes,

the complexity and unfamiliarity of sophisticated business processes means prosecutors often pare down cases to try to make them more manageable and comprehensible to a jury. This means the full criminality of such a fraud is not always exposed, and there are risks of a double standard between easy to prosecute 'blue-collar' crime and difficult to prosecute 'white-collar' crime.⁴⁰

The legislative recommendation was for, in the case of "serious fraud," a trial in which the judge sits alone. The White Paper speculated that this would affect no more "than 15-20 such trials a

³⁷The *Criminal Justice Bill* *supra* note 26 at 8-10.

³⁸*Justice for All* *supra* note 30.

³⁹*Id.* at 74, par. 4.28.

⁴⁰*Id.* par. 4.29.

year.”⁴¹

The resulting legislation, the *Criminal Justice Bill*, was introduced in 2002. It authorized the prosecution to apply to a judge of the Crown Court for the trial of certain complex or lengthy trials to be conducted without a jury.⁴² The judge would need to be satisfied that two conditions were met. First, the judge would have to conclude that the complexity of the trial or its probable length,

is likely to make the trial so burdensome to the members of a jury hearing the trial that it is necessary in the interests of justice for the trial to be conducted without a jury, or

would be likely to place an excessive burden on the life of a typical juror.⁴³

Again, the language of the bill seems to seek to protect the juror from the burdens of lengthy trials as much as it seems to reflect concern with the competency of a jury to hear such cases. However, the second condition which the Crown Court Judge would have to find reflects more directly on the complexity of the case. Here, the Judge would have to conclude that the complexity or length of the trial would be attributable to

the fact that the issues likely to be material to the verdict of a jury hearing the trial relate to arrangements, transactions or records of a financial or commercial nature or which relate to property, and

to the likely nature or volume of the evidence relating to those issues.⁴⁴

⁴¹*Id.* at 75, par. 430.

⁴²Criminal Justice Bill, House of Lords (Session 2002-03) Part 7, par. 42.

⁴³*Id.*

⁴⁴*Id.*

In essence, the legislation sought to limit the right to trial by jury when, because of the complex financial nature of a case, the burdens imposed on the jury were contrary to the interests of justice. In translation, this fear of a “burden” was really a concern that the complexity of the case would be so beyond the competency of the jury as to result in a result “contrary to the interests of justice.”

Not surprisingly, there were serious criticisms of the proposed legislation even prior to its consideration by Parliament. The Bar Council and the Criminal Bar Association took serious issue with the claims made in the Government’s White Paper. Essentially, these organizations claimed that the proposed legislation was based on anecdotal evidence at best. They observed that,

We are wholly unaware of any reliably reported trial histories that support the contention that “prosecutors often pare down cases to try to make them more manageable and comprehensible by a jury” resulting in the “full criminality of such a fraud . . . not always [being] exposed.”⁴⁵

The Bar Council and Criminal Bar Association claimed that the questions regarding jury competence were made, “wholly without the assistance of any research on this issue.”⁴⁶ Furthermore, they asserted that, “All cases are susceptible to straightforward explanation, particularly if juries are helped with schedules, admissions, flow charts and similar presentations.”⁴⁷ This scepticism on the issue of complexity was seconded by the civil rights

⁴⁵*Response to the Criminal Justice White Paper “Justice for All,”* The General Council of the Bar and the Criminal Bar Association, October, 2002, p. 21.

⁴⁶*Id.* at 22.

⁴⁷*Id.*

organization Liberty (The National Council for Civil Liberties), which observed that, “If there are complex issues involved in a case then it is the job the defense and the prosecution to make the issues understandable to the jury.”⁴⁸ The critics, Liberties claimed, were simply seeking someone to blame for a failed prosecution. “It is easier to say the trial failed because the jury did not understand than to accept the case simply was not proved.”⁴⁹

The human rights organization Justice also attacked the legislation, based, again, on the weak empirical justification for it. As Justice observed,

It is by no means clear that juries acquit in serious cases because they cannot understand complex evidence. The Home Office has itself acknowledged that the assertion that fraud cases can be too complex for most jurors to comprehend is hard to substantiate from empirical evidence, not least because research into jury room deliberations is not permitted. The simulation studies that exist have in fact shown that in assessing the prosecution and defense cases, the majority of participants did not use poor quality reasoning and that comprehension was related to length and manner of presentation.⁵⁰

One commentator observed that, despite the pros and cons of the proposition, “It must also be said, that the existence of the jury exerts an essential discipline on the prosecution to present the case in a form that can be readily understood by untrained lay people.”⁵¹

Eventually, the proposals made their way to the House of Lords where, on June 16 and July 15, 2003, comprehensive and informed debates on the merits of the proposal were held.

⁴⁸*Liberty’s Briefing on the ‘Criminal Justice Bill’ - 2nd Commons Reading*, November, 2002, p. 14.

⁴⁹*Id.*

⁵⁰The *Criminal Justice Bill* *supra* note 26 at 32.

⁵¹George Staple, QC, *Juries in Cases of Serious and Complex Fraud*, BARRISTER MAGAZINE, Issue 25,

Almost immediately, during the second reading of the bill on June 16, the Lord Chancellor, Lord Goldsmith, attempted to minimize the criticism of jury competence inherent in the bill by claiming that the change was necessary, “not because we doubt the competence of the jury, but because the trial places too great a burden on the jury and because the indictments have to be severed to make jury trial manageable.”⁵² Other supporters of the measure were less hesitant to view the bill as a means of address jury incompetence. Lord Donaldson felt that there was “no evidence that juries get it right more often than other tribunals” and claimed to know of “a number of cases in which I was astonished that the jury should have acquitted.”⁵³ Typically the support for these conclusions about jury competency were anecdotal at best. For example, Lord Renton noted that, “I remember a long-term fraud case many years ago that took place at Chelmsford Assizes in which I was defending. The jury were utterly puzzled by the case. The judge did his best to clarify the matter but had to drop a hint to the jurors that he hoped that they would convict. In such a case I very much doubt whether justice is done by having an ordinary jury.”⁵⁴

On the other hand, the opponents to the bill offered a number of arguments in opposition which can be broken down into four broad clusters: namely, that the jury is the most competent finder of fact, that juries are fairer because of their relationship to the community at large, juries keep government and the state in check, and juries are best able to reenforce democratic values

p. 2 (2003).

