

1950

Disregard of Scientific Proof by Juries

Manly Mumford

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Manly Mumford, Disregard of Scientific Proof by Juries, 41 J. Crim. L. & Criminology 320 (1950-1951)

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

CRIMINAL LAW CASE NOTES AND COMMENTS

Prepared by students of Northwestern
University School of Law, under the
direction of student members of the
Law School's Legal Publication Board

Russell P. Gremel
Editor

John W. Gilligan
Associate Editor

DISREGARD OF SCIENTIFIC PROOF BY JURIES

Manly Mumford

Our judicial system contains one practice which has drawn much criticism from persons trained in scientific fields. It accepts jury verdicts which are contrary to scientifically established facts.¹ Many scientists argue that by permitting jurors such complete freedom we countenance capricious obstructions to the orderly administration of justice.² This view is based upon a generally accepted theory that the proper function of a jury is to find the facts as rational men would be led to believe by the evidence; and that having reached this finding, the jury should apply the rules of law submitted by the judge and produce a simple yes-or-no answer.³

That juries do not always behave in such an orderly, scientific manner however, is quite apparent. They often find the facts to be those which will produce the verdict which they desire. Unless the verdict in a civil case is too outrageous, courts permit it to stand in the face of practical scientific certainty.⁴ Such a practice is defended by the courts upon the theory that the jury may have believed that the witnesses were lying, or that the scientific tests were carelessly made. However, both of these arguments are strained when there is no evidence to impeach the credibility of the witnesses or to suggest that their tests were improperly conducted.

What is the Role of the Jury?

What should a jury do in reaching a verdict in any case? The answer must rest between two extremes: (1) Considering nothing but the evidence,

1. For purposes of convenience in this comment, the term "scientific proof" is to be defined as evidence upon which (if believed) accepted modern scientific theory unequivocally implies the existence of a fact upon which the law will act. Thus, evidence that a defendant's blood contained more than a certain percentage of alcohol would amount to scientific proof that he was drunk.

2. Britt, *Blood Grouping Tests and the Law: The Problem of "Cultural Lag,"* 21 MINN. L. REV. 671 (1937); Wiener, *The Judicial Weight of Blood Grouping Test Results,* 31 J. CRIM. L. & CRIMINOLOGY 523 (1940); Schatkin, *Paternity Blood Grouping Tests: Recent Setbacks,* 32 J. CRIM. L. & CRIMINOLOGY 458 (1941).

3. For another view, see *Georgia v. Brailsford*, 3 Dall. 1 (1794). This was the first jury trial before the Supreme Court of the United States, an action by the State of Georgia to determine whether a debt belonged to it or to the defendant, a British subject. The debt had been sequestered pursuant to a state statute during the Revolutionary War, and no facts were in issue. In his charge to the jury, Mr. Chief Justice Jay stated that the province of fact was for the jury and the province of law for the court. . . . "But it must be observed that by the same law which recognizes this reasonable distribution of jurisdiction, you nevertheless have a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy." *Id.* at 4. After deliberation, the jury agreed with the Court as to the law, and gave a verdict for the defendant. This capitulating principle was repudiated in *Sparf and Hansen v. United States*, 156 U.S. 51 (1894). Sunderland, *Verdicts, General and Special*, 29 YALE L. J. 253 (1920).

4. Compare *Jordan v. Davis*, 57 A. 2d 209 (Me., 1948), with *Jordan v. Mace*, 69 A. 2d 670 (Me., 1949).

a jury should rationally determine the facts, and compound them with the law given by the trial judge; or, (2) Regardless of the law or evidence, it should render its verdict for the party which it feels should win. The second idea is untenable in any form of ordered society; but rejecting it does not necessarily entail a wholehearted acceptance of the first. If one adopts the former premise absolutely, it would seem logical to say that juries which are known to succumb to irrelevant and emotional arguments should be supplanted by more accurate finders of fact trained to view other people's affairs with cold dispassion.⁵

Before condemning the jury system as anachronistic governmental whimsy, it would be well to examine the standards by which the application of law should be governed. First, there is the requirement that law serve as a guide to human conduct so that men may predict the legal consequences of their acts. This requires the maximum uniformity of decision.⁶ In contrast to such a "strict law" theory is the belief that the law should deal with each case individually.⁷ Justice often demands that certain individual characteristics of the parties be taken into account,⁸ but these considerations are too ephemeral to become part of the written law.⁹ The circumstances surrounding an illegal act may justify it morally, yet provide no lawful excuse. Thus a regime based on right-and-wrong, rather than the mere convenience of certainty, should act in response to the special factors in the case at bar, as well as to the rules of law.

