A Theory of the ‘Perverse Verdict’

Bethel Erastus-Obilo*

Abstract

The concept of a perverse verdict is one that pervades the Criminal justice system of nearly all common law jurisdictions. The English Criminal Justice system is no exception and the concept has become institutionalised as if it were a true occurrence.

This paper challenges the idea and argues that it is, technically, a legal non-event given the system of trial by jury. The theory is that besides the jury, no one else is invested with the power and authority to declare a verdict and this position is supported both by legal custom and the mechanism of the criminal justice system.

In this paper, I investigate the concept of the perverse verdict, the position of the superior courts and theorise on who may legitimately declare a verdict perverse. The paper concludes by alluding to transparency in the system by creating a requirement and an atmosphere of jury accountability in the form of an explained verdict as an antidote to the concept of the perverse verdict.

*Dr. Bethel Erastus-Obilo,
Programme Chair: Faculty of Criminal Justice
Member: National Advisory Council
Associate Editor: Virtualities: International Journal of Online Studies
University of Atlanta, Atlanta, GA, USA
Perversity in the English Criminal Justice System

To a great extent, the legal system of any nation is based on the cultural dispositions and heritage of that country. Custom, itself, develops over a considerable period of time and is ingrained in the society. The laws of the land, thus, are an amalgam of cultural development and a careful, intellectual and largely practical approach to the legal challenges confronting any nation. A criminal justice system can be effective and legitimate only if it approximately reflects the country’s cultural evolution and is sufficiently aligned to it.

The idea of trial by jury was adopted and flourished in England precisely because it is sufficiently aligned to the tradition and sense of justice of the country. The essence of the system has always been that the jury returns a verdict consistent with its ‘knowledge’ and later, conscience. Almost throughout its history and development, the jury has also retained the right to return a ‘perverse’ verdict – verdict presumed to be against the weight of evidence. Opponents of this ancient institution cite this ‘right’ as one of the reasons a modern democracy must not fetter itself with a body, they argue, which is a relic and out of step with modern approach to criminal justice. The matter is pronounced because of a lack of accountability in the form of an explained verdict.

The argument is well documented and articulated. This paper will not rake over them.

However, one of the reasons advanced in England and elsewhere for abolishing trial by jury is that juries do not come reliably, or often enough, to what is perceived or interpreted to be ‘correct’ verdicts. Juries’ independence is not always easy to accept.

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This argument, advanced by the Chicago Jury Project in the US, is that this is supported by the frequency of verdict disagreement between trial judges and juries. One reason postulated by judges, it found, for the retention of jury trials, is that juries invariably arrive at verdicts with which judges concur though from different angles. The Chicago Jury Project results showed that judges agreed with the juries’ verdicts in seventy-five per cent of cases surveyed. Where there was disagreement, juries tended to be more lenient, often acquitting in cases where prosecution methods could have been considered to be unfair.²

Lord Devlin recognised the great value which flows from the freedom of juries to view the criminal law as flexible rather than rigid and to take an equitable approach in line with community attitudes and prevailing values.

‘If you want certainty or predictability, you must keep the judgment running close to the law. If you want the best judgment in the light of all the facts when they have emerged, then it will be one that has moved nearer to the aequum et bonum [equity and good conscience]. The unique merit of the jury system is that it allows a decision near to the aequum et bonum to be given without injuring the fabric of the law, for the verdict of a jury can make no impact on the law.’³

Consistent jury acquittals, however, may well have an impact on the law. The offence of culpable driving was created largely because juries consistently acquitted bad drivers charged with manslaughter. Jury verdicts are a way of informing legislators of public

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³ P. Devlin, Trial by Jury (Stevens and Sons Ltd., 1956), at pp.156-157.
attitudes to the criminal law. As Devlin observed, trial by jury is ‘an insurance that the
criminal law will conform to the ordinary man’s idea of what is fair and just’.  

Cornish counters this assertion by holding that juries have not consistently defended the
public interest in equity and justice but have been more likely to submit to oppressive
laws such as the attack on freedom of speech by the sedition laws and the attack on
freedom of association by anti-industrial union laws.  