⁵²HL DEB 16 June 2003 “c560”

⁵³HL DEB 16 June 2003 “c596”

⁵⁴HL DEB 16 June 2003 “cc580-581”

and civic responsibilities. With respect to juror competence, Lord Thomas of Gresford noted that, “there is an enormous arrogance in assuming that juries do not understand. That is not my experience. In most fraud cases, the financial background is perfectly clear and usually unarguable. The issue before the jury is simple: what did the defendant do and was it dishonest, not by the standards of the City of London, but by the standards of the cross-section of ordinary people of this community?”⁵⁵ Lord Lloyd concurred, observing that, “The essence of all such long cases is ultimately a simple question of dishonesty. Anybody with experience of those cases will confirm that juries have a very good nose for dishonesty.”⁵⁶ Finally, Lord Hunt noted that, “Juries well understand the issues relevant to guilt or innocence, particularly in relation to dishonesty in serious fraud cases. . . . Surely members of a jury are the best possible people to determine this.”⁵⁷

The jury, as members of the public at large, were viewed by opponents of the bill as being fairer and less conviction oriented than a judge might be. Lord Carlisle observed that, “Juries are generally accepted as being the best forum for findings of fact, applying, as they do, their knowledge of every-day life to the issues they have to consider.”⁵⁸ Lord Clinton-Davis noted that, “Juries, unlike judges, are not inclined to be either pro-prosecution or pro-defense. They have not heard similar cases before. They have not become case-hardened.”⁵⁹ This

⁵⁵HL DEB 15 JUL 2003 “c776”

⁵⁶HL DEB 15 JUL 2003 “c785”

⁵⁷HL DEB 15 JUL 2003 “c772”

⁵⁸HL DEB 16 JUN 2003 “c603”

⁵⁹HL DEB 16 JUN 2003 “c613”

preference for juries over judges because of the fear of becoming “case-hardened” was reiterated by Lord Ackner, who claimed,

A large proportion of the public, particularly the ethnic minority groups, looks upon trial by jury as giving a better quality of justice. They suspect that a judge has become case-hardened, which would not be surprising because the same sort of defense may be served up time and again. . . . I believe that in the majority of fair-minded judges there can be a subconscious bias towards the prosecution.⁶⁰

Fairness, these commentators claimed, required juries in lieu of a judge only approach.

Opponents to the bill claimed that the jury trial was a preferred method because it afforded a mechanism for the people to keep the state in check because, as Lord Hunt noted, “Trial by one’s peers prevents the justice system becoming a matter of the state judging the citizen.”⁶¹ Baroness Kennedy repeated the famous quotation of Sir Patrick Devlin that the jury was a “mini-parliament” as quoted above.⁶² Baroness Kennedy further pointed out that a judge only trial clearly pitted the “state” against the defendant with the consequence that, “In some high-profile cases, there might be the public perception that the judge is a man brought in to do a job for the state. The undermining of the confidence in the judicial system could be very serious.”⁶³ Lord Morgan asserted that the jury trial was a “bulwark of liberty” in the history of the United Kingdom.⁶⁴ Lord Mayhew asked if the Lords had, “forgotten how . . . a jury can be a

⁶⁰HL DEB 15 JUL 2003 “c778”

⁶¹HL DEB 15 JUL 2003 “c769”

⁶²HL DEB 15 JUL 2003 “c779”

⁶³HL DEB 15 JUL 2003 “c780”

⁶⁴HL DEB 15 JUL 2003 “c795”

bulwark against legislation that ordinary people think is oppressively widely drawn?”⁶⁵ Opponents of the bill asserted that the jury served the purpose of injecting the people into the judiciary process - for the betterment of the process, and to ensure that the state did not become overly powerful.

Finally, many participants in the debate contended that jury service, while potentially burdensome in the case of lengthy and complex jury trials, was beneficial in the long run as emphasizing the civil duty of all to serve. Baroness Anelay observed that, “Juries are an important part of a healthy democracy.”⁶⁶ Baroness Kennedy asserted that jury service, “empowers the citizen. It requires his or her responsibility to society. It means giving something back, participation, belonging to a community and bringing the communities values into the court room.”⁶⁷ Lord Maclennan asserted that, “Few responsibilities or rights of citizenship are so widely understood and accepted as is the duty to serve on the jury. . . . I think that people accept that it is an obligation of citizenship which, if they are invited to discharge it, may be burdensome but not so burdensome that they should not assume it with pride and willingness.”⁶⁸

Ultimately, many members of the House of Lords were not persuaded that the change was necessary simply because there appeared no firm evidence to demonstrate that grave problems asserted by the Government were actually occurring. Many members pointed to the conviction rate in fraud cases as evidence that things couldn’t really be all that bad. As Lord

⁶⁵HL DEB 16 JUN 2003 “c611”

⁶⁶HL DEB 16 JUN 2003 “c567”

⁶⁷HL DEB 15 JUL 2003 “c 779”

⁶⁸HL DEB 15 JUL 2003 “cc791-792”

Carlisle noted, “with a conviction rate of over 80 per cent in cases of serious fraud, the Government have produced no evidence to show that the present system does not work.”⁶⁹ Lord Clinton-Davis argued that it was up to the Government to produce evidence that, in complex cases, “juries acquit . . . because they are unable to comprehend complex evidence.”⁷⁰ The Government was able to offer no evidence to support its claim that, because these trials were so lengthy, the burden on the jury was overwhelming, thus forcing the prosecution to break cases up or limit the number of charges to make them “jury friendly.”

