PUBLICITY AND SECRECY IN JURY PROCEEDINGS

by

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I. Introduction

1. Can the accused waive trial by jury and opt for a mixed court or a judge?
2. How many jurors are there?
3. How are they selected, self-selected and screened?
4. What cases does the jury decide (criminal, civil, felonies, crimes)?
5. What decisions does it make (verdict, sentencing, award)?
6. What instructions does the judge give to the jury?
7. Which verdict options are open to the jurors (guilty, not guilty, not proven, or “not guilty if he returns the cows”)?
8. Which sentencing and award options are open to them?
9. Can the decisions of a criminal jury be appealed?
10. Is there a minimal and/or maximal time for jury deliberation? Is there a tradeoff between time and the required majority?
11. Are the jurors allowed to eat and drink and, if so, at whose expense? Are they allowed to sleep? Is their room heated?
12. Are they allowed to take notes during the trial?
13. Is the jury table circular, square or non-square rectangular?
14. Are the members of a disagreeing minority punished?
15. Is voting by simple majority, qualified majority or unanimity?
16. When unanimity is not required, are the numbers made public if the requisite majority obtains? Are numbers made public for acquittals?
17. Are the jurors supplemented by professional magistrates?
18. How is the foreperson of the jury selected? If elected, how?
19. Are jurors allowed to communicate among themselves?
20. Are jurors allowed to reveal their deliberations and votes to the outside world?
21. Are jury deliberations recorded?
22. Is voting open or secret? If open, is it sequential or simultaneous? If sequential, how is the order of voting determined? If secret, is it optional or mandatory? If optional, who decides?
23. Is the identity of the jurors known, before, during, or after the trial?
24. Are there any constraints on the information presented to the jury?

A set of answers to these questions (and to others one might think of) defines a *jury regime*.[1] Although some of the questions may seem strange or frivolous, they are (with the exception of # 21) grounded in sustained historical experience. Thus the starving of jurors, substituting physical stamina for mental acuity, has been a feature of many regimes. Similarly, a juror who seats himself or herself at a short end of a rectangular table is more likely to be chosen as foreperson (a fact open to several interpretations).

An ambitious but unfeasible research program would be to try to evaluate the many possible regimes, with a view to selecting *the best*. The program is unfeasible not only because of the complexity of the evaluative dimension (see below), but also because the interaction among the various features of a jury regime renders the causal analysis hopelessly difficult. A less ambitious program would be to hold most of the features constant and try to determine which features are optimal along the dimensions that are not held constant. Another relatively modest research program would be to determine at least one jury regime that is superior to a suitably defined judge-based system. A further modest program would be to identify *failures* of regime design, in cases where reforms intended to improve the regime in some respect had the opposite effect or no effect at all.

The evaluative dimension of juries has at least three aspects: a good regime should be conducive to the *factual accuracy of verdicts*, to the *normative rightness of sentencing and awards*, and to the *efficiency of the regime as a whole*.[2] As these are distinct goals that may be realized to varying

[1] I do not in this article consider *grand jury secrecy*, which raises several issues of its own as well as some of these covered here.

[2] We might also want the system to have a good impact on the *character of the jurors*. Thus Tocqueville (2004, p. 316) wrote "I do not know if juries are useful to civil litigants, but I do know that they are very useful to the people who judge them". Whether correct or not, this assertion cannot be made *publicly* as a defense of the jury system (Elster 1983, p. 96).

degrees by a given regime, a full normative account would also have to tell us how to trade them off against each other. I shall not, however, pursue that somewhat chimerical project.

Although we know what factual accuracy *means*, it may be hard or impossible to *determine* the accuracy of any given regime. To do so, one would have to observe the outcomes of a large number of cases and then compare them with "the fact of the matter" as determined by some infallible procedure. If such a procedure existed, however, we would have no need for a jury.

In practice, we have to judge the fact-finding ability of a regime from first principles rather than from the quality of observed decisions. Condorcet's jury theorem states that under specific conditions, large juries are better fact-finders than smaller ones. Also, to satisfy one of these conditions (the independence condition) one might – as in classical Athens and contemporary Brazil - both forbid deliberation and impose secret voting. The tendency of jurors towards conformism (Waters and Hans 2009) points to a similar conclusion. Since cognitive psychology suggests that juries tend to be influenced by certain normatively irrelevant facts, they should not be informed about them (Diamond, Casper and Ostergren 1989). The known tendency of diversity to improve decision-making (Page 2007) suggests both that the jury not be too small and that jurors be selected randomly. At the same time, the problem of informational free-riding (Mukhopadhaya 2003) suggests that juries ought not to be too large, lest jurors let their minds wander during the trial. To ensure true randomness, challenges and excuses should be minimized. To ensure that no juror votes out of fear, the vote may have to be shielded from external actors who might apply pressure and perhaps from other jurors

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In the following, therefore, I focus exclusively on the virtues and vices of jury *decisions*. For other comments on the "collateral virtues" of juries, see Stephens (1883), vol. I, p. 572-73.

who might inform these actors. When a jury verdict of guilty requires unanimity, so that the vote of each juror is evident from the verdict, it may be necessary to shield the identity of the jurors.

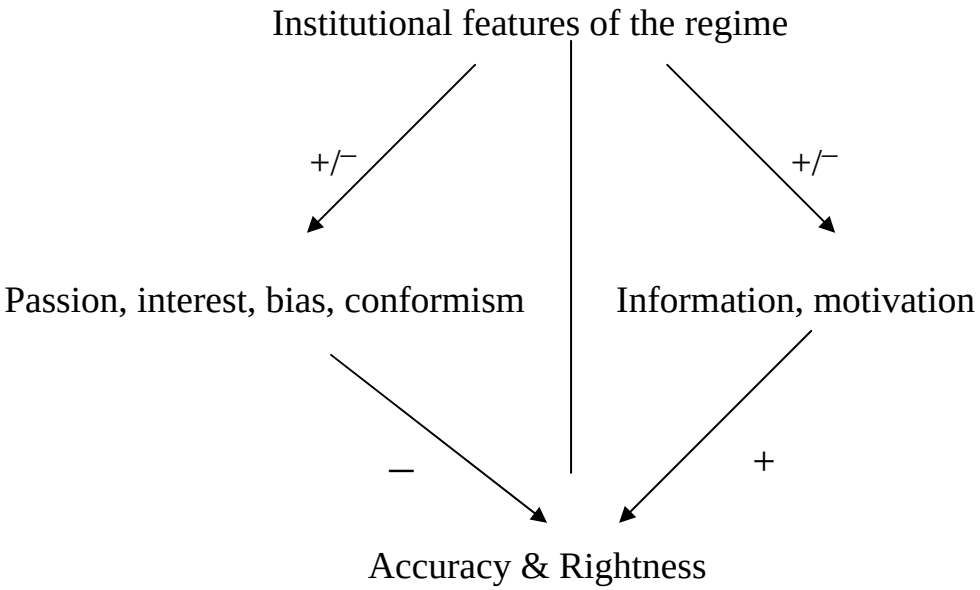
Generally speaking, a regime should minimize the role of *passion*, of *interest*, of *conformism* and of *cognitive bias* in the decisions of the jurors, while enhancing (though sometimes limiting) their *information* and strengthening their *motivation* to do their task well.[3] Although citing the interest of the jurors might seem strange, the existence of the "Friday afternoon syndrome", in which the jurors are impatient to get home for the weekend, shows that it is not completely irrelevant (Darbyshire, Maughan and Stewart 2002, p. 52*)*. More importantly, jurors ought to be shielded so that they cannot be bribed.

The idea of the normative rightness of verdicts and awards has no uncontroversial meaning. An outcome that would be desirable to those who hold a deterrence-based theory of justice might be hard to accept for scholars who take a retributive view (Smith 1759/1976, p. 394). What is an extenuating circumstance to some, can be attenuating to others (Elster 2004, pp.151-62). From the point of view of regime design, the problem is compounded by the fact that jurors have their own normative conceptions. If as a matter of fact jurors tend to be backward-looking or retributivist, the task for a forward-looking or utilitarian regime designer could be difficult (Sunstein et al. 2002). She might even wish to foster juror bias if it tends to offset retributivism. In general, however, I assume that the desiderata stated in the previous paragraph also applies to the promotion of normative rightness.

[3] As suggested in the previous footnote, motivation might suffer if the jurors were told that the main reason for relying on lay jurors rather than on professional judges was the character-building effect on the jurors. Because of informational free riding, motivation may also be diluted in large juries. Low pay for jury duty may also reduce motivation, by making the jurors eager to get back to work.

The idea of efficiency – reducing the cost of determining truth and justice - has many aspects. Larger juries entail more costs. Extensive screening of prospective jurors is costly. A unanimity requirement entails a larger chance of a hung jury and the prospect of a retrial. Some might count the tendency of jurors to award large and punitive damages in civil cases as a cost of the system. The opportunity costs to the jurors themselves increase with any feature that tends to produce longer trials. If the enemy is at the door, the opportunity cost to society of a long trial might also be a consideration. In the following, I shall not consider the costs of different regimes, however, but limit myself to the determinants of truth and rightness.

