

BOOK REVIEWS

THE AMERICAN JURY. BY HARRY KALVEN, JR. & HANS ZEISEL. Boston: Little, Brown & Co., 1966. Pp. viii, 559. \$15.00.

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The American Jury is only the first major¹ product of the University of Chicago's study of the jury system and as such it may be unfair to consider it in isolation. Later books scheduled for publication in the relatively near future may make clear the case for this mammoth empirical study—a case which regrettably is not made by this book. This, of course, is not to say that the book is a bad one—quite the contrary, it is a very good one. It is just that for scholars of the stature of Professors Kalven and Zeisel—and there are very few of these—and after the amount of advance publicity the study has received, *The American Jury*² comes as somewhat of a disappointment.

The methodology of the study is simple—perhaps deceptively so. A goodly number of judges³ filled out questionnaires relating to criminal jury trials taking place before them. These questionnaires, in addition to requiring the facts and surrounding circumstances of the case, asked the judge to note both the jury's decision and what would have been his own had he himself decided the case. With this data and the help of punched data cards—the hallmark of empirical research today—the authors attempted to isolate the factors which move the jury in the modern criminal trial.

Though Professors Kalven and Zeisel do not eschew a detour when their data supports conclusions not directly related to the main thrust of their study, that thrust remains the analysis of those cases where the judge and his jury reached different conclusions about the same case.⁴ Justification for this is that these “disagreements,”⁵ in

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¹ ZEISEL, KALVEN & BUCHHOLZ, *DELAY IN THE COURT* (1959) makes use of some of the earlier findings of the jury project. In addition, a whole host of articles, a bibliography of which is included in *The American Jury*, is attributable to the study.

² The title is somewhat less than completely revealing because *The American Jury* is entirely devoted to the performance of the jury in criminal cases. A later work on the jury in civil cases is due to be published in somewhat over a year.

³ Although the total number of judges participating was 555, 9% of the sample was attributable to only 1% of the judges and 50% of the sample attributable to 15% of the judges.

⁴ Some of the side tours are almost equally interesting—*e.g.*, the statistics on the actual percentage of jury trials, waivers of jury and acquittals for various crimes as well as a fascinating chapter on the hung jury.

⁵ Not of course to be confused with the somewhat formal term for the hung jury.

a sense, are the real measure of the performance of the jury. When we debate the value of the jury we do not attempt to compare it with a future computer which could evaluate all evidence with complete rationality; rather we ask how the decisions of the juries compare with those of judges whose training and roles are so very different.

It is, of course, not to be thought that jury trials represent a fair sample of all criminal trials, not, at least, so long as a defense counsel can waive jury,⁶ where he concludes that his client's chances of acquittal (or of conviction on a lesser offense) are better before a judge. Thus, one might suspect that, even if no more recondite factor were present, the preponderance of disagreements between judge and jury, in those cases actually tried before a jury, would be cases where the jury was more favorable to the defendant than was the judge. Such, of course, turns out to be the case.⁷

The more precise information sought in *The American Jury* is extracted by two major methods. First, the authors classify the judges' explanations for the differences between their decisions and those of the jury. This at least shows what the judges thought was the cause of the disagreements. Secondly, using a more "scientific" technique, the authors, still relying upon the judges' statements of the facts of the cases, use matrices involving a host of factors to see what effect each has on the percentage of disagreements between judge and jury.

As an example of this methodology, consider the verdict pattern for statutory rape in the study's sample. In no case did the jury convict where the judge would have acquitted, while the jury acquitted in 31% of the cases in which the judge would have convicted. (P. 276.) This figure, however, merely indicates that juries are more lenient toward the defendant than judges would have been in those statutory rape cases actually tried before juries. We learn more from the table showing that in cases involving girls of thirteen years and older, the jury acquitted 38% of the defendants whom the judge would have convicted. (P. 277.) (What happened here was that twelve cases—all, of course, involving girls under thirteen—were withdrawn from the tables and in every one of these in which the judge would have convicted, so did the jury.) Somewhat more striking conclusions emerge, however, where the reputation of the victim is bad. In such cases the jury acquitted fully 60% of the defendants whom the judge would have convicted. (P. 277.) Moreover, to indicate that this

⁶ Although, in theory, waiver of jury requires the consent of the prosecutor as well as the defendant, the prosecutor's continuing relationship with the judge makes his refusal to waive jury extremely rare.