He goes on to claim in his book
that the judges have been more relevant to the debate against oppressive laws in their
pronouncements that juries.

However, to what extent a verdict can be described as perverse is a matter that deserves
some investigation.

It is argued that no verdict delivered by a jury at the end of a criminal trial can be
correctly described as perverse within the meaning of the word to the extent that a verdict
of guilt or innocence is a matter for a jury as a result of deliberations on the evidence
consequent upon a trial. Furthermore, to the extent that a jury’s verdict is largely a
subjective matter, declaring a verdict to be perverse, by all other objective observers, is
tantamount to a usurpation of the role of the jury and thus inconsistent with the concept
of trial by jury.

Let us explore this further.

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4 Ibid, at page 160
6 The jurors consider evidence tendered in court. They are also expected to and do bring common sense and
reason to the process. Thus, they call upon a number of complex elements for assistance in their
deliberations. They are allowed to do this as a body of 12. An independent objective observer or a
magistrate, although may also employ these elements, arrives at a decision from an entirely different
perspective which could be as sterile as it is singular.
Where, in a Crown Court trial, an accused pleads ‘not guilty’ to a charge and the plea has been rejected by the prosecution, that matter will be arrayed before a jury for trial. This will involve a panel of 12 randomly chosen citizens.\(^7\) It is the duty of the jury to listen to all the evidence relating to the charge, listen to the judge’s direction on the law applicable to the case and then deliberate as a collective on what they consider to be the facts of the case and to bring in a general\(^8\) verdict of ‘guilty’ or ‘not guilty’ on the charge.

A juror’s oath is to ‘truly try the defendant and return a verdict according to the evidence’.\(^9\)

Do juries perform their role accordingly? There is much evidence of juries acquitting against the weight of evidence especially in cases that involve the Official Secrets Act\(^10\) although its willingness and ability to strike down the law in other cases has been questioned by writers such as Cornish as noted. The judge’s role is to direct the jury on the law and the jury’s role is to apply that law and direction to the facts as they find them. The principle of jury supremacy in matters of fact in a case is without equivocation. The notion of perverse verdict, therefore, undermines this principle. However, there is evidence that juries sometimes work on an entirely different plain, rejecting, in one case, the evidence of the chief prosecution witness whom they described as a ‘tin pot dictator’ and ‘pipsqueak’ civil servant and in the other, ignoring the finger print evidence presented in court.\(^11\)

In his 2001 review, Auld LJ recommended that:

\(^7\) S.1, Juries Act 1974. They are required to be between the ages of 18 and 70, on the electoral role and UK residents for at least 5 years since the age of 13.

\(^8\) In cases such as insanity, a special verdict may be acceptable.


\(^10\) Zuckerman A.A.S: The Principles of Criminal Evidence (Oxford) 1989 p.36

the law should be declared, by statute if need be, that juries have no right to acquit defendants in defiance of the law or in disregard of evidence and that judges and advocates should conduct criminal cases accordingly.\textsuperscript{12}

On the face of it, this appears reasonable enough given that a verdict that can be proved to be against the weight of evidence seriously undermines the criminal justice system. However, on further reading, it becomes clear that the reasoning is at best defective and at worst, impractical. Predictably, many have condemned this recommendation as displaying deep distrust of the jury system,\textsuperscript{13} wholly unacceptable – a serious misreading of the function of the jury – and that the right to return a perverse verdict in defiance of the law or the evidence is an important safeguard against unjust laws, oppressive prosecution or harsh sentences.

Zander is in good company. Many from the legal profession who responded to the review identified with these sentiments.

Legal historical tradition has been cited in support of the right that Auld LJ recommends against. Indeed, Bushell’s case\textsuperscript{14}, cited above, is a case in question where the jury returned a verdict supposedly against the weight of evidence.

There is further, the famous cases of Clive Ponting, Randle and Pottle as well as other modern cases where the jury has done just that. In such cases, it has been observed that the tyranny of the judges has been replaced by that of the jury.