The discussion so far can be summarized in a diagram showing the relation between independent or *institutional variables*, intermediate *subjective variables* and dependent *outcome variables*. As shown, the intermediate variables may have either a negative or a positive impact on the outcome. As noted, information actually has a more ambiguous status than shown in the diagram.



In this paper, I consider the impact of institutional factors corresponding to *questions 16-24* on the various intermediate variables. The issue of secret versus open voting (# 22) is discussed in considerably greater detail than the others. All these factors turn, in very different ways, on the choice between secrecy and publicity. In the Conclusion, I spell out the different dimensions of secrecy in some detail.

Before I turn to the discussion, I should mention an important issue that straddles the distinction between factual accuracy and normative rightness. Because fact-finding is fallible, some innocent defendants will be convicted (false positives) and some guilty ones acquitted (false negatives). The evaluation of the relative cost of these errors is a normative task. Although there is general agreement that it is more important to avoid false positives, opinions may differ as to *how* important it is. Hence the choice of a jury regime may turn, in part, on how much it tends to favor the defendant in criminal cases.

II. Are the numbers of votes cast made public?

According to § 17 of the English Jury Act of 1974, "The Crown Court shall not accept a verdict of guilty […] unless the foreman of the jury has stated in open court the number of jurors who respectively agreed to and dissented from the verdict". There is no similar requirement for a verdict of not guilty. (I conjecture but have not been able to verify that the foreman is *forbidden* from stating the numbers in this case.) Hence neither the accused nor the public at large will know whether the acquittal was based on a unanimous decision or whether a minority (of one or two) voted to convict. If the foreman is not required to state the number of jurors who agreed to or dissented from the verdict of not guilty, the reason is presumably that the taint of suspicion associated with a non-unanimous acquittal would be a greater burden than the suspicion of a taint associated with a number-free acquittal.

In nineteenth century France, there was an absolute ban on making known the number of votes on each side of the questions put to the jury.

> The mode in which the jury vote in coming to a decision, is regulated by a law of the 13th of May, 1836, and is as follows. Each juryman receives in turn from the foreman a slip of paper, marked with the stamp of the court, and containing these words; "On my honor and conscience my verdict is....." He is then to fill up the blank space with the word Yes! or No! upon a table so arranged that none of his colleagues can see what he writes, and afterwards hand the paper closed up to the foreman, who is to deposit it in a box kept for the purpose. A similar operation must be gone through on the questions of whether there are extenuating or aggravating circumstances or not; whether the fact admits of legal excuse; and whether the prisoner was competent to distinguish right from wrong when he committed the act. The foreman must next draw out the slips of paper and write down the result, *without, however, stating the number of votes on each side* […]. The slips of paper must then be burnt in the presence of the jury (Forsyth 1875).

I do not know the reasons behind this procedure. Since the decision took place by simple majority during most of this period, one may have wanted to avoid creating the doubts associated with a 7-5 vote for guilty. Although I have no grounds for asserting a causal influence, the practice conforms to the ideology of the revolutionary period. In the Constituent Assembly, there was a general ban on publishing the exact number of votes that had been cast for or against a proposed law, not only because the knowledge that it had passed by a bare majority might weaken its legitimacy, but also because the deputies were under the sway of a metaphysical theory of the general will (Castaldo 1989, pp. 272-73). On their interpretation of Rousseau, the function of the majority vote was to *reveal*, not to *determine* the general will. According to a contemporary text, "the minority was supposed to merge its will with that of the majority as soon as it was known" (*ibid.*, p. 351).[4] Whether the ban on

[4] This statement was made in reaction to a proposal by Mounier to have votes written down in two columns, with the names of those who voted for and against. As I discuss below, considerations of the general will were not the only source of objections to this proposal.

publishing the number of juror votes on the two sides is an echo of this idea is at best conjectural.

In contemporary Norway, too, the law states that the number of votes cast for and against is not to be made public outside the jury room. Since the vote itself is public, however, the members of the jury know how many voted to convict. In the French system just described, only the foreman of the jury knew the numbers. As it seems that the foreman was usually the oldest juror (Esmein 1913, p. 413)[5], his identity could presumably be known outside the jury room. If he had been elected by the jurors or chosen by lot among them, this would not be the case. Hence in theory the French system could be vulnerable to bribery. At the very least, as we shall see, it could lead to mistakes.

The Danish jury presents a special case. Whereas the verdict is decided by the jurors alone, the sentence is set by jurors and judges voting together. "The penalty is decided by a simple majority vote, the milder result prevailing in case of deadlock. If there are more than two possible results, the most severe opinion is averaged with the next less severe etc., until a majority is reached. Whereas the vote of the jury as to guilt must remain secret [i.e., the actual numbers are not published. J.E.] , the number of votes given for the different penalties is published, but the identity of the votes of the judges/jurors is not divulged" (Garde 2001).

The last feature of the Danish regime needs underscoring. Even when (as is usually the case) the identity of the jurors are known and the number of votes for and against conviction is known, the identity of the jurors who voted for and against need not be known. Under secret voting, it *will* not be known, but even with open voting the information need not be formally recorded and

[5] Esmein refers only to the grand jury, and says nothing about how the foreman of the petit jury was selected. I conjecture that the same method was used.

released to a wider public. We might thus want to distinguish the secrecy of the juror and the secrecy of the jury (Ruprecht 1997-98, p. 246).

III. Are the jurors supplemented by professional magistrates?

Jurors are laypersons, often chosen at random, and usually on a one-off basis. Judges are professional "repeat agents". When, as is the case in many countries, jurors are supplemented by judges, the dynamics of deliberation changes. The jurors cannot any more reserve their opinions to other jurors, but must share them with the judges. In this (somewhat special) sense, these augmented courts reduce the secrecy of jury deliberations. I do not here have in mind the "mixed bench" that is used in Germany and other countries, where a few lay judges serve together with one or several professional judges. Rather, I have in mind cases in which a full jury is supplemented by one or a few professional judges. I limit myself to two French cases.

In nineteenth century France, juries were famously reluctant to convict in political trials and in trials involving freedom of the press. As documented by Claverie (1984), they also often refused to convict in cases of infanticide, honor killings, murders of alleged witches or the fatal mauling of a neighbor who had let his cow wander into the fields of the accused. These acquittals reflected partly local values and beliefs, partly social pressure on the jurors, partly a belief that punishment was better left to the community, and partly reluctance to convict when the required sentence was felt to be excessively severe. When (around 1850) *and because* the magistrates were allowed to enter the room where the jury deliberated, however, the percentage of acquittals fell substantially *(ibid*., p. 146). This often-cited paper does not, unfortunately, explain the legal mechanisms behind this change.

We know more about a change that was introduced by the Vichy government in 1941 and which is, with some modifications, still in force today (see Vernier 2007 for a full discussion). The number of jurors was reduced

from 12 to 6, and they were supplemented by three professional magistrates. The acquittal rate fell from 24.7 % in 1941 to 8.4 % in 1942. It is overwhelmingly plausible that the new law was the cause of the fall. A reduction of the acquittal rate was also the principal *motive* behind the reform. Justifying it, the Minister of Justice, Joseph Barthélemy, said that "although it does not suppress the jury, it tends to defang it " (*lui enlever son venim*). After the war, almost nobody pleaded for the elimination of the magistrates, although the number of jurors was increased to 7 and then to 9. Today the rate of acquittal is about 4 %.

Jury nullification seems less likely in the presence of professional judges, than in their absence. At the very least, we would expect that their presence would have a chilling effects on the use of certain *arguments*, such as "the law according to which the act of the accused constitutes a crime is unjust" or "the sentence that would follow upon a verdict of guilty is too severe". Yet with the secret ballot used in French juries, the *votes* of the jurors might still reflect "verdict according to conscience" rather than according to the law. Thus the effect of the abolition of one kind of jury secrecy (the opening of the deliberations to non-jurors) may be counteracted, to some extent, by the maintenance of another (the secret ballot). If both kinds of secrecy were abolished, it seems likely that the magistrates would dominate completely and that acquittals would be rare. If avoiding false positives is seen as more important than avoiding false negatives, this effect might be undesirable.

IV. How is the foreperson of the jury selected?

A jury foreperson can shape the outcome *directly*, by the views she expresses, or *indirectly*, by the procedures she proposes. Concerning the direct influence, several studies find a correlation between the foreperson's predeliberation award preferences in civil cases and the final decision (Devine et al. 2001. p. 696). Because the foreperson also tends to speak more than

other jurors, especially in large juries, which heightens the fear of talking in front of an audience (Boster, Hunter and Hale 1991), this correlation may well reflect a causal influence. Concerning the indirect influence, the foreperson may propose that the jury vote by secret ballot, in jurisdictions where that procedure is neither mandatory (as in France) nor forbidden (as in Norway). Alternatively, she may propose “going around the table” (and impose the order in which the votes are taken) or a simultaneous show of hands. In some cases, the foreperson decides by “apparent consensus” (Urfalino 2007), that is, by the absence of opposition to the decision she proposes.