The end result was no change at all. The House of Lords voted to excise that portion of the bill which limited the jury trial right. This portion was reintroduced in the House of Commons and a compromise was eventually reached in November, 2003, whereby the provision was retained in the legislation in exchange for an agreement for cross-party consultation to seek a better way to achieve the results sought. The provision would not take effect unless a subsequent debate and vote were taken.⁷¹ On June 21, 2005, the Government announced that it would seek to implement the provision in early 2006.⁷² Then, on November 24, 2005, Lord Goldsmith, the attorney general, announced that the plan to implement the provisions would be

⁶⁹HL DEB 16 JUN 2003 “c603” *see also* the comments of Lord Thomas of Gresford who observed that, “It so happens that the conviction rate in fraud trials is variously assessed as between 83 and 87 per cent of those who are tried. That is significantly higher than the percentage of those convicted in all other trials.” HL DEB 15 JUL “c776”

⁷⁰HL DEB 16 JUN 2003 “c613”

⁷¹Horse-trading Saves Blair’s Flagship Bills, *The Telegraph*, Nov. 21, 2003 *available at* www.telegraph.co.uk.

shelved for “months” because of the recognition that the proposal would have been defeated in the House of Lords within the week.⁷³ To the very end of the process, the Government insisted that the measure was necessary not only because of the burden that a lengthy and complex trial imposed on a jury, but also because “Such trials, often involving subtle issues of acceptable business practice, or the complexities of the insurance market, require jurors to make decisions about matters that are far removed from their own experience.”⁷⁴ Certainly such a remark is a very thinly veiled expression of the belief that juries are not competent to handle such cases.

Why Not The U.S. As Well?

Given the common legal history of the United Kingdom and the United States and the similar level of economic development (which often leads to increase complexity in the law), one might wonder why similar calls for reform have not been heard in the United States. The silence in the U.S. is deafening and one must wonder why this problem does not appear to exist. Statistics indicate that the conviction rate for Federal white-collar crime defendants is in excess of 90% - similar to the rate found in the U.K.⁷⁵ Fraud prosecutions in state courts have an even lower conviction rate. In a U.S. Department of Justice study of state court felony dispositions for

⁷²HC DEB 21 JUN 2005 “c655”

⁷³Ministers Retreat on Scrapping Juries, The Guardian, November 25, 2005.

⁷⁴The Rt. Hon. The Lord Goldsmith Q.C., Remarks at the 23rd International Symposium of Economic Crime, Jesus College, Cambridge, Sept. 5, 2005 *available at* www.lso.gov.uk./speeches/05_09_05_cambridge_symposium_speech.doc.

⁷⁵Bureau of Justice Statistics, Federal Criminal Case Processing, 2002, 14 (2005).

large urban counties, only 54 percent of those charged with fraud were actually convicted.⁷⁶ Eighteen percent had their charges dropped and 30 percent had some other form of disposition, such as diversion or delayed adjudication.⁷⁷ This was the lowest conviction rate for any category of serious criminal charge tracked by the study.⁷⁸ It is certainly the case that in the U.K., commentators who believe that case complexity does not overtax the modern jury point to the United States as evidence for the proposition. As an editorial in the Financial Times noted,

It is premature to write off juries in complex fraud cases. US juries have found no difficulty in trials over the corporate scandals that followed the collapse of the 1990s stock market boom. Martha Stewart, Bernie Ebbers of WorldCom, Tyco's Dennis Kozlowski and the Rigases of Adelphia Communications have all been convicted. Andersen's conviction was overturned on appeal but it was the judge's advice to the jury that was the reason - not problems in handling evidence.⁷⁹

In fact, the commentators in the Financial Times may be correct. In the United States, it may be likely that no one sees case complexity as a problem in complex criminal prosecutions. This conclusion is supported by anecdotal evidence of jury participation in several high profile white collar crimes in the United States in the past five years. In addition, the conclusion is also supported by extensive jury research data - data that is unavailable to the British researcher.

WHITE COLLAR CRIME IN A POST-ENRON WORLD

Following the Enron scandal (and to a lesser extent the WorldCom scandal that followed

⁷⁶Gerard Rainville & Brian A. Reaves, *Felony Defendants In Large Urban Counties* 24 (2000).

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹*Verdict: Not Proven*, THE FINANCIAL TIME, June 22, 2005.

it) the U.S. public was very sensitive to white collar financial crime and how it was being prosecuted. A number of high profile prosecutions ensued which ranged from prosecutions resulting from the fall-out of the aforementioned financial scandals to securities fraud investigations involving the popular television figure Martha Stewart. These cases all had media exposure equal to that of the Maxwell scandal in the U.K. and several of the cases involved scandals which had direct and severe impacts on ordinary investors and employees of the companies involved. Yet, five years later no consensus exists among the public or the informed commentators to the effect that the process of trial by jury failed. In fact, with one prominent exception, all of these high profile defendants were convicted by the jury.⁸⁰

Interestingly, many commentators anticipated problems with trying these types of cases before juries. Prior to the verdict in the Bernie Ebbers case, the New York Times voiced apprehension noting “The federal securities laws, with their complex requirements, . . . make the government’s task more difficult and create opportunities for smart, high-priced defense lawyers to create a reasonable doubt in juror’s minds.”⁸¹ Prior to the trials of Jeffrey K. Skilling (of Enron), Bernie Ebbers and Richard Scrushy, the New York Times observed, “some white-collar crime cases are difficult to present to juries In the trial of Jeffrey K. Skilling, the former chief executive of Enron, . . . federal prosecutors will have to explain arcane accounting concepts to the jury. The prosecutions of Bernard J. Ebbers, the former chairman of WorldCom, and

⁸⁰The one prominent except was Richard Scrushy, the former CEO of HealthSouth, who was acquitted of all charges after a jury trial in the spring and summer of 2005.

⁸¹Jonathan D. Glater & Ken Belson, *In White-Collar Crimes, Few Smoking Guns*, NEW YORK TIMES, March 12, 2005, at C1.

Richard M. Scrushy, the former chairman of HealthSouth, may also turn on jurors' understanding of somewhat complicated accounting principals."⁸² Others illustrated the likelihood of problems by sympathizing with the daunting task facing jurors. As the Fulton County Daily Report stated, "Pity the plight of the juror in Richard M. Scrushy's criminal trial. After enduring four months of testimony, much of it of the mind-numbing sort, the juror plops down in the jury room and comes fact to face with a 37-page verdict form more perplexing than any college aptitude test."⁸³

Yet, despite these apprehensions, in nearly every high profile complex criminal fraud type case tried in the U.S., the defendants were convicted on some of the charges. While these results may or may not indicate that the system is working, the comments of jurors after the completion of their particular trial do lend support to those who claim that criminal complexity is not a problem here. The jurors in the Bernie Ebbers case commented to the press after the trial that they believed their job as jurors was, "to read as many of the documents as necessary to corroborate what they were hearing in the courtroom."⁸⁴ The jurors went on to describe a meticulous process of examining highly complex financial documents with the aid of four of the jurors who had financial backgrounds and assisted the entire jury in evaluating the documents

⁸²Alex Berenson, *Prosecutors Score White-Collar Victories*, NEW YORK TIMES, April 4, 2004, at 1.

