

BOOK REVIEW*

A Jury of Whose Peers? The Cultural Politics of Juries in Australia.
KATE AUTY and SANDY TOUSSAINT (eds)
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Because Alfred the Great, when he invented trial by jury and knew that he had admirably framed it to secure justice in his age of the world, was not aware that in the nineteenth century the condition of things would be so entirely changed ... For how could he imagine that we simpletons would go on using his jury plan after circumstances had stripped it of its usefulness, any more than he could imagine that we would go on using his candle-clock after we had invented chronometers? In his day news could not travel fast, and hence he could easily find a jury of honest, intelligent men who had not heard of the case they were called to try – but in our day of telegraphs and newspapers his plan compels us to swear in juries composed of fools and rascals, because the system rigidly excludes honest men and men of brains.

– Mark Twain, *Roughing It* (1872), Chap XLVIII

A Jury of Whose Peers? The Cultural Politics of Juries in Australia picks out themes advanced variously through six essays and three jurors' accounts. Cohesion is often a big hurdle in a collection of essays. This collection is bound together, not as the title suggests by jurors' representativeness vis-à-vis defendants, but by various approaches that expose embedded insensitivities based on power, gender and race in Australia's criminal justice system.

The collection contains thought-provoking observations progressed by way of a baton-change of themes with a focus on those who participate in the system as outsiders. It begins with the juror as an outsider. There is also the Aboriginal Australian as an outsider, the woman as an outsider and, in Gaynor's essay, even the barrister is cast as an outsider. While jury issues arise in each essay, the failures mapped by the essays are not intrinsic to jury trials. For example, the *Kina* and *Osland* trials discussed by Ford, Auty and Scutt would have been no less flawed had they been juryless trials. Also, Auty's thought-provoking piece exposing the fate of Indigenous defendants in the Western Australian Courts of Native Affairs of the 1930s, 40s and 50s documents injustice in juryless courts. As Auty reveals, Australia's inability to deliver justice to its Indigenous people relates to issues that run deeper than its jury system.

Have Auty and Toussaint succumbed to treating the jury as the whipping boy¹ for systemic flaws in Australia's criminal justice system? They observe

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[w]hat we suggest is that the blend of secrecy, finality and power which repose in the jury and its cloistered deliberations, in social and cultural environments which are increasingly recognised as full of their own constructed meanings, presents a problem. We have suggested ... that the jury is founded on an opaque cultural politics which should be more exposed to the light.²

If this statement is an implicit acknowledgement that juries draw the criticism that should be directed to other sources entrenched in our criminal justice system, why not title the book, *Cultural Politics in Australian Criminal Justice?*

I JURIES

Drawing as it does on a talismanic catchcry of jury-based justice, the title of the collection leads one to wonder about the attraction of the jury as a focus of academic commentary. Mark Twain's declaration that jury trials function as historical has-beens fails to be reflected in the ongoing fascination with the institution, both in the Anglo-based criminal justice world and beyond. To underscore the jury's broad appeal one need only note that both Spain and Russia have recently adopted the jury system. Closer to home, the New Zealand Law Commission has engaged in a thorough and searching review seeking to better understand juror and jury behaviour. More recently, in 2004, England implemented radical changes to jury composition following Sir Robin Auld's 2001 *Review of the Criminal Courts*.³

For an out-dated institution, the jury continues to have quite a kick. Its enduring appeal arises from its symbolic worth, not its day-to-day utility. Its symbolism is also its functionality. Juries perform their justice by some sort of alchemy, defying logic to mysteriously grant a form of democratic integrity to the legal process – at least in appearance. Juries have been described as the 'lay acid' injected into the 'closed shop of the legal expert'.⁴ So while it is a notorious fact that jury trials reflect a minute percentage of court business, they nevertheless function like a lightning rod, drawing heated criticism that might be otherwise dangerously levelled by litigant or commentator at the judge, the lawyer, evidentiary rules or the substantive law.⁵ The paradox of the jury is multi-faceted.

Jurors have a special role, but one does not need to be special to be a juror. This was the core of Mark Twain's criticism. Elites – lawyers and judges, for example – are excluded from the Australian jury.⁶ Jurors are amateur fact-

1 See Geoff Mungham and Zenon Bankowski 'The Jury in the Legal System' in Pat Carlen (ed) *Sociology of Law* University of Keele, Sociological Review Monograph, (1976) 216–17.

2 Kate Auty, 'Afterword', in Kate Auty and Sandy Toussaint (eds), *A Jury of Whose Peers? The Cultural Politics of Juries in Australia* (2004) 120.