The methods used for selecting a foreperson are as varied as the methods she may propose for reaching the decision. An advice to the defending counsel in American jury trials lays out some options:

> Methods of determining who will be the foreperson vary from jurisdiction to jurisdiction, e.g., the judge may select the foreperson, the jurors may chose one of their number as foreperson by selection or election, the first juror to enter the jury box may automatically become the foreperson. The judge will inform the jurors which method is used. […] If the jurors are left to their own devices, they may nominate and select the first person, particularly if standing while the others are seated, who says, "We've got to pick a foreperson," the person who seats him/herself at the head of the rectangular table (it's usually rectangular, rather than round as it should be to promote equal and face-to-face discussion), the person who volunteers by self-nomination, or the person who has been given the single copy of the jury instructions by the court bailiff who acts as jury shepherd. [Note: Be aware of the pro-prosecution ploy of having the bailiff nominate the jury foreperson by giving the court's jury charge to a juror the bailiff, a courtroom law enforcement officer who has observed the trial, deems to be leaning toward the prosecution. Defenders should prevent this unfairness by moving the court to order that the official copy of the instructions be placed in the center of the jury table before the jurors enter the deliberation room. Another alternative is to ask that each juror be given a copy of the court's instructions, preferably at the jury instruction stage of the case.] (Moses 2009)

With one partial exception, the foreperson seems never to be chosen by lot.[6] Although the *diversity rationale* for random selection applies to the choice of jurors, it is obviously irrelevant for the choice of foreperson among the jurors. By contrast, the *anti-manipulation rationale* may well be relevant, as suggested by the bracketed statement in the quoted passage. Again to my knowledge, Norway is the only country today that chooses the foreperson by secret ballot, with ties broken by lottery. The system was also used in Germany before WW I (Howard 1904, p. 664), with ties broken by age. In the literature on foreman choice I have never come across any references to *open and competitive* elections, with more than one candidate. The general impression is that elections are done by acclamation, often preceded by self-nomination.

The choice of a foreperson should ultimately be guided by the goal of achieving accuracy and rightness. A domineering self-nominated person might not allow a sufficient diversity of opinions to be expressed. A mechanical selection by age or by lot might lead to an unsuitable person being chosen. A judge-appointed foreman might reflect the prejudices of the judge (Horwitz 2004-5). The Norwegian solution does not seem to have any of these flaws.

V. Are jurors allowed to communicate among themselves?

Is each juror to keep her opinions to herself, or is she allowed, encouraged or required to *discuss* with the other jurors before they arrive at a decision? The former requirement imposes a form of secrecy on the jurors. Although the idea seems strange, we shall see shortly that there are both

[6] In France after 1848, the jury "choose a foreman, or chef des jurés, but, in default of any such choice, the first called into the jury-box by lot acts as foreman" (Forsyth 1873). Also, small-group psychology seems to show that groups with randomly selected leaders perform better than groups with leaders who are designated (or are believed by the group members to have been designated) on the basis of their responses to a questionnaire (Haslam et al 1998; Henningsen et al. 2004). The latter authors suggest *reactance* (see below) as an explanation of this phenomenon. Neither study explicitly focuses on juries.

historical and contemporary examples of this procedure. The latter idea, as stated, is somewhat ambiguous. To my knowledge, no jury systems require all jurors to express their opinion (and perhaps argue for it) before voting. The "silent juror" certainly exists.

If the vote is taken by secret ballot, the idea of silence should be expanded to include "cheap talk". In a recent trial, "only one juror stood between the death penalty and Zacarias Moussaoui and that juror frustrated his colleagues because he never explained his vote, according to the foreman of the jury that sentenced the al-Qaeda operative to life in prison last week" (*Washington Post* May 12 2006). Not only did he or she not explain his vote, but also, as the vote was secret, never identified himself. Although "the other jurors were relying on the discussions to identify the holdout" (*ibid*.), they were not able to. The holdout may not have been literally silent, but any opinion he or she expressed must have been insincere. Although this example has been used to argue for non-unanimous jury verdicts (Holland 2006), it could also be used as an argument for public voting. I note for later reference that the jury was anonymous.

In classical Athens, the large jury – at least 501 jurors – heard the arguments against and in favor of the accused before deciding on a verdict and a sentence. According to Aristotle (*Politics* 1268b), "most lawgivers" – presumably also the Athenian ones – forbade jurors to confer with one another. In his example, the reasoning applies mainly to the sentencing stage. He argues that in a very large jury it would be technically impossible to reach a compromise agreement on, say, the exact fine to be imposed. Hence the jury was constrained to a kind of "final-offer arbitration", that is, to choose between the sentence proposed by the accuser and that proposed by the defense. Yet this argument does not seem to apply to the verdict stage. Although it would clearly be impossible for *all* the jurors to express and exchange opinions, that would not have been an obstacle to debate. After all,

in the Athenian assembly an average of 6, 000 citizens did make decisions after listening to debates among (a subset of) themselves. The fear of demagoguery could hardly have been a reason for excluding debates, since the speakers for and against the accused engaged extensively in such practices.

The Athenian juries also decided by secret ballot. By what may be sheer coincidence, the only other jury regime known to me that forbids discussion among the jurors also uses secret ballot. This is the Brazilian regime, described as follows by Brinks (2004):

> At the end of the trial, the jury, the judge and the attorneys all go into the jury room. There, the judge presents the jury with narrowly drafted questions that will determine the outcome of the case. The jury votes by secretly placing small Yes or No cards in a basket. No deliberation is allowed. Indeed, in contrast to the common law's tradition of juror deliberation, *it is the height of misconduct and cause for a mistrial for one juror to make his or her voting intentions known or attempt to persuade another juror.* The questions move from the more general ("did a death occur") to the more specific ("did this defendant cause the death"), gradually guiding the process toward the final outcome. The results of each round are announced before the next round, so that the decision is built piece-meal, without deliberation but with information about the previous decisions made by fellow jurors. Like the secret ballot box, the voting method does not require jurors to identify, explain or justify their decisions, giving them full freedom to act on their individual judgments about the case – and on their prejudices and preconceptions. (My italics)

This regime, which has been in operation since 1822, is currently limited to cases of homicide, infanticide and instigation to suicide. I refrain from speculating about the motivation behind the principle that an attempt to persuade another juror can give rise to a mistrial. It does seem somewhat logical, though, that once *influence by words* has been banned, *influence by action* in the form of public voting should also be prohibited. Although, as we shall see, public voting need not take a form in which it can influence others, the only rationale for what I shall call ex post publicity is to create a pressure

for consistency between words and action. If there are no words, the rationale fails.

VI. Are jurors allowed to reveal their deliberations to the outside world?

The jury secrecy rule, which prohibits courts, newspapers or private individuals others from receiving or soliciting information from jurors after the verdict seems to be quite universal. The main arguments for the rule cite the chilling effect on free deliberation that could occur if the jurors knew that their discussions might become public, the need for a finality of the verdict, and the legitimacy of the jury system. In addition, a juror might be harassed if it became known that he had argued for the guilt of the accused or, in civil cases, for or against the plaintiff. Just as random selection and one-shot duty are guarantees against ex ante pressure, secrecy of the proceedings provides ex post protection. Jury nullification might also be jeopardized if the proceedings were not secret.[7]

The main argument against complete jury secrecy has always been that juries are prone to mistakes, because of incompetence, normative prejudices or cognitive biases. If, as in the French cases cited above, unjustified acquittals were the main danger, these mistakes might be seen as an acceptable cost of the system. Although it is hard to speak with any quantitative precision, we should not ignore that juries can also produce unjustified convictions. In England, The House of Lords has recently had the opportunity to consider the matter in the conjoined appeals of *R* v *Mirza* and *R* v *Connor and Rollock*:

> In both cases, the appellants were convicted following a majority verdict. After the trial, a member of the jury sent a letter to defence counsel (*Mirza*) and the trial judge (*Connor*) alleging impropriety on the part of

[7] On all these points and several others I refer to a Note in Harvard Law Review (1983), Campbell (1985), Ruprecht (1997-1998), Markovitz (2000-2001), Daly (2004), Hoeffel (2005) and Courselle (2005-2006).

> the jury. The defendant in *Mirza* was a Pakistani man who had resided in the United Kingdom for 13 years. He used an interpreter at the trial, and following queries from the jury, the judge gave a direction that no adverse inference should be drawn from this. The letter sent by the juror suggested a failure to follow this direction (the jury believing the use of the interpreter to be a 'devious ploy') and racial bias. In *Connor*, the defendants were convicted following a joint trial. The letter suggested that the jury had failed to consider the evidence properly (they were looking for a 'quick verdict') and had convicted both defendants when they were uncertain which of them was guilty. The Court of Appeal dismissed both appeals, holding itself unable to admit into evidence the terms of the jurors' letter (Daly 2004).

In a dissent to the dismissal of the appeal by the House of Lords, Lord Steyn "accepted that there must be a general rule of secrecy, but held that the Court of Appeal should have the power 'in exceptional cases' to examine material regarding jury deliberations. The effect of an absolute rule was that in the 1 per cent of cases tried by jury, the law was subordinating the risk of a miscarriage of justice to the interests of protecting the efficiency of the jury system. The safeguards in place did not deal with this problem and in the long run this would reduce confidence in the system" (*ibid*.). This factual conjecture is the very opposite of the one that is usually made, namely that the knowledge that jury secrecy can be breached would, in the long run, undermine the legitimacy of the system. As far as I know, there is no empirical evidence to sustain either conjecture.