As a means of individualizing the application of law, in either civil or

5. See FRANK, *LAW AND THE MODERN MIND*, 179 (1930). See also Appendix V, Notes on the Jury, *id.* at 302.

6. Pound, *Justice According to Law*, 13 *COL. L. REV.* 696, 709 (1913). The author lists the following advantages in the use of a uniform body of law in the administration of justice: (a) predictability of the course of that administration; (b) security against errors of individual judgment; (c) security against improper motives of administration; (d) availability to the magistrate of standards containing the formulation of the ethical ideas of the community; (e) availability to the magistrate of the experience of his predecessors; and (f) prevention of sacrifice of ultimate interests to less weighty but more immediate social and individual interests. He also lists the following disadvantages: (a) the rules are made for mass application and tend to become impersonal and arbitrary; (b) a tendency arises to make law an end rather than a means; (c) "law begets more law" and too many rules spring up; and (d) there is a tendency to lag behind changing ideas of justice and social need. *Id.* at 712.

7. See note 6 *supra*. Pound, *The Theory of Judicial Decision*, 36 *HARV. L. REV.* 940 (1923): "In a developed legal system when a judge decides a cause he seeks, first, to attain justice in that particular cause, and second, to attain it in accordance with law—that is, on grounds and by a process prescribed in or provided by law." Our body of law, it would seem, is the product, rather than the progenitor of justice in the individual case. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 22 (1921); the author states that the common law system does not deduct from universal truths, but decides inductively, establishing principles by experiment and rejecting them if they prove unjust. "For every tendency one seems to see a counter-tendency; for every rule its antimony. Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless 'becoming'." *Id.* at 28.

8. Without attempting to define the word "justice" adequately, one may describe certain characteristics of this jurist's holy grail. For the purposes of the present discussion these characteristics include: impartiality of administration, compliance with generally accepted moral and ethical standards of the community, and behavior in accordance with the expectations of others who reasonably rely thereon. See Griswold, *Law and Justice in Our Society*, 52 *HARVARD ALUMNI BULLETIN* 298 (Jan. 14, 1950): "But in our time, I think it may be said that more emphasis has been placed in legal thought and action on those factors which we connote by the term 'justice' and less on the relatively rigid concepts which are inherent in the word 'law'."

9. POUND, *THE TASK OF LAW* 72 (1944): ". . . Moral precepts are tested and described by the circumstances which surround their application. The law cannot but morals may admit environment as an excuse."

criminal cases, the general jury verdict has advantages over a purely legal decision. It permits the rules of law to be stable and precise, yet allows exceptions in their administration which would not be desirable in the laws themselves.¹⁰ Further, it admits of a certain degree of emotion (mercy or retribution, for example); although this is anathema to proper grounds for judicial decision, it does not seem totally inconsistent with modern concepts of justice. In judging the men concerned as well as the facts, the jury can make suitable allowance for the peculiar advantages or disadvantages of either party,¹¹ and may, in a rough way, attempt to inhibit potentially evil developments in the behavior of one. The flexibility provided a jury verdict may allow greater utilization of new social thought: precepts not yet sufficiently well established for incorporation into law may be permitted in the administration of law, yet not made part of the body of legal rules.¹² While the law does not adjudge the rights of persons not parties to the suit, a jury may consider them. Thus, in a divorce suit where the husband alleges a child not to be his, a jury may well take into account the interest of the child (not a party) in having his paternity determined. Finally the common sense of ordinary men in arriving at a just solution should not be disregarded. If the technical reasoning of the law or the lack of judicial imagination requires a manifestly unjust result, it is good to have a tribunal of ordinary men to set things right.