⁸³Ann Woolner, *Scrushy Jury Faced With Cruel and Unusual Task*, FULTON COUNTY DAILY RECORD, June 15, 2005 at 7.

⁸⁴Jesse Drucker and Li Yuan, *'How Could He Not See?': Documents Swayed Ebbers Jury*, THE WALL STREET JOURNAL, March 17, 2005 at C1.

and who explained concepts such as adjustments and line-costs.⁸⁵ In the Tyco case involving the defendant Dennis Kozlowski, one juror noted that “This wasn’t about trying two men or corporate America; it was about the evidence. . . We were looking for verification of what the board said versus what Kozlowski and Swartz said.”⁸⁶ The same juror went on to say that the defense failed to present documentation to support their claims.⁸⁷ Such statements clearly seem to support a belief that juries do take the process seriously and do focus in on the evidence, no matter how difficult or complex the case may be.

The one exception to the string of high profile white-collar crime convictions of the past few years is that of Richard Scrushy. Scrushy was acquitted on federal corporate corruption charges after a jury trial in Birmingham, Alabama in 2005. Prof. David Skeel of the University of Pennsylvania School of law stated that, “This in everybody’s book was the strongest case for conviction [among the spate of high profile white-collar prosecutions] and the government ended up with nothing.”⁸⁸ This apparent incongruity was attributed, partially, to the jury and the way that it interpreted the case. The problem seemed to be the composition of the jury, which was partially related to the venue of the trial. As Prof. John Coffee of Columbia University Law School noted, “If he [Scrushy] had been placed on trial in any major neutral city, and the jury

⁸⁵*Id.*

⁸⁶Andrew Ross Sorkin, *Ex-Chief and Aide Guilty of Looting Millions at Tyco*, THE NEW YORK TIMES, June 18, 2005 at A1.

⁸⁷*Id.*

⁸⁸Ameet Sachdev, *Former HealthSouth CEO Scrushy Acquitted in Corporate Fraud Trial*, THE CHICAGO TRIBUNE, June 29, 2005.

had people on it who has some business or financial experience, there would have been a pretty quick conviction.”⁸⁹

The competence of this jury can be drawn into question when one examines the post-verdict comments of some jurors. Several of the jurors made the point that they expected “hard evidence” - like what one would find in a typical criminal case. One juror commented that, “As for evidence, I wanted something in black and white, something like fingerprints.”⁹⁰ When jurors were asked by the federal prosecutors, after the verdict, what they could have done differently, “The jurors told us they needed ‘real’ evidence . . . somebody asked me, ‘Why didn’t you get fingerprints off the [financial] reports. . .’”⁹¹ The prosecutor pointed out to the jurors that all the financial reports were taken off the hard drives of computers because all of the originals had been shredded.⁹² She also indicated her surprise at the fixation on physical evidence in a white-collar crime such as this.⁹³ John Carroll, former federal judge and current Dean of Samford University Law School noted, “Jurors are hard to persuade unless you have physical evidence . . . It may have something to do with the rise of shows like ‘CSI’ and ‘Law and Order.’

⁸⁹Walter Hamilton, *Hometown Victory of Scrushy*, THE LOS ANGELES TIMES, June 29, 2005 at C1.

⁹⁰Simon Romero & Kyle Whitmire, *Corporate Conduct: The Overview; Former Chief of HealthSouth Acquitted in \$2.7 Billion Fraud*, NEW YORK TIMES, June 29, 2005 at A1.

⁹¹Patti Bond & Mike Tierney, *Scrushy Prosecutors Ask ‘Why’ Jurors Say Physical Evidence Was Lacking*, THE ATLANTA JOURNAL AND CONSTITUTION, June 30, 2005 at E1.

⁹²*Id.*

⁹³*Id.*

The public just expects it.”⁹⁴ These comments do raise serious questions about juror competence and the efficacy of jury trials in complex white-collar crime cases.

What Do The Statistics Say?

Those examining jury competence in complex criminal cases in the United States have the benefit of a body of research unavailable to British researchers. In the United States, it is permissible to speak with jurors after a case is completed and attempt to discern the extent to which the complexity of the case affected their verdict. Such research is prohibited in the U.K. pursuant to Section 8 of the Contempt of Court Act of 1981 which states that it is “contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceeding.”⁹⁵ Fortunately, in the United States no such uniform prohibition exists, though individual courts may admonish a jury not to discuss their deliberations with the press.⁹⁶ The result has been several extensive statistical evaluations of jury performance in complex criminal cases.

The first of these projects was the famous University of Chicago School of Law’s Jury Project, which ultimately led to the seminal work *The American Jury*.⁹⁷ In this project, Kalven

⁹⁴*Id.*

⁹⁵Contempt of Court Act, 1981, § 8 (Eng.).

⁹⁶For example, Judge Karon O. Bowdre, who presided over the Scrushy case, instructed the jurors to “speak only about their own thoughts on the case and not to describe the deliberations in the jury room. ROMERO & WHITMIRE, *supra* note 90.