VII. Are jury deliberations recorded?

As noted at the outset, this question does not reflect any sustained historical practice. It would, however, from some perspectives, be desirable to record the deliberations of the jury. One could ascertain how well the jurors understood the instructions from the judge; whether bias, pressure or conformism seems to have operated; and a host of other interesting questions. If possible, one might also want to compare two regimes, one in which jurors

knew that their deliberations were being recorded and might or would be made public, and one in which they were unaware of recording equipment. One purpose would be to verify the presence or absence of the often-alleged chilling effect, according to which jurors would be more reluctant to engage in freewheeling and sometimes productive debates if they knew they were being recorded. Meade and Stasavage (2008) find this effect in a unique natural experiment involving debates in the Open Market Committee of the Federal Reserve Board. For a number of reasons, a similar study of the jury system is hard to imagine.

As part of the groundwork for the pioneering book by Kalven and Zeisel (1966), *The American Jury*, University of Chicago researchers tape-recorded the deliberation of juries in six civil cases, with the consent of the judge and counsel for both sides, but without the jurors' knowledge. When this fact became known, there was a general outcry, leading first to Senate hearings and later to federal legislation prohibiting the recording of jury deliberations. In the opinion of Senator Jenner of the subcommittee of the Senate judiciary Committee, the knowledge that jury deliberations may be recorded "must color the thinking of all juries from now on until appropriate action has been taken to insure that this eavesdropping on jurors will not recur in any single instance" (US Senate 1956, p. 1). In his testimony Harry Kalven denied that recording would tend to have a chilling effect : "With the consent of the attorneys and with the consent of the judge, and for scientific purposes, a few juries may from time to time be recorded. I see no reason why that should strike any fear in the heart of any juror in America" (*ibid*., p. 7). Once again, this is an empirical issue that cannot be resolved on a priori grounds.[8]

[8] In the Senate hearings, it was implicitly assumed that the behavior of the attorneys and judges would not be affected by their knowledge that, unbeknownst to the jurors, the deliberations were being recorded. This assumption may well be justified. Yet given a well-known dictum from lawyer folklore, "in the face of a weak case, confusion is good", one

In 1997, CBS made video recordings of three criminal jury cases, with the consent of the parties (attorneys and judges) as well of the jurors. Because jurors who did not want to speak on camera were excused, the procedure introduced a self-selection bias that may have affected the deliberations as well as the verdict (Abramovsky 1996). Also, the fact that two of the three trials ended in hung juries "might indicate that the presence of cameras in the jury room caused jurors to harden their positions and be more reluctant to compromise" (*ibid.).* As a possibly more acceptable form of publicity, one could make transcripts of jury deliberation available after the verdict and before appeal (Ruprecht 1997). On an analogy with some Central Bank Committees, one might also published anonymized minutes rather than verbatim transcripts. The fact remains, however, that in the absence of recorded cases in which the jury not only ignored that they *were* being taped, but also that they *might be* so, there are no empirical grounds for asserting the superiority or the inferiority of the secret regime.

VIII. Is voting open or secret?

This vast topic could be the subject of an article or a book of its own. I shall only be able to touch on a few aspects, beginning with some conceptual distinctions.

The vote cast by a juror may either be unknown by the other jurors, or be known to them but, disregarding illegal leaks, not to anyone else. When a jury uses public voting, it is usually secret in the second sense, except if a unanimity requirement makes it clear that a verdict of guilty implies that all jurors voted for it. If less than unanimity is required, it is usually impossible for outsiders to identify which jurors, if any, dissented. The only exception

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can at least wonder whether a lawyer for the defense would be as willing to spread confusion if the effects of his obfuscation could be observed.

known to me occurs in the polling of the jury in the two American states that allow for non-unanimous verdicts. In Oregon, the following is the rule: "When the verdict is given, and before it is filed, the jury may be polled on the request of a party, for which purpose each juror shall be asked whether the verdict is the juror's verdict. If fewer jurors answer in the affirmative than the number required to render a verdict, the jury shall be sent out for further deliberations." In Louisiana, the judge may at her discretion either poll the jurors orally or do so by asking each juror to write on a slip of paper the words "Yes" or "No" along with his signature. Note that if the jury votes by secret ballot, the Oregon procedure and the first Louisiana procedure will reveal to each juror how the others voted. The second Louisiana procedure will not.

As this observation suggests, one can combine secrecy ex ante with publicity ex post. The taking of votes can be arranged so that (a) no juror can know, when casting her vote, how anyone else voted and yet so that (b) all votes are known to all once they are cast. As Bentham (1999, p. 106-9) noted with respect to assembly voting, these two aims can be reconciled if all votes are taken *publicly and simultaneously*. He noted, however, that "neither the process of crying *Aye* or *No*, nor that of holding up hands, can be rendered so exactly simultaneous, but that, if the slave is *bonâ fide* upon the watch, he may wait to observe the part taken by the master's voice or hand, so that he may take the same" (*ibid*., p. 107). Also, show of hands is vulnerable to pluralistic ignorance: "Suppose a juror fears that her position is unpopular, or appears insensitive or stupid. Before raising her own hand, she will look around to room to see how many other hands are going up. Other like-minded jurors might be employing the same strategy. The result can be zero votes for a particular verdict, despite the fact that several jurors actually support it" (Schwartz 2006). In principle, these obstacles could be overcome by asking jurors to sign their written ballots before handing them to the foreperson, who would then read the votes with names out loud. Although the votes would not

strictly speaking be simultaneous, they would be unobservable by others at the time of voting. To my knowledge, this obvious solution is not chosen anywhere.

To explain the problem to which it would be a solution, I first cite Bentham (1999, p. 107) again: "The concealment thus recommended is not that which the inconvenience, where there is any, resulting from the secret act of voting. It is only the will of the seducer that is concealed, for a moment, from the knowledge of the voter – not the conduct of the voter that is concealed, at the long run, from the knowledge of the public". Disregarding for a moment the reference to the public, my point here is that one may not want the conduct of the juror to be concealed, "at the long run", *from other jurors*.

In the absence of ex ante secrecy, publicity may induce conformism and invite pressure. An example from Seneca (*On Mercy* I. 15) illustrates the point.

> When Tarius was ready to open the inquiry on his son [who had plotted against him], he invited Augustus Caesar to attend the council; Augustus came to the hearth of a private citizen, sat beside him, and took part in the deliberation of another household. He did not say, "Rather, let the man come to my house"; for, if he had, the inquiry would have been conducted by Caesar and not by the father. When the case had been heard and all the evidence had been sifted - what the young fellow said in his defense, and what was brought up in accusation against him Caesar requested each man to give his verdict in writing, lest all should vote according to his lead.

In this *hierarchical* setting, the secrecy was optional. In other cases, it has been imposed as mandatory for similar reasons. In American court-martials, mandatory secret voting is justified by the need to insulate junior officers against pressure from their superiors. Moreover, the votes are *collected* by the junior jurors, since if "the junior member collects the ballots, the senior member is less likely to see how each member voted; but if the senior member

collects the ballots, then he can readily identify each member's ballot, raising the possibility that the junior members will defer to the senior member's opinion" (Holland 2006 p. 124 n. 126).

In what we might call *quasi-hierarchical* juries, which contain a majority of jurors and a minority of magistrates, the secret vote may, as noted above, be the only way for jurors to retain some independence. On the basis of interviews with French jurors, Vernier (2007) finds that their work is articulated around four concerns: to express an opinion, to defend it with arguments, to respond to the arguments of other jurors and the magistrates, and "to vote by secret ballot, given that a juror may write down a quite different conclusion from the one he has defended during the debates". Direct opposition to the magistrates was rare. "If jurors rebelled, they did so in the anonymity of their vote, as in the case of JS, an educator from Paris, who voted No to the question of guilt although she understood very well that he was guilty of the acts alleged against him" (*ibid*).

Belgian juries present a variation on the French system. The question of guilt is decided by 12 jurors voting by secret ballot. Three courts magistrates can undo the verdict if it was voted by a simple majority (7 to 5). Sentencing is decided by a body of 15 - jurors and magistrates – who vote by a show of hands. In France, a body of 9 jurors and three magistrates make both decisions by secret ballot. In Belgium, both the presence of magistrates and the public voting are likely to make jurors go along with the sentencing proposed by the professional judges.

In *non-hierarchical* juries, secrecy may be valued as a means of protecting holdouts against horizontal pressure. The pressure may be especially strong when, as in almost all American criminal juries, unanimity is required. We might expect, therefore, hung juries to be more frequent under a regime of secret voting. Kerr and MacCoun (1985), however, report the opposite finding in mock juries. In their view, "being publicly identified with a

position may force *early* commitment to that position and make it difficult to change one's position without appearing inconsistent or irresolute" (my italics).[9] Their study allowed the foreperson to propose successive (open or secret) ballots until unanimity was reached. Under those conditions, early public commitment may well have been conducive to hung juries. When there is only a single ballot, however, this mechanism would not operate.