\textsuperscript{12} Criminal Courts Review infra. Chapter 5 at 107
\textsuperscript{13} Lord Justice Auld’s Review of the Criminal Courts – A Response by Michael Zander, QC, Emeritus Professor of Law (London School of Economics) at http://www.lsettp/collections/law/staff/zander/auldresponseweb/pdf

\textsuperscript{14} 22 Charles II. A. D. 1670. [Vaughan's Reports, 135].
Auld LJ added:

…flagrant mistakes, in particular unjustifiable verdicts of ‘not guilty’ are bound to occur only too often. The layman may be inclined to regard this as one of the chief advantages of the system that it can act as an unofficial pardoning agency. However, if this is the idea, it should be clearly expressed instead of being disguised as justice.\textsuperscript{15}

The fact is that neither the system nor the government wishes for this to be the case and worse, although such practice is condoned by a collective acquiescence and institutional ignorance, it has never been definitively proven that a verdict is perverse given that the fact finder is supreme in this role.

These sentiments are well understood though. They clearly are the frustration felt by those who are charged with investigating and prosecuting crime and those who play a role in the judicial process.\textsuperscript{16} It also shows a direct tension between the government’s stated purpose of the CJS – the control of crime – and the position sometimes\textsuperscript{17} taken by lay assessors in criminal trials. However, it exposes another dimension – the diverging perception of justice by the public and the institution. More importantly, it underlines the need for accountability from the jury.

It is argued further, that the issue turns on the meaning of ‘perversity’ in a jury trial. Do juries really return perverse verdicts? One is inclined to answer in the negative. There are good reasons for this.


\footnotesize{\textsuperscript{16} In the English Courts, the role of the judges is not to obtain a prosecution but to be the servant of justice.}

\footnotesize{\textsuperscript{17} It would be quite incorrect to claim that juries always disregard the evidence and return a verdict that is contrary. History is instructive in this regard and it has been suggested that some of the blows for justice were not struck by the jury but by appellate judges over the years. See Blom-Cooper op.cit.}
The Grounds for Perversity

A criminal trial in an English Crown Court is a matter before a judge and jury. As has been noted above, the jury is charged with deciding on matters of fact, the judge, on matters of law. The judge’s role, by no means easy, is relatively straight-forward. Objectivity is required and he must rule on what evidence is admissible or otherwise, staying dispassionate at all times. He must bring nothing but a sound legally trained mind and professional experience to his role. Although he may have access to the defendant’s adverse history, his focus is on the fairness of the trial. The judge need not be concerned with the veracity of a witness’ testimony, whether he made eye contact, his manner of dress or speech, his occupation or indeed his social status. He need not second-guess a witness’ statement or compare his life experiences and aspirations with that of the accused. He need not pay attention to the oratory of the counsels. These are rightly left to the jury. His attention is, at all times, focused on the evidence and whether or not it is sufficient for the matter to be put before a jury for a determination of the facts. Proof beyond a reasonable doubt does not apply to the judge in a criminal trial.

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18 Even here, objectivity is by no means a given factor. The guidelines on sentencing in England and Wales indicate that judges are allowed to make subjective evaluations within a set of given guidelines when handing down sentences. These include age, family backgrounds and propensity to commit further crimes. Even the demeanour of the victim or the support of the family are factors that a judge is advised to take into consideration.

19 The decision as to whether or not the prosecution has discharged its burden to the standard set is a matter for the jury. The point is not that the burden of proof beyond a reasonable doubt is not required but that the judge, in determining the evidence in a trial, only has to consider the relevance, probative and prejudicial value of a piece of evidence and the fairness of the trial. In so doing, as a matter of clinical sterility, he need not be mindful of any subjective elements in the trial. He must stay objective as far as that evidence or witness is concerned. Doubt is a subjective principle turning on the principle of belief based on the lack of knowledge. The judge, presented with evidence and other matters of evidence must decide if the weight of evidence before him is sufficient to allow the matter to go before a jury. It is a matter of the relevance and sufficiency of evidence – an altogether measurable outcome –before a matter can be put to a jury, which is why a ‘judge’ is better placed to explain his verdict in the higher courts when he sits alone or with a panel. The subjective elements are irrelevant although they can have a controlling influence on the jury in the face of sympathetic summing up and fabricated evidence as the judge in the Archer case so lucidly illustrated when he addressed the jury. See Mr. Justice Caulfield, Trial judge at the Archer Libel Trial in 1987 quoted by BBC News on Thursday 14 June 2001 at http://bbc.co.uk
Whether or not the judge can honestly remain dispassionate, however, is quite another matter and his demeanour may have an impact on the jury. Given that Crown Court trials are set before a judge and jury and that the judge never has to deliver a verdict, we are yet ignorant of his ability for avoiding the complicity potentially inherent in the swathe of adverse and prejudicial information available to him.\(^{20}\)