⁹⁷HARRY KALVEN JR. & HANS ZEISEL THE AMERICAN JURY (1966).

and Zeisel evaluated questionnaires completed by judges from 3576 cases, which were compiled from 1954-1955 and 1958.⁹⁸ Of those cases, across the spectrum of crimes, 89 were fraud cases, 22 were tax evasion cases and 42 were embezzlement cases - the types of cases most easily view as “white-collar” crimes.⁹⁹ Essentially, the researchers were seeking to discover how often the judge and jury disagreed about a particular outcome by asking the judge what the jury verdict was and what his verdict would have been had it been a bench trial. The authors were primarily looking for explanations in those cases in which the jury verdict and the hypothetical judge verdict differed. Specifically, the authors sought to discover if the “difficulty” of the case - as measured by the judge’s assessment of how difficult it was to comprehend the evidence - accounted for the difference between the actual verdict and the hypothetical verdict. Of all of the cases of disagreement (962 cases) the authors contend that in only one instance did the judge indicate unequivocally that the disagreement was due to jury misunderstanding.¹⁰⁰ The study went on to illustrate that, while disagreement varied widely between those cases which the judge viewed the case as “clear” and those which he viewed the case as “close,” within each category there was little or no difference generated by the judges conclusion that the evidence in the case was “easy” or “difficult.”¹⁰¹ As the authors observed, “The result is a stunning refutation of the hypothesis that the jury does not understand.”¹⁰² This straightforward conclusion does much to

⁹⁸*Id.* at 33.

⁹⁹*Id.* at 67.

¹⁰⁰*Id.* at 152-153.

¹⁰¹*Id.* at 157.

¹⁰²*Id.*

perhaps explain why jury competence is not a significantly debated topic in American criminal cases. One could argue that the data and results in this study are dated - particularly if one accepts one of the premises of this article - namely that case complexity increases as societal complexity increases. The answer may be, however, that just as society and criminal prosecutions become more complex, the jury becomes increasingly sophisticated.

Studies of how juries deal with complexity since *The American Jury* have tended to focus on the civil, rather than the criminal jury. It is difficult to say what effect, if any, this difference has in assessing the ability of a jury to cope with complex cases. The type of complexity may be somewhat different, as well as the procedural and tactical differences that also arise. Nonetheless, it may be useful to briefly look at the studies of complex civil cases and how juries cope. One study conducted by the A.B.A. Special Committee on Jury Comprehension concluded that while some jurors had difficulty coping with complex trials, “The most able jurors tended to take leadership roles in jury deliberations, assisting the other jurors in understanding the evidence and leading the discussion.”¹⁰³ Similarly, a jury simulation study concluded that “individually, jurors’ memory was only moderate. However, the jury’s collective memory was impressive.”¹⁰⁴ Another study concluded that despite the difficulties that case complexity posed, jurors often understand enough of the evidence to reach a rational decision.”¹⁰⁵ In general, the types of evidence that seem to pose the most problems to civil juries

¹⁰³A HANDBOOK OF JURY RESEARCH 3-6 (Walter F. Abbott et al. eds., 1999).

¹⁰⁴VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 120 (1986).

¹⁰⁵*Id.*

dealing with complex cases is statistical evidence and expert testimony.¹⁰⁶ One could argue that in the case of complex criminal cases, statistical evidence (and perhaps even expert testimony) would be far less likely than in many types of complex civil cases. When it comes to understanding, most research points to the jury instruction as being perhaps the most difficult task for civil juries.¹⁰⁷ This problem has also been replicated in the criminal arena¹⁰⁸ and is really the fault of the instructing judge as much as the jury required to understand and interpret the instructions. Supporters of juries, when discussing the various issues associated with comprehension, assert that:

the jury decision really derives from the deliberations of twelve people. Any lack of comprehension on the part of the individual juror may be corrected through group discussion. Second, even if they still do not fully comprehend the instruction, the jury's decision is based upon common sense, and usually ends up at the same place as the law intended it to be. Third, . . . the problem lies with the instructions rather than with the jurors. The instructions should be changed, not the jury system.¹⁰⁹

While recent and definitive statistical evidence does not exist to support the conclusion that case complexity in criminal cases poses no problem for the criminal jury, the evidence that

¹⁰⁶*Id.* at 3-7-3-10.

¹⁰⁷*Id.* at 3-11.

¹⁰⁸*See* WOOLNER *supra* at note 83.

¹⁰⁹HANS & VIDMAR, *supra* note 104 at 121.

does exist suggests that complexity is not a predominant problem. While there may be problems for individual jurors in interpreting particular statistical or expert evidence, or even in understanding the judges instructions we must never forget that the jury is a collective body. Because of this, juries as a entity often get it right simply because the more capable members of the jury are able to assist those having difficulties on particular issues. As has been noted, “the key to jury competence is the fact that jurors decide on verdicts in deliberating groups.”¹¹⁰ This evidence provides some support for the notion that, in the United States, jury competence in the case of complex criminal cases is not an overriding concern.

Accommodating Complexity In The United States

If we accept that anecdotal evidence combined with statistical research leads us to suspect that case complexity in criminal cases does not pose significant problems for the American jury we must then ask if there are aspects of our legal system which might account for the difference between this conclusion and the fears of the British Government.¹¹¹ This discussion will conclude by examining three differences between the British and American legal system which might account for the differing degree to which juries in each county are able to cope with complex white collar criminal cases (to the extent that a difference truly does exist).

¹¹⁰A HANDBOOK OF JURY RESEARCH, *supra* note 103 at 3-7.

¹¹¹Some might argue that the best explanation for the difference is that there is no difference at all - that the British Government simply was attempting to force a significant structural change in the jury system without any credible evidence to support the change. That certainly would be the opinion of the various members of the House of Lords cited above.

There is no evidence of either an anecdotal or statistical nature to support these tentative conclusions. Rather, they represent an attempt to tease out of the many similarities between the two systems some differences which might be significant.

THE JURY POOL

It would seem logical that if one was concerned with jury competence, the educational levels of the jurors would be a key. Commentators have concluded that there clearly is a linkage between education and the ability of the jury to comprehend jury instructions.¹¹² These same commentators claim that, “Juries with relatively low levels of education are likely to be at a disadvantage if the evidence or law is complex.”¹¹³ If this is the case, it would be useful to see if there is a significant difference in the education levels of British juries as opposed to juries in the United States. A first step in that process would be to examine, comparatively, the U.K. and U.S. jury pool.

In the United Kingdom, the jury pool is made up of those people found in the register of electors in a given area who are between the ages of 18 and 70.¹¹⁴ Thus, to determine the educational level of a typical British juror one must look at how the prospective juror ends up on the register of electors. Electoral registration is governed by the Representation of the People Act of 1983. Electoral registration officers are required by law to compile a register of all electors within their area every year. This is accomplished by the use of a questionnaire sent to

¹¹²A HANDBOOK OF JURY RESEARCH, *supra* note 103 at 3-6.