When voting is public and sequential rather than simultaneous (or unobservable), *order effects* may arise. Although some path-dependence and informational cascades are inevitable under such regimes, one can try to reduce undesirable effects. The reason why the foreperson of a Norwegian jury is required to cast the last vote is presumably to minimize the importance of the juror who already, by virtue of his position, has a special influence. The German pre-1914 regime cited above imposed the same rule, while also requiring other jurors to cast their votes in the order in which they had been drawn from the jury lottery. Although the contemporary German regime is not part of my universe of cases, the rules for the voting of the mixed bench are nevertheless interesting: "The order of voting is [the following]: first the youngest lay judge will cast their vote, then the older one. The professional judges vote after them, first the rapporteur, the others in the order of their length of service, the youngest first. The presiding judge is the last one to cast their vote. This is meant to ensure that the lay judges do not feel inhibited before the professional judges, or the younger judges before the older ones" (Siegismund 2000, p. 123).

[9] It is interesting to compare this statement with Madison' well-known comment on the Federal Convention: "had the members committed themselves publicly at first, they would have afterwards supposed consistency required them to maintain their ground, whereas by secret discussion no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth, and was open to the force of argument." (Farrand 1966, vol.III, p.479). It seems clear, in fact, that the fear of appearing inconsistent may also shape debates in groups that deliberate in private, such as the Convention or a jury. Yet it also seems plausible that the fear is larger when the speakers are exposed to an external audience.

Although regulating the order of voting by *lottery* might seem an attractive option, a passage from Cicero's *Pro Cluentia* shows that it can be risky:

> At the trial, after the speeches and evidence on both sides had been heard, the votes of the jurors were given, not by ballot, but openly, at the desire of the accused, who availed himself of the option granted by a law at that time in force. Those to whom it fell by lot to vote first were men of notoriously bad character, and all of these gave a verdict of guilty, some of the more respectable and conscientious, feeling convinced that there was foul play somewhere, declined voting, five gave a verdict of not guilty, but when the votes were summed up, the accused was condemned by a majority of two.[10]

It is worth while noting that in this case the accused had the choice between secret and open voting. (Perhaps one could say that he gambled on the order of voting and lost.) The Roman jury seems mostly, however, to have used the secret ballot (Stavely 1972, p. 229-30). In some systems, notably in American state trials, the accused also has the choice between going before a jury or a judge. The fact that juries return guilty verdicts at a higher rate than judges does not show that the defendants who prefer a jury are irrational, since they may have a weaker defense to begin with.

In the absence of ex post publicity, secrecy may be the source of suboptimal deliberation. According to Stephen (1883, vol. 1, p. 560), "the rule that juries should vote by secret ballot would be a direct inducement to impatience, and fatal to any real discussion". Moreover, the secret ballot might cause a discrepancy between words and actions. A juror might appear to go along with the perceived majority only to vote against it. (If the majority is only *perceived* to exist, as in cases of pluralistic ignorance, the majority itself

[10] The actual vote stood as follows. Nine jurors of unimpeachable character gave a verdict of guilty. (Some of these may have been influenced by the second group, who voted first.) Eight jurors, suspected of being venal, also gave a verdict of guilty. Five said not guilty and ten abstained.

might be reversed upon the vote.) By contrast, if jurors know that any such discrepancy will be revealed after the vote, they are more likely to *articulate their reasons* for voting against the majority and to change their mind if met with persuasive objections. Even though they would not incur any material sanctions when their insincerity was brought out, they might be deterred by the highly aversive idea that others would think badly of them (Dana, Cain and Dawes 2006; Elster 2007, p. 368).

To discuss a further variation on the theme of ex ante secrecy with ex post publicity, I shall consider first a hypothetical case and then an historical one. In contemporary Norway, juries are (roughly speaking) made up of an equal number of men and women. Imagine a regime of this kind deciding by majority vote. Votes are taken by secret ballot, but in some cases (involving rape or battery for instance) the total numbers of female and male jurors voting to convict shall be made public.

An historical precedent involved the Roman jury:

> On the tribunal was set either one voting urn or, when as normally the jury was drawn from members of distinct social groups, as many voting urns as there were groups represented. As to the purpose of this practice of using different voting urns for different groups, we can only speculate that it was designed to minimize the chances of either *excessive bias or corruption* on the part of any one group. The verdict of each group, senators, equites, and, after 70, tribuni aerarii, was made public along with the overall verdict of the court; and any undue divergence of view would have been certain to induce suspicion (Stavely 1972, p. 229; my italics).

Although the Romans might have required that their stratified juries have a majority within each subgroup for conviction, this is not how they proceeded. Instead they acted (I assume) on the belief that if jurors know that any bias will be exposed to public scrutiny, they will curtail it. Observe that in this case, the ex post publicity extends to the world at large, not only to the other jurors.

I known turn to the relation between open or secret voting in juries and in assemblies. In a book on voting in the ancient world, Stavely (1972, p. 84) affirms as a general proposition that "the trend in any democratic society is towards the observance of greater secrecy in the recording of the vote rather than less". Although his main purpose is making that claim is to discredit the idea that the Athenian assembly may have used secret ballot before passing to vote by a show of hands, he also draws a parallel with the juries. Among other sources, he refers to a passage in which Thucydides (4.74.3) asserts that the Megarians established their oligarchy by bringing their enemies before the people and "compelling the vote to be given openly, had them condemned and executed".

We meet a similar parallel between political voting and jury voting in France, when secret ballot in the jury was introduced in 1835-36. In the jury system introduced by the Revolution, each juror expressed his vote to the President of the court, in the absence of the other jurors. A reform of 1808

> did not preserve these somewhat spectacular forms, but it maintained the principle of the oral verdict; *it did not even isolate the jurors from each other* as had been previously done. When they had retired into the jury room, and the discussion was at an end, the foreman of the jury questioned them one after another and took down their replies (Article 345). This method was bound frequently to put a restraint upon timid dispositions and even falsify the voting. It was changed by the Law of 9th September, 1835, establishing the vote by secret ballot. 'It is asked,' said the Keeper of the Seals, in the Committee Report, 'why, *when everything is done among us by ballot*, it is not allowed to the courts of assizes to express one's private conviction, — the proceeding used in elections at all stages, *and in the making of the laws*' (Esmein 1913, p. 531; my italics).

At the time, the National Assembly did in fact adopt laws by secret ballot (Pierre 1893, p. 1018). The general proposition that secret voting in elections, secret voting in assemblies and secret voting in juries tend to go together and to have a common justification cannot, however, be defended. After the Italian parliament abandoned secret voting in 1988, no elected assembly to my

knowledge uses this procedure on a regular basis. The mandatory use of secret ballot in juries exists in France and in Belgium and no doubt elsewhere too, but is far from universal. By contrast, there are no exceptions today to the principle of secret voting in elections to political office. Today, secrecy rules in elections, publicity in assemblies, whereas juries can be organized on either principle.[11]

During the Terror phase of the French Revolution, we can observe a close link between assembly publicity and jury publicity. Although the Convention never voted by secret ballot, it had the choice between voting by standing and sitting on the one hand and voting by roll calls on the other. On a spectrum from private to public voting, the former was closer to the private extreme and the latter to the public extreme. Neither was *at* the extreme, since full secrecy would require ballots and full publicity involve recording and publication of individual votes. During the Constituent Assembly that preceded the Convention (before the interlude of the first legislative assembly), the radical left had successfully developed the rhetorical strategy of using roll-calls as a weapon of intimidation. To cite only one instance, when debating whether members of the Constituent Assembly should be eligible for the first legislature, the deputy Custine said that "I demand a roll-call vote. In this way we shall see who wants to be reelected" (AM 8, p. 200), as if nobody could vote against the proposal on disinterested grounds (Elster 2009, p. 328-29).

On March 10-11 1793, the Convention debated the creation of a revolutionary tribunal. Two questions were intermingled: should the assembly vote on the tribunal by a relatively public procedure (roll-call) or by a relatively secret one (sitting and standing), and should fact-finders (the jury) on the tribunal vote publicly or by secret ballot? Although the record does not

[11] Note that in the passage just cited, three distinct regimes succeed one another: secrecy among the jurors but not towards the President of the court, no secrecy among the jurors but (presumably) secrecy towards the outside world, and full secrecy.

allow certainty, I conjecture that some of those who wanted secret ballot in the jury to avoid intimidation of the jurors (see below) would have preferred secret voting in the assembly to avoid intimidation of the deputies. What is certain, however, is that in the debates, the radicals did resort to tactics of intimidation. One deputy (Lépeaux) having asserted that "A degree of this kind requires a roll-call vote" (*L'appel nominal pour un pareil décret*), another (Monmayou) added "Only counterrevolutionaries can fear it" (AM 15, p. 681). Later, the deputy Vergniaud demanded "roll-call vote to make known those who always use the word of freedom in order to abolish it" (*ibid*., p. 684).