⁷ Thus, in 13.4% of the cases both judge and jury acquitted. In 62.2% of the cases both judge and jury convicted. In 16.9% of the cases the judge would have convicted while the jury acquitted and in 2.2% of the cases the jury convicted while the judge would have acquitted. The remaining 5.5% of the cases resulted in hung juries.

jury reaction represented a distinct jury feeling that statutory rape is somehow less criminal where the victim possesses a bad reputation and was not merely a differential weighing of the credibility of a "bad" girl (a fact which might be interesting in *itself*), the authors set out yet another table. This showed that of those cases which the judge regarded as clear for conviction (presumably cases where the jury was most unlikely to have based any disagreement on a differential weighing of the evidence) the jury disagreed 50% of the time where the victim had a poor reputation, but did so only 17% of the time where the victim's reputation was not poor. (P. 278.)

Although the above figures are quite interesting and in some sense would have to be regarded as the most significant type of information in the study, the tabulations of the judges' comments on the cases, to my mind, illustrate many of the same points with at least equal clarity. This is especially true as to statutory rape because, in addition to the natural attrition of any sample caused by subdividing out one variable after another, the statutory rape sample was further truncated by the fact that the questions on the reputation of the victim were included only in those questionnaires covering the last third of the sample of cases.⁸ While the authors are supremely capable of making a virtue of adversity,⁹ in this case the fact that the first questionnaire differed from the second completely lacked any redeeming feature. As a result, their conclusions as to the percentage differences between judge and jury verdicts in the clear cases, by reputation of the victim, are based on a sample of only ten cases. The authors, of course, recognized:

In this simplistic form the table can be only a weak proof Although the numbers are desperately small, they show that even in clear cases the jury reacts to the difference between the good girl and the bad girl (Pp. 277-78.)

One need not be an expert in statistical theory to realize that the size of their sample does not permit the authors to make the subdivision after subdivision which would be necessary to draw meaningful conclusions in many of the situations¹⁰ which they discuss. The methodological problems of the study, however, are less appropriate for these pages

⁸ The total sample of cases was 3,576. The first questionnaire was used for 2,385 cases while the second was used for 1,191.

⁹ "We had the rare chance of designing a second questionnaire after long experience with a first one" (P. 47.)

¹⁰ One of the most dramatic instances of this is in the table on the effect of superior defendant counsel on jury disagreement where judge convicts. That table, although showing much that is plausible, also reveals that in a clear case with a sympathetic defendant the defense does much better if it does not have a superior counsel. Thus, of the cases where the judge convicted and the defendant was sympathetic, the jury disagreed only 13% of the time where the defense counsel was superior but 35% of the time where he was not.

than for those of the journals of behavioral sciences—which I am sure will rise, at great length, to the challenge. Nonetheless, one item does deserve comment here. Though the authors at many points refer to the impact of the superiority of one side's counsel over the other's, their method of determining this is subject to serious question. First of all, the questions asked to determine this varied in the two questionnaires used. The second asked the question directly, "Was the case tried equally well on both sides," and allowed for the answers "Yes," "No, Prosecutor was better," and "No, Defense Lawyer was better." In the first questionnaire the question was asked "somewhat differently." Here the two relevant questions were, "Was the defendant's attorney an experienced trial lawyer?" and "Was the prosecuting attorney an experienced trial lawyer?" The size of the sample made it imperative to use the answers to Questionnaire One as well as Two, so in tabulating the first Questionnaire, "if one question was answered 'yes' and the other 'no,' imbalance of counsel was inferred." (P. 353.) This bold inference (one which every trial lawyer knows to be a very dangerous one) casts strong suspicion on the first questionnaire—but the problem does not end there. The fact is that the answers to the second questionnaire are also suspect. Before one could safely attempt to correlate superiority of counsel with jury disagreements, one would have to be sure that the judge's comments on the superiority of counsel were not influenced by the very fact of disagreement. Although the judge was instructed to write his verdict down before the jury returned (p. 531), there was no such instruction with respect to the abilities of counsel. Thus the judge might well have defined a superior lawyer at least in part as one who could talk a jury into an erroneous verdict and hence his view might reflect the result as much as isolate an independent cause. Moreover, even apart from this, the judge, whose training and class background may differ greatly from that of the jury, might have great difficulty in determining the superiority of counsel in its only relevant aspect—its impact upon the jury.