3 Lord Justice Sir Robin Auld, *A Review of the Criminal Courts of England and Wales* (2001).

4 Zenon Bankowski, 'The Jury and Reality' in Mark Findlay and Peter Duff, *The Jury Under Attack* (1988) 20.

5 See also, Mungham and Bankowski above n 1, 216–17

6 This is no longer the case in England.

finders, and may reveal a lack of understanding on occasions.⁷ Advocates for the retention of juries in criminal trials convert a juror's amateur status, and even the occasionally exposed failings of jury deliberation, into indicia of egalitarianism and emblematic democracy, touting the jury as a hallmark of impartiality. Jury trials work because 12 strangers cannot, except by an impossible stretch of the imagination, have a vested interest in the outcome of the case.

It is easy to see why juries maintain a popular as well as an academic attraction.

Our courts, and this usually means our jury trials, are constant sources of cinematic and literary entertainment. The popular culture of the courtroom makes the jury's mysterious workings both familiar to all – and known to none. We all 'know' what courts do, what a jury's task is and where tensions can lie. However, if the *Three Juror's Tales* and similar from-inside-the-jury expositions are representative, jurors often feel at a loss when they are in the jury room and in the courtroom. They themselves are outsiders in the criminal justice system. Yet, when they deliberate they are the only ones with the inside knowledge and the last say. Juries may exist to give symbolic legitimacy to the judgments and punishments meted out by our criminal justice system, but their potential power over the defendant and the prosecution is far from symbolic. As such, one might expect the system to be a stickler for the requirement that jurors play by the rules. However, as some recent New South Wales cases show,⁸ a juror's own misdeeds, for example in engaging in private extra-curial information-gathering, go largely unchecked. This is not by design;⁹ it is because jury business is a secret one.¹⁰ Rules of evidence may rigidly limit what jurors hear during a trial, but there are modest fetters on how they *actually* use information, however they may gain it. Though the professionals in the system – judge and counsel – can implore jurors to adopt the 'correct' approach, it is rare for scrutiny to attach to the jury.¹¹ In contrast, judges and counsel are scrutinised by appeal courts and the media regularly and systematically.

A final beguiling jury power – romanticised probably far beyond its real worth – is the occasionally-exercised ability of juries to be disobedient to political (or judicial) whim.¹²

And now, to the collection.

7 For a compelling depiction of such a revelation, see the text at 15, 20, 23 for Lola, Arthur and Mary's approaches to reaching a verdict.

8 But see *R v K* (2003) 59 NSWLR 431 and in *R v Skaf* (2004) 60 NSWLR 86 where the misdeeds of some jurors became known. See also *R v Connor*; *R v Mirza* [2004] UKHL 2.

9 It is standard phenomenon for jurors to be 'outed' for their misbehaviour after casual revelations made in social contexts, rather than through systematic checks and balances.

10 Some Australian jurisdictions have made it a criminal offence for a juror to engage in extra-curial enquiries improperly. See, eg, *Jury Act 1977* (NSW) ss 68C, 55DA.

11 Appeal courts may, in certain ways, scrutinise the results of jury decision-making such as the 'unsafe and unsatisfactory' verdict, the perverse verdict and the inconsistent verdict. These categories show that the jury verdict is not untouchable, but it is nevertheless, in broad terms, unreviewable.

12 See the examples given by Vodanovich, ch 3, 37–40.

II IS ANY JURY TRIAL 'EASY'?¹³

The *Three Jurors' Tales* pierce the veil of jury secrecy. The pressure of being an amateur in a demanding specialist environment is a recurring theme: the *Tales* portray jurors as outsiders to the trial process, excluded from important information and ignorant of how to understand important language.¹⁴ We learn of the discomfort – the emotional and intellectual challenge and confusion – of those conscripted to serve as jurors. It seems that none of these jurors felt that they, or at least their fellow jurors, were in command of the tasks expected of them. Uncertainty reigned. One juror felt that his energies and the endurance of emotional strain were under-appreciated: 'the jury experience was very harrowing. ... The unceremonious way jurors from our court were thrown into the wild after a stressful experience did not seem reasonable'.¹⁵

The essay that follows *Three Jurors' Tales* continues the sense of powerlessness and uncertainty, but with a new focus. Liz Gaynor writes of her own powerlessness and uncertainty on an occasion when she, as a barrister, waited for the jury to consider its verdict. As defence counsel¹⁶ Gaynor is ordinarily very much an insider in the system, but in this context she is an outsider waiting for the insider's ruling. The links between the *Tales* and this account drive home the humanness of the trial process and the ambiguity of power in the criminal justice system.