These interventions took place, however, before the deputy Thuriot proposed "an amendment that will reconcile all. I demand that the jury give their vote openly (*à haute voix*)" (*ibid*.). It is not at all clear from the record which opinions in the previous debate he wanted to reconcile, and why public voting would be a means to this end. It is possible, however, that the proposal was made on the background of the experiences from an earlier revolutionary tribunal, created on August 1792 and abolished on November 29 of the same year. In that tribunal, the jurors in each session were drawn at random from a pool of 96 elected by the Sections of the Paris Commune and voted by secret ballot (white and black balls). Although these features should have rendered the jurors immune to bribery, the acquittal of M. de Montmorin (a relative of the former foreign minister) was nevertheless widely ascribed to corruption (Monselet 1853, p. 149-50). In this perspective, the following passage from *Révolutions de Paris* (No. 193) takes on considerable interest:

> [On March 10 1793] one adopted a measure that at first seemed to eliminate the effects of corruption from this tribunal: no more secret voting, and they were right; in the tribunal of August 17 hypocrites used the white balls to hide themselves and to acquit the scoundrels. […] Yet while this measure is good to stop a weak man, it fails before the scoundrel of character, the determined conspirator. One needs to have a conscience and a sense of shame (*pudeur*) to be afraid of the strict [public] opinion; but if a jury sells its conscience and its shame, how can

> open voting serve you? It would be better to prevent it from being sold, by merging it in a large crowd of jurors until it is drawn by lot.

The author does not seem to notice that the corrupt juries had in fact used the very regime he advocates. The general point is nevertheless interesting: if the rationale of open voting (or of ex post publicity) is to deter by means of shame, a shameless person will not be dissuaded. Yet in the context of the Terror, other deterrents were more important. Among the deputies who argued against open voting, Burat argued that it would "hinder the freedom of the juries" (AM 8, p. 688) and Guadet that "open voting favors innocence when the judges are corrupt, but in moments when the multitude is inflamed by passion, this mode of voting will be fatal to it" (*ibid*., p. 689). To put it more starkly, it was more important to prevent jurors from being massacred by the crowds if they acquit than to prevent them from being bribed to acquit. Predictably, the radicals responded that "it is an insult to the people of Paris to claim that that would disturb the representatives of the people in their function" (Lamarque, *ibid*,, p. 688-89). Also, the radicals asked, since the deputies had voted publicly for the execution of Louis XVI without fear of being accused of influence, "why [did they] not think jurors capable of the same firmness?" (Prieur, *ibid*., p. 689).

Finally, I comment briefly on the mechanics of secret voting. There are several ways of delivering a secret vote. Roman jurors were given waxed tablets inscribed with the letters A (absolvo) and C (condemno) on the two sides and instructed to erase one of the letters before putting in the urn (Stavely 1972, p. 229). In some French courts white and black balls have often been used to vote not guilty or guilty. In other French courts, jurors have been required to write down "Yes" or "No" on bulletin votes. In all cases, they are usually asked to cover the tablet, ball or bulletin with their hands to ensure secrecy.

I do not know how often these regimes allow the voluntary disclosure of one's vote to other jurors. In elections, it is generally recognized that to serve its purposes, secrecy has to be mandatory, not optional. Under many voting regimes, it is in fact technically impossible to disclose one's vote. Some assemblies that use the secret ballot have also banned disclosure, but not necessarily by making it impossible. Under the July Monarchy, the president of the assembly could invalidate a vote if a deputy intentionally made it possible to observe the color of his ball (Connes 2008, p. 95). In these cases, the rationale for obligatory secrecy is not so much to hide the vote from one's peers (other voters or deputies) as to prevent the actors from making credible promises to outsiders (candidates or ministers) that they will vote in their favor. In juries, neither open nor optionally secret voting would allow an outsider to monitor the votes. A juror *can* make a credible promise to vote for acquittal, at least in the weak sense that a break of the promise would be detected if the jury voted Guilty, if conviction requires unanimity, If, however, conviction requires only 11 votes out of 12 (as is sometimes done to allow juries to convict even with one "rogue juror") and the accused bribes two of the jurors to vote for acquittal, he cannot know, if he is convicted, which of them reneged on the promise. Hence neither can credibly promise to vote for acquittal.

In the case of written ballots, the identity of the juror may sometimes be inferred from the handwriting. Alternatively, the handwriting may be unintelligible. In a bizarre and revealing episode from 1822, the President of a court in Amiens described one case as follows:

> We have learned from positive and definite information that we have received from eight of the jurors that the jury, upon a proposal from of them, voted by secret ballot. As a result there were eight positive votes for conviction [the minimum required], or with regard to one them so at least it seemed. One of the bulletins, written by an untrained hand and probably by an illiterate, presented a number of letters in excess of what is needed to express OUI or NON. The first letters were V.O., suggesting

> that the person had the intention of writing OUI but spelled it as VOUI, which is how it some people pronounce it. As the foreman of the jury could not see how this concoction of meaningless letters could stand for either “oui” or “non”, he thought it his duty to ask the juror who had written this bulletin which of these two words he had intended to write. But since none of the jurors wanted to admit to the vote or to reveal his ignorance, the bulletin was interpreted in the favor of the accused as a NON, thus producing the simple majority [7 out of 12] to which the accused owed his life (Claverie 1984, p. 148).

This event took place during the period where the foreman was supposed to question the jurors one by one. It seems that they just ignored the law and arrogated to themselves the right to use a secret ballot. Moreover, the secrecy also made it impossible to resolve the ambiguity created by the illiterate juror. The episode also tells us that contrary to a common assumption, the strict tax-payments requirements for being a juror, satisfied by only 100, 000 French citizens in a population of 30 million, were no guarantee for literacy. As noted, this gentry elite also believed that killing a witch was legitimate self-defense.

IX. Is the identity of the jurors known?

In many jury regimes, the identity of the jurors is not revealed until, or shortly before, the trial. The purpose is to shield jurors from pressure and bribes. Like the Athenian jurors, they are “taken from the crowd for a day” and go back to an anonymous existence when their task is done. Even when they are chosen to do jury duty ahead of time, their assignment to a particular case is often done so late as to leave no opportunity to influence them.

The questions remain whether their identity should remain unknown (i) during the jury selection process and (ii) after the trial is over.

(i) It has been argued that in countries that allow challenge of jurors for cause and also allow lengthy interrogations to determine possible bias, anonymity during the selection process is desirable to encourage prospective jurors to reveal embarrassing but relevant information about themselves (King

1996, pp. 136-37, 147-48). On the other side of the issue, it has been argued that anonymous jury selection would prevent the jurors from disclosing potentially relevant information, such as their address (Abramovsky and Edelstein 1998-99, p. 478-79). Which effect is stronger is a matter of speculation.

(ii) The more important issue concerns the fear of jurors of retaliation by the defendant or his associates if he is found guilty. Such fears are especially likely to arise when the defendant is accused of being involved in organized crime or terrorism. In the United States, this concern has over the last 30 years led to a steady increase in anonymous juries. The decentralized nature of American state courts makes it hard, however, to gather accurate data. The federal jury judging the four policemen accused of beating Rodney King was anonymous. As noted above, the jury in the Moussaoui trial was anonymous, as was the jury in the 1994 trial of four accused of bombing the World Trade Center.

If jurors fears are justified, they provide pro tanto an argument for anonymity. Even critics of the practice admit that in some cases it may be admitted as a measure of last resort. Even if the fears are not justified, it has been argued that they will have a negative effect on the quality of the deliberations (King 1996, pp. 137, 142-43), independently of a tendency to acquit that might also be induced by the fear. One might also conjecture, however, that anonymity will cause jurors to take their task less seriously. Although jurors cannot be held formally accountable, the knowledge that they will have to face their fellow citizens after the verdict could focus their minds. It is hard to assess the net effect of these tendencies.

Whether the fears *are* justified, is hard to tell. Although *witnesses* have often been harmed, “in the 200-year history of the American justice system, there are few if any instances in which jurors have been injured, and none in which a juror has been killed, as a result of his service on a jury” (*ibid*., p.

466). It is of course possible that some members of anonymous juries would have been harmed had they been identified; we cannot tell. It seems, however, that fear of harm to jurors in Northern Ireland during the “troubles” was very much justified. One case from 1998, “involving eight men charged with armed robbery in Belfast, was certified for jury trial despite reports that the men had IRA connections. Seven trials involving seven juries reportedly took place before the case was finally stopped, and one of the trials collapsed amid allegations of jury tampering” (Jackson, Quinn and O’Malley 1999, p. 223).

The Irish remedy to the problem of juror intimidation was not jury anonymity, but the creation of “Diplock courts”, trials by a judge rather than by jury. It was widely believed that in a small country (about 2 million citizens), one could not achieve juror anonymity. Paramilitary groups needed only to identify one juror in order to use that person to find out the others on the panel. In the United States, at least in big cities, anonymity was easier to achieve. It has been objected, however, that “this urban-areas-only limitation would mean that a defendant accused of theft in one part of the state would face a drastically different criminal trial procedure than would a similar defendant in another part of the state” (Rastgoufard 2003, p. 1019; see also Abramovsky and Edelstein 1998-99, p. 481). The objection is related to the proposal by King (1996) to make anonymity a routine rather than an exceptional jury feature, an idea to which I return shortly.