To advocate a system of unchecked jury caprice would be absurd.¹³ Yet

10. POUND, *THE TASK OF LAW* 84 (1944): "In a large part, the purpose is, while keeping the letter of the law as it is in the books, to allow juries free rein to apply different rules or extra-legal considerations in the actual determination of causes." FRANK, *LAW AND THE MODERN MIND* 173 (1930): "Why, then, has the general-verdict jury system developed? In large part, it would seem, because it serves two purposes: It preserves the basic legal dogma in appearance and at the same time (albeit crudely and bunglingly) circumvents it in fact, to the end of permitting that pliancy and elasticity which is impossible according to the dogma, but which life demands." Sunderland, *Verdicts, General and Special*, 29 *YALE L. J.* 253, 262 (1920): "In short, the general verdict is valued for what it does, not for what it is. It serves as the great procedural opiate, which draws the curtain upon human errors and soothes us with the assurance that we have attained the unattainable."

11. See GREEN, *JUDGE AND JURY* 180 *et seq.* (1930); Morris, *Punitive Damages in Tort Cases*, 44 *HARV. L. REV.* 1173, 1188-1191 (1931).

12. The classic illustration of this principle is the behavior of juries in suits by injured employees against their employers prior to the workmen's compensation statutes. POUND, *op. cit. supra* note 11 at 80: "It is notorious that at that time a feeling that employers and great industrial enterprises should bear the cost of the human wear and tear incident to their operations dictated more verdicts in case of industrial accidents than the rules of law laid down in the charges of the courts. . . . But the judicial process depended upon finding of the facts by juries, and the facts were so found as to compel the judicial process to apply rules quite different from those contemplated by the books." *Cf.* POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 72 *et seq.* (1922): in the past, three ideas have obtained in thoughts about the end of law: (1) solely to keep the peace (primitive law); (2) preservation of the status quo (Greeks and Romans, also feudal system); and (3) ". . . to secure the claims of individuals to assert themselves freely . . ." (rise of capitalism, fall of the feudal system). Beginning with the end of the last century, law seems to be entering a fourth phase: "Jurists began to think in terms of human wants or desires rather than of human wills." *Id.* at 89. Note that the doctrines of assumption of risk and contributory negligence seem to have better foundations in a philosophy dedicated to the maximum free exertion of the individual will, whereas the workmen's compensation statutes seem based on a philosophy promoting individual wants.

13. See POUND, *SOCIAL CONTROL THROUGH LAW* (1942). The author mentions the rise of the insurance theory of liability and the "tendency of juries to hold that, whenever anyone has been hurt, someone able to respond in damages ought to pay." *Id.* at 117. In connection with this, he mentions Lord Bramwell's story concerning a pickpocket who was so impressed by a sermon in furtherance of charity that he picked the pockets of all within reach and put the proceeds in the collection plate.

a limited discretion on the part of juries seems desirable. The extent to which this discretion should be allowed to operate depends primarily upon the proper balance between uniformity and individualization.¹⁴ In certain types of cases, the need for uniformity is relatively great while little thought is to be given to the moral element. For instance, in commercial law where the question is which of two businessmen shall bear the risk of loss, or where a decision will be used extensively as a guide to future conduct (an unfair competition case), or where the opinion is likely to be used as a guide for the courts in future decisions (a case involving the transmission of property interests), the role of a jury should be more nearly that of a fact-finding machine than in those controversies requiring more individual treatment. If there is a strong moral element present (as in a criminal case) or a question of policy not reducible to rules of law (an anti-trust case, for example) or no particular need for a guide to conduct and future decisions (personal injury suits), then the discretion of the jury should be given greater effect.

Particular Cases

In two fields in which scientific evidence is used extensively, criminal cases and disputed paternity proceedings, it would seem that a relatively high degree of individualization is required. In criminal prosecutions the law should be applied on a case by case basis to allow for possibilities of rehabilitation, exceptional circumstances surrounding the crime, general moral character of the defendant, and for opportunities to curb the activities of definitely anti-social defendants. Although the prime need for uniformity is as a deterrent, a potential criminal is not likely to read cases on the type of crime he intends to commit, or talk the matter over with his lawyer; so exact standards of certainty, such as those needed in cases involving negotiable instruments, for example, are not essential as a guide to conduct. The uniformity desired as a deterrent is certainty of punishment for willful violation of the law. In administration it seems that this certainty should defer to any special circumstances in the case. It is conceivable that in some instances, although the defendant has in fact committed the acts alleged in the indictment, and commission of those acts constitutes a crime according to the law, he should not as a matter of justice be convicted. In certain recent "mercy killing" cases,¹⁵ if one believes that the defendant actually committed the acts charged, it seems thoroughly consonant with the principles of justice that the defendants should not be punished in the same manner or to the same extent as a man who, in the course of an armed robbery, shot his victim in cold blood.¹⁶ Regardless of the court's instructions, the question which the jury is likely to