¹¹³*Id.*

¹¹⁴Juries Act, 1974, c. 23, §3 (Eng.).

every household in the U.K.¹¹⁵ The head of the household is required to fill out the form indicating the names of all within the household who are eligible to vote.¹¹⁶ There is a criminal penalty attached to not completing the form or for supplying incorrect information.¹¹⁷ A recent report released by the Electoral Commission in the U.K. indicates some concern regarding overall electoral registration. In that report it was disclosed that overall rates of non-registration in England and Wales for 2000 was between 8 and 9%, up from 7% in 1991.¹¹⁸ Nothing in the report tied non-registration specifically to education level, but one indication of non-registration was unemployment, non-permanent employment, and/or lack of qualifications.¹¹⁹ Such factors could be attributed to lower educational achievement, but it is an indirect link at best.

What this tells us about the jury pool in the U.K. is that it is essentially a very broad collection of all within the country who have registered (as per law) to vote. While there are many (8-9%) who do not register, there is no direct linkage between this group and those who have lower levels of education. Thus, in the U.K. the educational level of the jury pool should closely approximate the education level of the country as a whole.

The jury pool in the United States is significantly different from that of the U.K. Juries are typically selected at both the state and federal level by resort to the voter registration lists

¹¹⁵The Electoral Commission Factsheet: Electoral Registration in Great Britain, 02-05, p.1 *available at* www.electoralcommission.org.uk.

¹¹⁶*Id.*

¹¹⁷*Id.*

¹¹⁸THE ELECTORAL COMMISSION, UNDERSTANDING ELECTORAL REGISTRATION ix (2005).

¹¹⁹*Id.* at x.

found within individual counties. Some states do allow for jurors to be selected from other lists, primarily the drivers registration lists within a given county, but this is typically not the “default” method for jury venire selection. The question then becomes whether voter registration in the U.S. is similar to elector registration in the U.K. The short answer is absolutely not. Voter registration in the U.S. is not compulsory, and thus the voter registration list, by definition, is not an accurate representation of society as a whole - and, consequently not an accurate representation of the educational attainment of the U.S. as a whole. The statistics indicate the those who chose to register to vote are typically more educated than those who do not register.

The U.S. Census Bureau Survey of 2004 indicates that roughly 70% of respondents indicated that they were registered to vote.¹²⁰ The remaining 30% included not only those who said they were not, but also those who “did not know” or “did not report.”¹²¹ The numbers are then broken down into various levels of educational attainment. (See attached Appendix A). The numbers clearly indicate that as ones level of educational attainment increases, the likelihood of registering to vote also increases. 67.5% of those with less than a ninth grade education were not registered, along with 54% of those with a 9th to 12th grade education and no diploma.¹²² Only 61.5% of those with a high school degree were registered to vote, while 77% of those with a college degree and 80.3% of those with an advanced degree were registered voters.¹²³

¹²⁰U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, NOVEMBER 2004 (2005).

¹²¹*Id.*

¹²²*Id.*

¹²³*Id.*

The conclusions to be drawn are clear, the more educated in the U.S. are much more likely to be registered voters - and consequently members of a jury pool - than the less educated members of American society. Jury pools selected from voter registration lists are therefore not representative of the overall level of educational attainment in the U.S. Rather, the U.S. jury pool, if based on voter registration lists, is self-selected to be a more educated group as a whole than would be the case in the U.K. If we believe jury competence is linked to juror education, competence would likely be higher in the U.S. than the U.K. based on the manner in which the jury pool was formed. This may account for the difference in juror competence in complex criminal jury trials between the two countries (to the extent that a difference does exist).

Jury Selection

A second area to examine is the difference in the manner in which juries are ultimately selected from the jury pool. If the jury selection process results in the selection of jurors with lower levels of competence, as indicated by education levels or life experience, then it would not be unusual for a less competent jury to result. The manner in which juries are selected in the U.K. and the U.S. are different enough to perhaps explain any difference in jury competence in complex criminal cases.

In the U.K., jury selection has evolved significantly over the past 100 years. Jury selection in the U.K. is fairly straightforward with little opportunity for the attorneys for either the defendant or the Crown to significantly skew the random nature of the pool. Challenges to the selection of individual jurors by the attorneys is limited to a challenge for cause, with the

cause being primarily limited to personal knowledge of the defendant or of the witnesses.¹²⁴ In addition, peremptory challenges which permit the removal of an individual juror for no specific reason, were abolished in the U.K. in 1988.¹²⁵ While the Crown Prosecutor does retain the right to have a specific juror “stand aside,” this simply means that the juror goes to the end of the line and does not mean that he or she is excused.¹²⁶ Thus, depending on the manner in which the selection process plays itself out, the juror who stood aside could come back into play. The jury selection process is so attenuated in the U.K. that barristers “are not permitted to identify the less competent jurors through voir dire questioning of the jury. . . .”¹²⁷ Thus, in the U.K., the jury that is selected from the jury pool is not shaped in any significant way by the process of jury selection. Rather, the jury is essentially random and would likely reflect the composition of the pool at large. Obviously, the jury ultimately chosen may be shaped by who is excused from jury service - but this is a not a process which is shaped by the litigants and may not represent any concerted effort to achieve a jury of any particular level of competency. This issue was discussed in the House of Lords debate on the Criminal Justice Bill when Lord Condon, who was a defendant in a lengthy regulatory case noted,

Once the judge made it apparent that the trial would last for at least five weeks, everyone wearing a suit and tie disappeared from consideration. Once it was reinforced that the trial would last for at least five or six weeks, the penny dropped and people began

¹²⁴Robin C. A. White, *The English Legal System In Action: The Administration Of Justice 187-188* (3rd Ed. 1999).

¹²⁵*Id.* at 188.

¹²⁶*Id.* at 186.

¹²⁷GOBERT, *supra* note 17 at 72.

to come up with - I must be unkind here - contrived excuses which were allowed.¹²⁸

Even if this does occur frequently, however, it does not appear to be systematic nor the choice of the litigants.