Gaynor's piece brings the reader sweetly to 'Jury Competence, Decision-making and Nullification' by Ivan Vodanovich. He begins with an eclectic history of the jury system and his essay romances the jury whilst also confronting selected foibles. Vodanovich chronicles some published observations by past jurors:

Lola used tarot cards to help her decide. Frank felt the law was wrong ... Arthur who never made notes, and took the odd nap in court, had somehow managed to form an opinion and Mary just felt sorry for the accused.¹⁷

Whilst this behaviour may not reflect 'the best traditions of jury duty' (to use Vodanovich's words), Vodanovich concludes with a 'thumbs-up' for the jury. He discusses some instances where juries have acted single-mindedly to prevent politically motivated injustice: Clive Ponting, the Eureka miners, the 18th century jurors in Penn's trial. But Vodanovich does not mention the jury acquittal of the white defendants in the first trial following the Myall Creek massacre (New South Wales, 1838), nor the directed acquittal in the *Bolden* case¹⁸ involving a white squatter (a friend of the judge, apparently) who killed Aboriginal

13 Auty, above n 2, 122.

14 See, eg, text at 17–18 (the description of the jury room, 'an interesting metaphor of exclusion') in *Three Jurors' Tales* and 22 (the explanation of reasonable doubt) also in *Three Jurors' Tales*.

15 *Three Jurors' Tales*, 22–23.

16 Liz Gaynor's essay is of her time as a defence counsel but she is described in the book as holding the position of a County Court judge in Victoria.

17 Di Jobbins, 'Positive Verdict on Jury Duty', Sydney Morning Herald, 27 June 1994, cited in Ivan Vodanovich's chapter, *Jury Competence, Decision-making and Nullification*, 46.

18 Michael Christie, 'The Language of Oppression: The Bolden Case, Victoria, 1845', in Michael Walsh and Colin Yallop (eds) *Language and Culture in Aboriginal Australia* (1993).

trespassers. Vodanovich's essay sits starkly next to Frankland's essay, which follows.

III OTHER OUTSIDERS

Richard Frankland's "'Mr Neal is Entitled to be an Agitator': Indigenous People Put upon Their Country' pivots around the theme of exclusion. Frankland, an Australian Aboriginal, reveals a jury and a justice system failing Indigenous Australia. As Frankland shows, the legal process welcomes Indigenous people into select domains only – chiefly, the dock and the gaol – and not into the jury room. Frankland writes as a committed Indigenous agitator devoted to changing a system that reflects the dominant power-base within white Australia. It may be troubling to have the secrecy of the jury room prevent important scrutiny of the functions of the 'justice' system, but what of the Indigenous voice? It is excluded from all corners of power. Frankland's piece is powerful.

Kate Auty's essay maintains the momentum captured by Frankland's essay as she develops compellingly some points he has raised. Auty chronicles some of the ways the criminal justice system in the 19th and 20th centuries aided the dispossession of black Australians by white Australia. Systematically Indigenous Australians were removed from their land, their families and their law. Her vehicle is history and her focus is Western Australia. Like Frankland, her points are less about the jury and more about the justice system. She exposes a racially divided, intolerant and ignorant justice system operating in the 19th and the early 20th century, reflecting, as she points out, the society within which it sits. The role of the jury is inextricably part of Auty's account of frontier injustice. Her fascinating analysis of the establishment and functioning of the Western Australian Courts of Native Affairs (1936–54) is about juryless 'justice'. Auty catalogues the failures and distortions of fair process in these courts and presents a vista of systematic exclusion of Indigenous people from fair and just processes. The 'protective' innovations of this court system included removing rights of appeal and trial by jury for Western Australian Indigenous defendants. These second-rate courts, which lasted into the middle of the twentieth century, determined the culpability of Indigenous defendants charged with capital offences. The courts were introduced to respond to the inequities of frontier justice and were (ironically) developed to remedy injustice arising from racist jury trials.

The next essay, by Auty and Sarah Ford focuses on *R v Kina*,¹⁹ the 1988 exemplar criminal case of lawyer–client miscommunication. It provides a further exposition of the Indigenous outsider in the Australian criminal justice system, this time in the role commonly allotted to Aboriginal Australians, namely as defendant. Kina, an Aboriginal woman, was 'silenced' by her lawyers' inability to obtain instructions that would have revealed brutality, sexual abuse and threats

19 (Unreported, Supreme Court of Queensland, Court of Criminal Appeal, 23 November 1988).

from her deceased partner, the man she killed. As a consequence, her lawyers did not realise that self-defence and provocation were available to her case. Perhaps, as Ford and Auty suggest, a jury of Kina's cultural peers might have made a difference. I doubt it. Robyn Kina's problem was giving her account to her lawyer. A female Indigenous lawyer may have made all the difference. At a second appeal attempt, Kina's conviction was quashed and a new trial ordered. Importantly it should be noted, it was a journalist, not the justice system, that exposed Kina's plight.