Despite these and other problems of methodology, which make suspect many of the more specific conclusions of the study, we can say that *The American Jury* does offer proof of varying degrees of conclusiveness on many issues. Most important, it teaches two vital lessons—one, that the jury often does not follow the dictates of the law when its sympathies run in a contrary direction; the other, and in this age of fact scepticism, perhaps even more significant, that often the jury does follow the dictates of the law even though its sympathies exert a contrary pull. In any individual case one can only estimate the likelihood that the jury will bend the law and, though the quantitative data in *The American Jury* is less than conclusive, the book is to date the finest work I know for bringing out the many factors which

constitute "jury appeal." Thus, if it does not prove, it makes more than plausible the influence of dozens of factors. We learn that the jury:¹¹ applies a somewhat broader privilege of self-defense than given by the law (pp. 221-42); often becomes impatient with trivial cases (pp. 258-86); weighs the moral quality and fault of the victim as well as of the defendant (pp. 242-58); is considerably less sympathetic with prosecutions under some laws than under others (pp. 286-301); and considers the possible punishments as well as the guilt of the defendant (pp. 306-13).

In many cases, the jury will be able to give effect to its feelings on these and other matters through what the authors refer to as the "liberation" hypothesis:

The sentiment gives direction to the resolution of the evidentiary doubt; the evidentiary doubt provides a favorable condition for response to the sentiment. The closeness of the evidence makes it possible for the jury to respond to sentiment *by liberating* it through the discipline of the evidence. (P. 165.)

Where the jury is not so "liberated," as many somewhat cynical young trial lawyers discover to their great surprise, it more often adheres to its role as defined by the trial judge and casts aside its sympathies. In *Anatomy of a Murder* it was put slightly differently:

Even jurors have to save face. Get this now. The jury in your case might simply be dying to let you go on your own story, or because they have fallen for your wife, or have learned to hate Barney Quill's guts, or all of these things and more. But if the judge—who's got nice big legal face to save, too—must under the law virtually tell the jurors to convict you, as I think he must now surely do, then the only way they can possibly let you go is by flying in the face of the judge's instructions—that is, by losing, not saving face. Don't you see? You and I would be in there asking twelve citizens, twelve total strangers, to publicly lose their precious face to save yours. It's asking a lot¹²

This, of course, brings us to what may well be the most common charge leveled against *The American Jury*—that it only demonstrates the obvious. If this were so it would hardly occasion surprise. After all, the vast folklore of trial lawyers is in a sense a much larger sample

¹¹ Of course many of these factors may also move the judge. The study has no way of measuring this but does demonstrate that however much they move the judge, they move the jury more.

¹² TRAVER, *ANATOMY OF A MURDER* 42 (1958).

than that of *The American Jury*. This is not to say—as I am sure that some reviewers will—that all the empirical evidence in *The American Jury* has added nothing to our total knowledge. At the very least it is a bold attempt to quantify the strength of many of the factors which may be obvious to trial lawyers only in a rough qualitative sense.¹³

Moreover, even if its proofs were merely of the obvious, this would not in itself be a fatal indictment. The fact is that one major purpose of *The American Jury* is to demonstrate that this type of large-scale empirical study can prove things—and if this one does not prove a great deal it may well be, ironically, merely because it was not large-scale enough.

One cannot, however, close a review of such a book on a negative note. The fact is that entirely apart from its analysis of the jury as it differs from the judge, *The American Jury* contains a wealth of information essential to any student of the administration of criminal justice in the United States. The chapter on the imposition of the death penalty should be required reading for anyone undertaking the debate on capital punishment. The figures on the quality of representation which the poor and the Negro receive are fascinating, and the comments on subcultural crime is one which will bear analysis and discussion for some time to come.