In the United States, on the other hand, jury selection is a much more intricate process. The litigants are afforded the right to challenge for cause and to utilize peremptory challenges, which may be exercised for any reason (barring an unconstitutional one). Challenge for cause in the U.S. is much broader in scope than in the U.K., with the focus being not only on obvious bias based on personal knowledge, but broader notions of bias based on general knowledge and attitudes. Such challenges would not, however, likely affect the overall competence of a jury except in very indirect ways. Peremptory challenges, however, afford the state and the defendant the opportunity to significantly shape the jury and one must question whether this process is utilized in a way that would enhance or undermine the overall competence of the jury selected.

The “common knowledge” of jury selection seems to indicate that the peremptory should be used by the defendant and perhaps even by the prosecutor to exclude overly intelligent jurors.

Lawyers are often criticized for using their peremptory challenges to “dumb down” the jury. . . . Perhaps lawyers fear that highly educated individuals will dominate in the jury room and be able to persuade the jury to their side during deliberations.¹²⁹

Other commentators have claimed that the use of the peremptory challenge coupled with the use of the jury consultant has inexorably led to a less competent jury. As Prof. Graham C. Lilly

¹²⁸HL DEB 15 JUL 2003 “c 805”.

¹²⁹Robert D. Meyers, Ronald S. Reinstein, & Gordon M. Griller *Complex Scientific Evidence and the Jury*, 83 JUDICATURE, No. 3, at 154 (1999).

claimed,

Those persons in the venire who appear perceptive, well-educated, or independent-minded are in the most danger of being peremptorily struck. . . . Too often, after all of the parties have exercised their peremptory challenges, the brightest and most capable members of the panel have been struck. Their elimination . . . is apt to weaken significantly the collective educational and intellectual capacity of the empaneled jury. Indeed, probably is true that jury selection procedures, especially in high profile cases, have a built-in bias favoring jurors who are comparatively less informed, less skilled, or less educated than the pool of potential jurors, and who, it this seems, may often be unrepresentative of the community. . . . even if formal education is increasing on an absolute scale, it could still be that juries are less educated on a relative scale.¹³⁰

This claim has been supported by anecdotal evidence from at least one recent high profile white-collar crime case. In the second trial of Dennis Kozlowski, one juror complained that the jury selection process had been skewed to select only blue-collar workers.¹³¹ The juror went on to state that, “They picked a jury that would get easily confused . . . there was some financial kingpin from Deutsche Bank sitting near me in the beginning. Of course he didn’t make it.”¹³²

There is evidence, however, that the “common knowledge” is beginning to change with respect to complex cases. As one commentator has observed, “In complex cases . . . it is in the best interest of all concerned to select educated jurors and not strike persons based on the extent

¹³⁰Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 64-65 (2001).

¹³¹Andrew Ross Sorkin & Roben Farzad, *At Tyco Trial No. 2, Similarities to No. 1*, THE NEW YORK TIMES, June 20, 2005 at C1.

¹³²*Id.*

of their education.”¹³³ In the case of complex civil litigation, another commentator observed that, “The best attorneys in complex business litigation understand that the key to winning is in choosing jurors who can follow complicated fact patterns.”¹³⁴ The anecdotal evidence from several recent high profile white-collar crime cases seems to indicate that attorneys are seeking more educated and more sophisticated jurors in these types of cases. For example, in the Frank Quattrone obstruction of justice case, some of the key evidence was e-mail messages. Defense counsel sought jurors who were e-mail users and tried to avoid those who were unfamiliar with it.¹³⁵ Ultimately, the jury selected for the Quattrone case included a technology entrepreneur, an unemployed executive assistant, the owner of a marketing and design firm, a freelance television director, and a marketing consultant for radiology.¹³⁶ Clearly, this doesn’t look like a successful case of “dumbing down” the jury.

Further evidence of this trend may be found in the first jury in the Dennis Kozlowski/Tyco case. In that case, the jury included a former employee of Lehman Brothers, a software writer for Reuters, a juror with a law degree, an employee of UBS Global Asset Management, a clerk for a law firm, an accountant, a financial consultant and a writer.¹³⁷ Again,

¹³³MEYER, ET AL. *supra* note 129 at 154.

¹³⁴A. Barry Cappello, *Selecting a Jury for a Complex Trial*,

¹³⁵Barry Meier & Jonathan d. Glater, *Picking a Jury for a Case in the Headlines*, THE NEW YORK TIMES, April 30, 2004 at C2.

¹³⁶*Jury for Quattrone Trial is Chosen*, THE WALL STREET JOURNAL, April 16, 2004.

¹³⁷Andrew Ross Sorkin & Jonathan D. Glater, *Jurors, Fresh from Deliberations, Recall What Led to Tyco Mistrial*, THE NEW YORK TIMES, April 5, 2004 at B1.

this hardly seems like a jury that would be chosen if “dumbing down” were the object. Finally, and most recently, a jury was selected in the Kenneth Lay/Jeffrey Skilling- Enron case. The jury was selected in a single day - which is very unusual. In addition, the jury seemed highly educated once again. “The jurors range in age from 24-26 - six have college degrees and of those, two have master’s degrees. Three work in the oil and gas industry, and a few are in accounting. Three are in education, and two are self-employed.”¹³⁸ In addition, the lead attorney for Kenneth Lay stated, “They’re a well-educated jury, better educated than most.”¹³⁹ Jeffrey Skilling’s attorney stated that “we are very pleased with the jury we have.” This certainly doesn’t seem like a defense whose tactic it was to exclude the intelligent and sophisticated from the jury. And, if this is not occurring and if, in fact, more educated jurors are sought for complex criminal cases, one can distinguish the process in the U.S. from that of the U.K. and perhaps account for the greater competence (actual or perceived) of the American criminal jury in comparison to its British counterpart.

Alternatives To Criminal Prosecution

The final difference that might exist between the process of complex criminal prosecution in the U.K. and the United States is that, in the U.K. other alternatives to criminal prosecution for complicated frauds may not exist, thus forcing all cases - irrespective of their strength - into the criminal courts. This may be different from the approach in the United States which utilizes administrative agencies to adjudicate many types of financial wrong doing for which the

¹³⁸Alexei Barrionuevo, *Enron Jury Chosen in First Day, Setting Stage for Opening Arguments*, THE NEW YORK TIMES, January 31, 2006.