The main objection against anonymity in high-profile cases is that it will bias the jurors against the defendant and undermine the presumption of innocence. In practice, judges have occasionally tried to meet this problem by falsely telling the jurors that anonymity was a regular practice, or that its main purpose was to protect them against the media rather than against the accused (Abramovsky and Edelstein 1998-99, p. 472-76). In one local jurisdiction, Fairfield County in Ohio, all defendants are in fact routinely tried by anonymous juries, absent a showing of good cause for publicity (Rastgoufard

2003, p. 1016-17). As noted, King (1996) argues for a generalization of this practice. One critic (Rastgoufard 2003, p. 1020) responds that "even though [routine] jury anonymity would not suggest that any one defendant is more guilty than another, it would suggest that defendants as a whole are, generally speaking, guilty of the crimes charged and that jurors need protection. This, of course, would violate a defendant's right to a presumption of innocence". Abramovsky and Edelstein (1998-99, p. 472) make the same point.

As a reductio ad absurdum argument against the claim that jury anonymity would violate the First Amendment, King (1996, p. 154 n.123) asserts that "As an analogy, one could not very well claim that the failure to provide voter identities deprives the press of the ability to cover elections and their results". In modern societies, elections are in fact the only decisions in which *the identity of the deciders is unknown*. By and large, nobody except election officials knows who casts a vote, who puts a blank vote in the ballot box, and who abstains by staying home. Although I agree with King in that anonymity is not an obstacle to adequate press coverage either of elections or of jury trials, her proposal to overcome juror bias caused by anonymity by making it a routine practice is less convincing. Once again, however, the causal arguments on either side are mostly conjectural.

X. Are there any constraints on the information presented to the jury?

In civil as well as in criminal cases, "juror blindfolding" is common. Before I proceed to examples and discussion, let me note some cases of (almost) literal blindfolding. In the dialogue *Hermotimus* by Lucian of Samosata we read that

> Reason insists that the owner of it must further be allowed ample time; he will collect the rival candidates together, and make his choice with long, lingering, repeated deliberation; he will give no heed to the candidate's age, appearance, or repute for wisdom, but perform his functions like the

> [Athenian court of the] Areopagites, who judge in the darkness of night, *so that they must regard not the pleaders*, but the pleadings (my italics).

In Plutarch's *Life of Lycurgus*, we read the following description of voting in Sparta:

> The manner of their election was as follows: The people being called together, some selected persons were locked up in a room near the place of election, so contrived that they *could neither see nor be seen*, but could only hear the noise of the assembly without; for they decided this, as most other affairs of moment, by the shouts of the people. This done, the competitors were not brought in and presented all together, but one after another by lot, and passed in order through the assembly without speaking a word. Those who were locked up had writing-tables with them, in which they recorded and marked each shout by its loudness, without knowing in favor of which candidate each of them was made, but merely that they came first, second, third, and so forth. He who was found to have the most and loudest acclamations was declared senator duly elected. (My italics.)

Goldin and Rouse (2000) studied the impact of having a screen between audition committees and applicants for positions in an orchestra, and found that it led to a substantial increase in the hiring of female musicians. As they observe, the effect is somewhat similar to double-blind refereeing in scholarly journals.

Note, however, a difference among these four cases. The Areopagites and the musical audition committee were screened from certain *perceptions* that might have an undesirable impact on their choices. The Spartan voters and journal referees are screened from irrelevant and possibly bias-inducing *information* about candidates or authors. Both issues arise in jury cases. Although perception-screening is unlikely to be realized, the issue merits a brief discussion.

Two perceptual bias-triggering factors are gender and race. As juries, unlike musical audition committees, do not seem to be biased against women, I limit myself to race. Following a proposal to allow anonymity of the defendant in celebrity cases (Morris 2003), a Note in *Georgetown Journal of*

Legal Ethics (2005) extended the argument to minority defendants. In fact, whereas the former article simply argued for *name anonymity*, the latter advocates for *invisibility*, that is, for allowing the defendant to be physically absent from the courtroom throughout the trial.[12] If witnesses have to identify the defendant, they can do so through closed circuit video technology that shields the defendant from the jury. As the Note points out, perhaps the most difficult "is the issue of creating an inference of guilt among jurors should a defendant choose to remain anonymous or absent. Jurors may view the absence of a defendant at a trial as an indication of guilt if it is not a practice that is often followed by defendants" (p. 1159). Unlike the bias created by juror anonymity, however, one cannot attenuate the anti-defendant bias created by defendant anonymity by making it mandatory.

The screening of *information* is a much more important issue, at least in the sense that it is very widely done. Let me just cite a few examples.

In criminal cases, "the criminal record of the defendant who does not testify generally cannot be made available to juries as evidence of his or her propensity to commit such acts. While a defendant with such a record may be more likely to have committed the offense currently charged, the probative value of this information is seen as outweighed by its potential prejudicial effect" (Diamond, Casper and Ostergren 1989, p. 249). Also, a number of states do not permit the parties or the court to inform the jury what sentence the offender would be eligible to receive if the jury refused to impose death (*ibid*., p. 254).

In civil cases, jurors are not supposed to know "(1) that a plaintiff who bears 50 percent of the responsibility for his or her losses will be barred from any recovery; (2) that the defendant carries liability insurance; (3) that the

[12] If he or she has a characteristic given name or family name indicating ethnic origins, that might also have to be withheld. It is currently widely discussed whether CVs for job applications ought to be anonymized in a similar way.

parties have arranged for payment of attorneys' fees; (4) that the award may not be subject to taxation; (5) that original parties to the suit have settled; (6) that settlement offers have been rejected; (7) that repairs were made following an accident; and (8) that a jury award in a private antitrust suit is by statute automatically tripled by the court" (*ibid.).*

In these cases information is constrained by *rules*. In one important case, it is left to the discretion of the judge. In theory, Anglo-American jurors are supposed to be finders of fact only, and to leave the law to the court. Confusingly, they are also allowed to decide according to their conscience (jury nullification). Since jurors may not be aware of their power in this respect, the question arises whether the judge should tell them. In United States v. Dougherty, the Court found, in the paraphrase of Horowitz (2007-08, p. 434) that "nullification may occasionally be a good thing, but jurors definitely ought not to be informed of this option". In other words, the court "expressed a preference for *sua sponte* nullification by the naïve jurors" (*ibid*.). As is easily imagined, arguments for mandatory information to the jurors about their right to nullify are also found.

Rather than pursue the rationale of the rules of admissible evidence and their (sometimes dubious) efficacy, let me briefly discuss what happens when jurors are *instructed to ignore* certain informations rather than simply *not receiving* them. Generally speaking, deciding to ignore what you know is a psychologically difficult task. Even when jurors are told that the defendant's criminal record is relevant only for the credibility of his statements and not for his guilt (over and above what the lack of credibility might imply for his guilt), they tend to use the record as *direct* evidence against him (Wissler and Saks 1985). Moreover, being *told* to ignore something easily triggers *reactance*, the tendency to rebel against the perceived loss of autonomy (Brehm 1966). Patients sometimes refrain from taking their medications because they are *told* to take them (Fogarty 1997). Similarly, it seems that jurors often put more

weight on evidence when instructed to ignore it (Lieberman and Sales 1997, p. 607-8).

XI. Concluding comments

It should be clear from this survey that issues of secrecy and publicity are at the core of jury organization. To put it more strongly, I do not know of any other issue in which institutional designers have a comparable obsession with secrecy. Feelings run high on all sides in the controversies. The knowledge that can be denied, impeded or granted to jurors or non-jurors includes the following

- Juror knowledge of what other jurors think
- Knowledge by non-jurors of how jurors think
- Juror knowledge of how other jurors vote on verdict and sentence
- Juror knowledge of how other jurors vote on the choice of foreperson
- Knowledge by non-jurors of how individual jurors vote
- Knowledge by non-jurors of how groups of jurors vote
- Knowledge by jurors or others of how many voted to convict
- Juror knowledge about certain aspects of the case
- Juror knowledge about the law (nullification)
- Defendant knowledge of the identity of the jurors
- Juror knowledge of the identity of the defendant

We have seen that some politicians and scholars have tried to justify secret votes and even anonymity of the participants with reference to other democratic institutions, such as elections and assembly decision-making. In my opinion, such arguments are bound to fail. The choice between secrecy and publicity along the nine dimensions explored above should be made with a view to the effects on the factual accuracy and normative rightness of the decisions (and perhaps also on the costs of the system).

The effects of mandatory secrecy will in general differ from those of optional secrecy. In some cases, optional secrecy is pointless or self-defeating. If voters can let others observe how they vote, their choice to hide the vote may already allow others to infer how they are going to vote. In revolutionary assemblies, it may be possible to infer the voting preferences of those who oppose roll call voting. Similarly, if secret voting were optional in court-martials and a junior officer requested it, his superior officers might be able to guess how he intended to vote. Also, when the choice of an anonymous jury or (hypothetically) of an invisible defendant is optional, it is likely that jurors will infer the guilt of the accused. As we saw, however, it has been argued that they would make the same inference with mandatory jury anonymity.