14. See Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940 (1923).

15. Acquittal of Dr. Hermann N. Sander reported in N. Y. Times, March 10, 1950, p. 1, col. 6. Acquittal of Carol Paight reported in N. Y. Times, Feb. 8, 1950, p. 1, col. 2. *Id.* at p. 24, col. 3 for a report of four recent mercy killing cases in which the defendant was acquitted and three in which he was convicted.

16. In view of the reluctance of most juries to return a guilty verdict in cases of murder when the defendant killed the victim in the honest belief that this act was solely for the benefit of the latter, it would appear that a change in the law might make punishment for such offenses more nearly certain. While legalized euthanasia would probably not be countenanced at present, there seems to be a difference in kind between this type of homicide and the more wanton felony suggested by the term murder. Perhaps a statutory crime which entailed a prison sentence of from five to fifteen years, say, for shortening a human life to prevent further suffering would serve better than the present method in (1) expressing as law society's disapproval of euthanasia and (2) enabling the prosecutors to get a higher percentage of convictions.

answer is not: "Considering only the evidence admitted, did the defendant commit the acts alleged?" but rather: "In the light of all that occurred in our presence, should the defendant be punished for the crime for which he is being tried?" If the jury feels as a matter of justice, or right-and-wrong, that the defendant should not be punished for the crime charged, the members will be sorely tempted to disregard the judge's protracted (and frequently incomprehensible) instructions and render a verdict of "not guilty." Technically, of course, succumbing to this temptation is unconscionable. But, if we look beyond the mechanics of the law to the purpose which it is to serve, it appears a highly beneficial attribute that, in those few cases where the established rules of law produce unfair results, some means of judicial correction enables justice to prevail.

In paternity suits to require the alleged father to support the child of an unwed mother, the need for individualized administration seems particularly appropriate. The moral issues are frequently complex; the ability of the defendant to pay and the welfare of the child are considerations which can not adequately be handled in a highly systematized manner. The utility of these suits as a deterrent to fornication seems a slim reason for uniformity: few men contemplating sexual intercourse are likely to examine the case law on the support of illegitimate children.

The defendant may prove by blood tests that he is not the father, and yet the jury might be allowed to ignore this. It should be emphasized, at this point, that juries are not permitted to go wild in deciding against the evidence. In a great many cases where blood grouping tests exclude paternity, litigation is dropped; in many more a verdict is directed; and in most of the rest the jury finds in accordance with the evidence. Only in the few cases that remain does the problem arise. For the case to get to the jury, at all there must be some evidence of paternity; and generally the evidence which demonstrates a logical likelihood of paternity may indicate a moral duty to support, beyond the mere accident of non-paternity. An illustrative and highly publicized case to this point is that of *Berry v. Chaplin*.¹⁷ Evidence showed that the wealthy defendant had been intimate with the mother several times, at least once about the probable time of conception; there was a possibility that either of two other men, not parties to the suit, was the father. Blood tests conclusively demonstrated that the defendant could not have been the father, but the jury declared that he was, and the California Court of Appeals refused to set aside the verdict. Although the medical testimony concerning the blood tests came from physicians whose qualifications, competency and integrity were not questioned, the evidence was said not to be conclusive. With regard to the other possible fathers the Appellate Court said: "But even though complete or satisfactory proof had been made of sexual acts by Miss Berry with any other man on other occasions, it would still have been the exclusive function of the jury to determine whether the defendant is the father of her child by virtue of his act in December, 1942."¹⁸

As a matter of cold biological fact, the defendant in the *Chaplin* case was not the father. But in view of the circumstances, it does not seem unjust to require him to contribute to the infant's support. It was mere chance which rendered someone else the actual father, rather than any discretion or restraint on the part of the defendant. The defendant was eminently able to contribute, and whatever moral sanction exists in the law under which the suit was brought should be applied in this case. Further, the defendant was within

17. 74 Cal. App. 2d 652, 169 P. 2d 442 (1946).

18. *Id.* at 662, 169 P. 2d 450.