¹³⁹*Id.*

evidence is less clear. This hypothesis was first suggested in the House of Lords debates in 2003. In the June debate, Lord Brennan asked,

Why can we not give the financial services regulatory agency the same form of draconian powers that exist in the United States to deal with serious fraud? People within the world of finance are regulating those who do wrong within the world of finance. Why should we undermine a major constitutional aspect of our country - jury trial - because of the inconvenience of serious fraud?¹⁴⁰

Later, in July, Lord Brennan pointed out that,

We are hopelessly weak in our attack on white-collar crime. . . . We do not have an organization such as the SEC - the Securities and Exchange Commission - in America that pursues people early on and makes them pay massive fines to get out of trial.¹⁴¹

In the U.K., financial regulation is undertaken by the Financial Services Authority (FSA-UK), which was created in 1997.¹⁴² The FSA-UK is a non-governmental agency which has, theoretically, tremendous centralized authority to regulated all aspects of the financial and securities industries.¹⁴³ The problem, however, is the authority that the FSA-UK actually has. As noted by Jerry Markham,

There is a long and well developed culture in London of avoiding governmental interference in business. The FSA-UK, while reflecting a political demand for more regulation, is still a non-governmental body that remains an extension of the City's

¹⁴⁰HL DEB 16 JUN 2003, "cc529-593".

¹⁴¹HL DEB 15 JUL 2003, "c800".

¹⁴²Jerry W. Markham, *Super-Regulator: A Comparative Analysis of Securities and Derivatives Regulation in the United States, United Kingdom, and Japan*, 28 BROOK. J. INT'L. L. 319, 377 (2003).

¹⁴³*Id.* at 377-378.

abhorrence to intrusive regulation. London has learned from long experience that, while there will always be scandals and failures, each should be viewed as *sui generis* and dealt with accordingly.¹⁴⁴

Thus, in the U.K., there may be no administrative method of prosecuting a complex white-collar fraud except in the criminal courts. The recognition that financial regulatory agencies provide a useful counterpart to criminal prosecution is part of the dialogue surrounding white-collar crime prosecutions in the U.S. In commenting on the acquittal of Richard Scrushy, former federal prosecutor Stephen Huggard observed that, “Maybe the government needs to stick to more obvious frauds and leave the arcane frauds to the [Securities and Exchange Commission].”¹⁴⁵ Thus, one can argue that the regulatory schemes in place in the U.K. and the U.S. differ to such an extent that juries may be able to more competently deal with criminal fraud prosecutions in the U.S. because only the clear cases of fraud are brought to criminal trial - with less clear cut cases being pursued administratively. To the extent that such an option does not exist in the U.K., British juries may be exposed as less competent in complex fraud cases because less clear cut cases may end up before them.

Conclusions

In conclusion, it seems clear that the use of juries in complex criminal cases in the United States is not an actual or perceived problem at this time. Unlike the U.K., there is no apparent constituency in the United States calling for a review of the use of juries for these types of cases. In addition, the statistical information and the anecdotal information also seem to indicate that

¹⁴⁴*Id.* at 396.

juries in these types of case actually do a fairly good job. The call for significant changes in the U.K. may be attributed to two broad explanations. First, and perhaps the most likely, is that the British Governments proposals are simply not supported by any clear evidence of failure in the U.K. Many of the claims made by the government rely on limited anecdotal evidence or broad assertions. In particular, the claim that prosecutors skew their cases to accommodate juries which are unable to comprehend complex cases or sit through long trials is completely without verification by any source.

If, however, there truly is a problem in the U.K. with juries and their ability to effectively handle complex criminal fraud cases - a problem not found in the U.S. - this may well be attributable to some systemic differences between the U.S. and the British systems of criminal prosecution. First, the U.K. jury is drawn from a more representative pool than in the U.S. with the result that, while it may more accurately reflect the overall education and sophistication of the British public, it is less educated than the U.S. jury which is chosen in a manner that increases, in percentage terms, the numbers of educated jurors in the pool. Second, the jury selection process in the U.K. does not allow for a great deal of attorney input into the process. Jurors cannot be excluded with the use of a peremptory challenge, and challenges for cause are much more limited than in the U.S. The result, again, is a more random, but accurate reflection of the jury pool (and consequently society as a whole). In the U.S., however, the use of the peremptory challenge coupled with a much more searching inquiry for removal for cause results in a jury which reflects the views of attorneys as to what makes a good juror. The evidence

¹⁴⁵AMEET SACHDEV, *supra* note 88.

seems to indicate that in white-collar crime cases the choice is often for the juror that is more educated and sophisticated than the average member of the public, thus resulting in a U.S. jury that is more educated than one in the U.K.

Finally, the systemic differences between the two countries and the ways they deal with financial crimes may explain why there is fear over jury competence in the U.K. The U.S. has a fairly extensive system of financial and securities regulations which may often afford a means of pursuing wrongdoing outside of the criminal courtroom. The advantage of this process is that the level of proof necessary may be considerably lower in these venues than in a court of law. In the U.K., however, the regulatory scheme is non-governmental and it tends to avoid heavy-handed regulation. The result is that financial wrongdoing in the U.K. may often only be addressed in the context of a criminal cases - irrespective of the strength of the case or its complexity.

It is fair to say that the criminal jury for complex cases is here to stay in the U.S. It is much less clear that this will continue to be the case in the U.K. While there have been effective counter-attacks to the Government's desire to change the jury system, it is unclear how long they will continue to be effective. In addition, in a world in which complexity may extend beyond just criminal fraud cases to include the new threat of terrorism, one wonders if the British Government might seek to scale back jury trial rights for those types of prosecutions as well.¹⁴⁶

¹⁴⁶See Phillip Johnston, *Clarke Calls for Rethink on How Terrorists are Tried*, THE DAILY TELEGRAPH, March 22, 2006 where the British Home Secretary voiced concerns about the continued use of the adversary system in terrorism prosecutions.

A form of trial which has been the accepted for hundreds of years may now be under the magnifying glass in the country of its origins.

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