With optional secret ballots, the direction of any causal effects is more difficult to assess, because of endogeneity. Does the secret ballot tend to produce hung juries, or are divided juries more likely to use the secret ballot? As Kerr and MacCoun (1985, p. 352) note, “jurors who prefer to use a secret ballot may also act in other ways that make agreement less likely (e.g., avoiding direct and open conflict that may be necessary to achieve unanimity)”. Similarly, if defendants had the option to make themselves invisible to the jury and those who chose it turned out to be convicted at higher rates, it might either be because of the impact of invisibility on the jury or because of self-selection by the accused.

Legislators may also attempt to achieve the intended effects of secrecy by other means. If they want to reduce acquittal rates, they may breach jury secrecy by adjoining magistrates to the jury, reduce the majority needed for conviction, or increase the property qualification for jurors. In nineteenth- and twentieth century France, all three responses were observed. If they want to reduce the number of hung juries, they may either enforce open voting (assuming that the secret ballot favors hung juries) or reduce the majority needed for conviction. To avoid self-selection of the foreperson, they may

either require that he or she be elected by secret ballot or chosen by lottery or by age. To avoid bribery of jurors, they may either impose use of secret ballot (but not also require unanimity for conviction) or require jurors to be wealthy enough to be immune to bribery. Random choice of jurors can also serve as a bribery prevention device. Random choice of foreperson and secret voting can serve as alternative ways of preventing self-selected individuals from domineering the jury.

Finally, I have been at pains to underscore the conjectural nature of many of the claims about the *effects* of secrecy and publicity. Often, a proposed regime change will arguably have some positive and some negative effects, with the net effect often indeterminate. In practice, this confers a great advantage to the status quo.

REFERENCES

Abramovsky, A. and Edelstein, J. (1996), “Cameras in the jury room”,

Abramovsky, A. and Edelstein, J. (1998-99), *Arizona State Law Journal* 28, 865-92.

AM = *L’Ancien Moniteur*, Paris 1840-45

Bentham, J. (1999), *Political Tactics*, Oxford University Press

Brehm, J. (1966), A *Theory of Psychological Reactance*, New York: Academic Press.

Boster, F., Hunter, J., and Hale, J. (1991), “An information-processing model of jury decision making”, *Communication Research* 18, 524 -547.

Brinks, D. (2004), *Legal tolls and the rule of law*, Ph. D. Dissertation Notre Dame University.

Campbell, E. (1985), “Jury secrecy and contempt of court”, Monash Law Review 11, 169-200.

Castaldo, A. (1989), *Les méthodes de travail de la Constituante*, Paris: Presses Universitaires de France

Claverie, E. (1984), “De la difficulté de faire un citoyen: les ‘acquittements scandaleux’ du jury dans la France provinciale du début du XIX^{e} siècle”, *Études Rurales* 95-96 (1984), 143-66.

Connes, F. (2008), *La sécurité des systèmes de vote*, Thèse de Droit, Université Paris II.

Courselle, D. (2005-2006), “Struggling with jury secrecy, jury independence, and jury reform”, *South Carolina Law Review* 57, 203-54.

Daly, G. (2004), “Jury secrecy: R v Mirza; R v Connor and Rollock”, The *International Journal of Evidence and Proof* 8, 184-90.

Dana, J., Cain, D. and Dawes, R. (2006), “What you don’t know can’t hurt me”, *Organizational Behavior and Human Decision Processes* 100, 193-201.

Darbyshire, P., Maughan, A. and Stewart, A. (2002), “What can the English legal system learn from jury research published up to 2001?”, Kingston upon Thames, Surrey, U.K. : Kingston Business School.

Devine, D. et al. (2001), "Jury decision-making: 45 years of empirical research on deliberating groups" *Psychology, Public Policy, and Law*, 7 622–727.

Diamond, S., Casper, J. and Ostergren, L. (1989), "Blindfolding the jury", *Law and Contemporary Problems* 52, 247-68.

Elster, J. (2004), *Closing the Books*, Cambridge University Press

Elster, J. (2007), *Explaining Social Behavior*, Cambridge University Press

Elster 2009, *Le désintéressement*, Paris:Seuil

Esmein, A. (1913), *A History of Continental Criminal Procedure*, Boston: Little, Brown.

Farrand, M., ed. (1966), *Records of the Federal Convention*, New Haven CO: Yale University Press.

Fogarty J. (1997), « Reactance theory and patient noncompliance », *Social Science and Medicine* 45, 1277-88.

Forsyth, W. (1875), *History of Trial by Jury*, at http://www.constitution.org/cmt/wf/htj.htm.

Garde, P. (2001), "The Danish jury", *International Review of Penal Law* 72, 87-120.

Goldin and Rouse (2000)

Haslam, S. et al. (1998), "Inspecting the emperor's clothes: Evidence that random selection of leaders can enhance group performance", *Group Dynamics* 2, 168-84.

Henningsen, D. et al. (2004), "It's Good to be leader: The influence of randomly and systematically selected leaders on decision-making groups", *Group Dynamics* 8, 62-76.

Hoeffel, J. (2005), "Risking the eight amendment: Arbitrariness, juries, and discretion in capital cases", *Boston College Law Review* 46, 705-70.

Holland, R. (2006), "Improving criminal jury verdicts: Learning from the court-martial", *Journal of Criminal Law & Criminology* 97,101-146.

Horowitz, I. (2007-08), “Jury nullification: An empirical perspective”, *Northern Illinois University Law Review* 28, 425-51.

Horwitz, A. (2004-5), “Mixed signals and subtle cues: Jury independence and judicial appointment of the jury foreperson”, *Catholic University Law Review* 54, 829-878.

Howard, B. (1904), “Trial by jury in Germany” *Political Science Quarterly* 19, 650-672.

Jackson, J., Quinn, K. and O’Malley, T. (1999), “The jury system in contemporary Ireland: In the shadow of a troubled past”, *Law and Contemporary Problems* 62, 203-14.

Kalven, H. and Zeisel, H. (1966), *The American Jury*, University of Chicago Press.

Kerr, N. and MacCoun, R. (1985), “The effects of jury size and polling method on the process and product of jury deliberation”, *Journal of Personality and Social Psychology* 48, 349-63.

King, N. (1996), “Nameless justice: The case for the routine use of anonymous juries in criminal trials”, *Vanderbilt Law Review* 49, 123-59.

Lieberman, J. and Sales, B. (1997), “What social science teaches us about the jury instruction process”, *Psychology, Public Policy, and Law* 3, 589-644.

Markovitz, A. (2000-2001), “Jury secrecy during deliberations”, *Yale Law Journal* 110,

Meade, E. and Stasavage, D. (2008), “Publicity of debate and the incentive to dissent: Evidence from the US Federal Reserve”, *Economic Journal* 118, 695-717.

Morris, J. (2003), “The anonymous accused”, *Boston College Law Review* 44, 901-46.

Moses, R. (2009) “Scratch the juror’s itch - the defender's role in creating a fair deliberative process”, at
http://juryargument.homestead.com/Sample4.html

Mukhopadhaya, K. (2003), “Jury size and thee rider problem”, Journal of Law, Economics and Organization 19, 24-44.

Note: “Trumping the race card: Permitting criminal defendants to remain anonymous and absent from trials to eliminate racial jury bias”, *Georgetown Journal of Legal Ethics 18* (2005), 1150-60.

Note: “Public disclosures of jury deliberations”, *Harvard Law Review* 96 (1983), 886-906.

Page. S. (2007), *The Difference*, Princeton University Press

Pierre, E. (18930, *Traité de droit politique electoral et parlementaire*, Paris.

Rastgoufard, B. (2003), “Pay attention to that green curtain: Anonymity and the courts”, *Case Western Reserve Law Review* 53 1009-40.

Ruprecht, C. (1997-98), “Are verdicts, too, like sausages? : Lifting the cloak on jury secrecy”, *University of Pennsylvania Law Review* 146, 217-68.

Schwartz, E. (2006), “Secret ballot or a show of hands?”, *Lawyers Weekly USA*, February 27.

Siegismund, E. (2000), “The function of honorary judges in criminal law proceedings in Germany”, at www.unafei.or.jp/english/pdf/PDF_rms_all/no56.pdf

Smith, A. (1759/1976), *The Theory of Moral Sentiments*, Oxford University Press.

Stavely, E. (1972), *Greek and Roman Voting and Elections*, London: Thames and Hudson.

Stephens, J. (1883), *A History of the Criminal Law of England*, London: Macmillan.

Sunstein, C. et al. (2002), *Punitive Damages*, University of Chicago Press.

Tocqueville, A. de (2004), *Democracy in America*, New York: Library of America

Urfalino, P. (2007), "La décision par consensus apparent. Nature et propriétés", *Revue Européenne des Sciences Sociales* 45, 34-59

US Senate (1956), “Recording of jury deliberations”, Washington D.C: Government Printing Office.

Vernier, D. (2007), *Jury et démocratie*, Thèse de Doctorat, École Normale Supérieure de Cachan.

Waters, N. and Hans, V. (2009), "A jury of one: Opinion formation, conformity, and dissent on juries", *Journal of Empirical Legal Studies* 6, 513-40.

Wissler, R. and Saks, M. (1985), "On the inefficacy of limiting jury instructions", *Psychology, Public Policy, and Law* 7, 37-48.