The final essay is a critique of the law's approach to 'battered women's syndrome'. Jocelyne Scutt critically examines aspects of the case of Heather Osland and her subsequent appeals.²⁰ The *Osland* trial was another murder prosecution of a woman defendant who had killed her abusive partner. Osland was convicted of murder. Her appeals were unsuccessful. Scutt's thesis is that the law gives a limited (and masculine) understanding of the reality of abusive relationships that end with a woman killing her violent partner. Scutt's examination has a strong feminist focus. She shows that even where a woman defendant is not disadvantaged by 'bicultural incompetence'²¹ and is able to reveal to her lawyer the reality of the violent circumstances she has suffered, the law remains culturally incapable of giving adequate voice to her circumstances in court. Instead the law relies on myths and stereotypes that fail to reflect 'battered women's reality'. Scutt suggests that to counter the myths and stereotypes:

Judges should inform juries in murder trials such as this, that women can be 'locked into' violent relationships through socialisation, including the opinions of neighbours or family friends, economics, responsibility for children, and the lack of alternatives such as housing, independent income, broader family support.

Are the issues in *Osland* and *Kina* best corrected by judges educating jurors? It is problematic to rely on judges to undertake the task of educating the jury against misogynist stereotypes, but there is precedent. Judges in some Australian states must direct juries about the many reasons why a sexual assault victim may delay telling someone that she has been raped. But jury instruction from the bench is only a partial solution. If judges are to be social educators of the jury in a criminal trial they will be better equipped to do so if they (and lawyers, doctors, social workers and police) are provided with education programs that explain the complexities of family violence. This is one of the recommendations of the 2004 Victorian Law Reform Commission ('VLRC'), *Defences to Homicide: Final Report*,²² released after this collection was published. Few jurors would appreciate that it may be reasonable for a woman to lay plans and wait until her male tormentor is unarmed and defenceless before killing him. A better educated group of professionals may facilitate the defence in calling expert witnesses who will explain to the jury why it might have been a reasonable response in the circumstances, at least as the defendant perceived them, to kill a violent partner,

20 *Osland v R* (1998) 197 CLR 316.

21 A term used to describe Robyn Kina's inability to communicate adequately with her lawyer: Diana Eades, *Aboriginal English and the Law* (1992).

22 VLRC, *Defences to Homicide: Final Report*, Report No 94 (2004).

despite no immediate threat to the defendant's life – and at least where the threat of serious harm *is* inevitable.²³

Often jurors act in ignorance because criminal law and evidentiary limitations dictate a narrow and truncated portrayal of the crime – and the defence. Necessary reforms to criminal law are a further consideration, but one beyond this review.²⁴ An alternative or additional response to judges helping juries to understand family violence would be to remove certain evidentiary constraints. As the VLRC Report *Defences to Homicide* indicates, such constraints often prevent a jury from being fully informed of the violent and dysfunctional nature of the defendant's relationship with her deceased partner. A significant limitation in this respect is created by the narrow common law exceptions to the hearsay rule.²⁵ The hearsay rule can make it impossible for the defence to lead evidence showing that in the weeks, months or years prior to the killing the woman defendant made many calls for help or described to her neighbours and friends her fear for her life and her partner's ongoing and unrelenting torment and violence. Jurors can only reach good decisions if they have good information.

A Jury of Whose Peers? makes an important contribution to understanding the contemporary criminal justice landscape in Australia as well as its colonial and post-colonial heritage. To conclude, *A Jury of Whose Peers?* is a mandatory acquisition for any library or collection seeking quality Australian socio-political writings on the Australian criminal trial.

23 This reflects the formulation for the test of self-defence (which is a complete defence to murder) recommended by the VLRCs *Defences to Homicide: Final Report*, *ibid*, based on the Model Criminal Code provisions.

24 The VLRC, above n 22, recommended the partial defence of provocation be abolished (because it implies that the victim is somehow responsible for their own death). The VLRC also recommended that the partial defence of excessive self-defence be re-introduced in Victoria to avoid the plea of self-defence being 'all or nothing'. The need for law reform with respect to provocation in estranged relationships was exposed graphically in late 2004 (post-dating the publication of *A Jury of Whose Peers?*) when the Victorian murder trial in *Ramage* ended with the jury finding the (male) defendant guilty of manslaughter after he killed his estranged wife. The jury accepted that the defendant had been provoked by the deceased's taunts that sex with him repulsed her and that she had met someone else. The apparent ease with which a jury accepted this partial defence, acquitting of murder and convicting Ramage of manslaughter presents a graphic juxtaposition to the fate of Heather Osland. Unlike Ramage who was convicted (only) of manslaughter because he was able to rely on the partial defence of provocation based on his verbal taunts, Osland was convicted of murder. Osland planned and conspired to murder her partner after years of physical and psychological brutality and torment from him. These two cases present starkly the inadequacies of the law and the criminal justice system.

25 In this respect, the uniform *Evidence Acts* (Cth, NSW and Tas) are less limiting, though far from perfect. Opinion evidence limitations can also inappropriately limit expert evidence of battered women's reality: see VLRC, above n 22, 159.