Moreover, though the primary constituency of *The American Jury* is the academic community—thus requiring that the book be judged by different standards—the book is a must for all trial lawyers or would-be trial lawyers. First, it is delightfully and sensitively written. In addition, it teaches the beginning trial lawyer many a lesson which he might acquire during his career at vastly greater cost. And for those more experienced trial lawyers the book has a very different value. For them the book is more an emotional than an educational experience. In the pages of *The American Jury* one meets so many old friends that it is almost like a speeded-up review of a career at the bar. In each category one can remember a case or two where one or more of the factors discussed played a part. Each table brings to mind a case where one feels he could increase the sample. Sometimes a table will quiet a nagging feeling that this or that case should certainly have been won. Other times it will reveal that a victory was even more of an achievement than it appeared at the time. Most of the time one will just nod agreement. Most of the time, but

¹³ Now that the book is out, whether the conclusions of *The American Jury* are obvious is as impossible to demonstrate as to disprove. Although at almost all points *The American Jury* meets possible criticism of its methodology and conclusions head-on and discusses them with sensitivity and sophistication, the authors' anticipatory defenses regrettably do not include any reply to this attack. Perhaps in the future an additional questionnaire on the conclusions of such studies might be given in advance to the repositories of the conventional wisdom. The obviousness of what after the fact appears obvious is in itself a field for study.

not always, however—for there remains more to be learned from *The American Jury*. It is extremely doubtful that any lawyer has experience so broad as to cover all the varieties of cases discussed by Professors Kalven and Zeisel. Thus the many lawyers who have never tried an indecent exposure case—or discussed the problem with those who have—may not appreciate the fact, which comes out with some clarity from tables (p. 275), that the jury in such cases follows a double standard, considering indecent exposure to an adult far less serious than to a child. It is hardly an unreasonable conclusion, but one which might well not jump to mind.

It is possible that the contributions of *The American Jury* may not be noticed by those who have expected too much. Nonetheless, if one puts aside this quite natural feeling, one can heartily recommend this book to any serious student of the law. And though, considering their high aims, this will be insufficient consolation to its authors, it is nonetheless a great tribute to them that *The American Jury* can be both somewhat of a disappointment and yet not only required reading for all those interested in the functioning of American justice but also an informative, interesting and indeed entertaining experience.

PURSUIT OF AGREEMENT: PSYCHIATRY AND THE
LAW. BY JONAS B. ROBITSCHER. Philadelphia: J. B. Lippincott
Co., 1966. Pp. 260. \$8.00.

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The psychiatrist is a familiar, indeed a ubiquitous, figure in American courts. The weight to be accorded his opinions, the nature of his testimony, his role as a witness for a litigant, the state or as a so-called "neutral" expert are subjects of innumerable learned legal books and articles.¹ The validity of convictions and commitments often turns on the exact phraseology of the question to be asked the psychiatrist and the wording of his reply.

The extraordinary assimilative powers of the common law have encompassed, at different times, trial by ordeal as well as the most sophisticated techniques of demonstrative evidence and scientific proof. Recently, however, the domination of the trial by the expert psychiatric witness has posed unprecedented problems. On occasion a noted psychiatrist has even advised the court that the action of a defendant could not rise to murder in the first degree but only to murder in the second degree.

Many lawyers and some judges, seeking to mitigate the harshness of the M'Naghten Rule,² have turned to the psychiatrist for the sanctity of "scientific" opinion to authorize the formulation of what would appear to be a more humane and liberal doctrine.³ Other courts have relegated the testimony of the psychiatrist to the same probative level as that of the most uninformed and ignorant lay witness.⁴ An occasional clear and lonely voice such as that of Dr. Thomas Szasz⁵ condemns the reliance of the courts upon the psychiatrist. Others decry the inadequacy of mental hospitals and treatment

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¹ See, *e.g.*, the perceptive Isaac Ray Award books: OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* (1953); ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* (1954); BIGGS, *THE GUILTY MIND; PSYCHIATRY AND THE LAW OF HOMICIDE* (1955).

² M'Naghten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843). The oft-quoted test of mental capacity in criminal law takes its name from this case. It is well to remember that the jury rendered a verdict of "not guilty, on the ground of insanity."

³ See the case of H. W., detailed at p. 157.

⁴ See *Commonwealth v. Woodhouse*, 401 Pa. 242, 260, 164 A.2d 98, 107 (1960).

⁵ See SZASZ, *LAW, LIBERTY AND PSYCHIATRY* (1963).

facilities. The definitive study of the American Bar Association⁶ has pointed up the failure of the law in many areas to protect the liberties of those whose mental capacity is called into question. Proposed palliatives and panaceas range from more and better hospitals⁷ to more and better legal procedures.⁸ But until the perceptive study by Jonas B. Robitscher, *Pursuit of Agreement: Psychiatry and the Law*, there has been little exploration of the inherent and fundamental incongruities of the American legal system and the role of the professional psychiatrist.

Dr. Robitscher, who is not only both a psychiatrist and a lawyer, but also a man with ethical sensibilities and compassionate common sense, explains the limitations and functions of the law and of psychiatry. He ranges briefly over the many fields from marriage to murder in which the mentality of the individual is a dispositive legal fact. The methods and the aims of the two professions, he reveals, are different and frequently incompatible. Too often the law has forced upon the psychiatrist a role which he is unable to fulfill without violating the tenets and ethics of his profession. And the law in adapting to the standards of psychiatry has betrayed its role as guardian of the rights and liberties of the individual.

Dr. Robitscher's method is illuminating. He quotes from not atypical cases in which the courts have relied upon psychiatric testimony or reports and then analyzes the psychiatric findings and the legal decisions. The author questions tacit assumptions common to both professions. Can psychiatric probation, for example, protect society? Will incarceration in a state mental institution rehabilitate or cure the individual? Can a psychiatrist establish a proper doctor-patient relationship when the patient is under court order to submit to treatment or examination? And what becomes of the privileged relationship when the psychiatrist testifies that his patient is dangerous and should be incarcerated?

Dr. Robitscher also reveals the misuse of the legal process in those areas in which due process is ignored under the guise of treatment and care—notably in the cases of the sexual psychopath and the juvenile offender. The author concludes with respect to the underlying philosophy of detention and treatment that “where law has been pushed aside to make way for sociologic or psychiatric progress, the result has been possibly the tyranny of mere will.” (P. 171.)

Dr. Robitscher's lucid analysis of the fundamental incompatibility of the judicial process and psychiatry makes certain of the carefully propounded and developed forensic jurisprudential doctrines seem ir-

⁶ LINDMAN & MCINTYRE, *THE MENTALLY DISABLED AND THE LAW: THE REPORT OF THE AMERICAN BAR FOUNDATION ON THE RIGHTS OF THE MENTALLY ILL* (1961).

⁷ See Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960).

⁸ See Note, *Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill*, 56 YALE L.J. 1178 (1947).

relevant. For example, in reviewing the much discussed differences between the M'Naghten and Durham Rules,⁹ he points out that if the death penalty were abolished, the difficulties in fixing criminal responsibility might be less significant.

The fair, dispassionate concern of Dr. Robitscher is to accord to each profession its proper role in the disposition of the difficult problems of distraught human beings caught in a world of problems. To the medical profession he counsels moderation of the exaggerated claims which some advance on behalf of psychiatry. To the legal profession he urges the continued protection of the individual. Courts should no longer seek to force the psychiatrist into the Procrustean bed of hoary legal formulations. Nor should society blandly assume that placing individuals in mental hospitals is humane or progressive. The agreement between law and psychiatry which Dr. Robitscher seeks can come only after a painstaking re-examination of many problems and societal values. His book is invaluable to both professions and to the public in identifying the problems and pointing the way to some solutions.

⁹ See *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). Cf. the earlier case of *United States ex rel. Smith v. Baldi*, 192 F.2d 540, 567 (3d Cir. 1951), in which the dissenting judges point out: "A very large part of the confusion which invariably results in the trial of the criminal defendant alleged to be insane, lies in the fact that the law insists that the psychiatrist deal with mental states and conditions which do not exist save as legal conceptions."