This is because the prosecution is not there to persuade him but the jury.\(^{21}\) It is purely a matter of the relevance and admissibility of an item of evidence\(^{22}\) once the judge has ruled that there is a case to answer. It remains to be seen whether or not a person (for that is, after all, what a judge is) is able to stay objective given the exposure he has to adverse evidence.\(^{23}\) Galbraith\(^{24}\) made is clear that the judge has no discretion as to whether or not to put a matter before a jury if he feels that there is sufficient evidence upon which a reasonable jury, properly directed, might convict. He must put it to the jury.

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\(^{20}\) An argument could be made about the Diplock Court in Northern Ireland where a judge sits without a jury in the determination of prescribed criminal cases. However, it must be pointed out that a judge’s verdict must be accompanied by a written explanation and is subject to automatic appeal to the superior courts. See John D Jackson & Sean Doran, Judge without jury: Diplock Trials in The Adversary System (1985).

\(^{21}\) There is an element of prejudgement in a criminal trial but this does not relate to the final verdict of the jury. This occurs when the judge has to rule on matters of abuse of process or in response to an application for a ‘no case to answer’ from the defence. Following R v Galbraith (1981) 73 Cr app. Rep 124, 145 JP 405, ‘where…the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness’s reliability or other matters which are, generally speaking, within the province of the jury and where on one possible view of the facts, there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury’.

\(^{22}\) In a Civil Trial by judge alone, the judge will hear evidence, consider the law and deliver a reasoned judgement summarising the legal principles governing the case and the facts to which they must be applied and giving his decision. If his decision is challenged, an appellate court may ordinarily review both the legal ruling and the factual findings and the applications of one to the other’. Lord Bingham of Cornhill in R v Pendleton [2001] UKHL 66

\(^{23}\) For a stimulating discussion of the separation of evidence and its relevance to the charges brought in a trial, see M. Damaska, ‘Evidence Law Adrift’, Yale University Press 1997 at page 48.

The jury, on the other hand, swears to ‘truly try the defendant and return a verdict according to the evidence’.  

For the jurors, it is not a simple matter of objectivity. Their task is the more onerous one. Not only must they sift through the admissible evidence tendered in court that is relevant to the case, they must also purge pieces of inadmissible evidence from their minds.

They must consider the demeanour of the witnesses as part of their deliberation process and the trial. They must watch the actors in court. They must make a judgement on the oratory and theatricals skills of the counsels, assess the body language of the witnesses, measure the weight of a piece of evidence and determine from the tone of the judge where the court’s sympathy lies without allowing such bias, if any, to affect their decision. They must also call upon their own experiences, prejudices, social status, sense of justice, morality and community inclinations. In addition, each juror must consider the role played by police officers and others investigating the crime, the state of the nation – do they feel safe in their homes, do they have a sense of civic responsibility, do they think the offence charged should be a crime etc?

When they retire for deliberation, the jurors must consider their relative positions and be part of a negotiating process that pitches one juror’s wit and understanding against another’s, one juror’s interpretation of the evidence against another’s and one juror’s skill of persuasion and negotiation against another’s.

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25 Archbold (2007) 4-254 page 453 sets out the relevant part of the Consolidated Criminal Practice Direction, Blackstone (2007) App. 8 sets out the CCPD in full; IV.42.5-9 are at page 3001

26 Damaska argues that ‘despite the separation of the finders of fact from the judge, Anglo-American jurors are also exposed – for a variety of reasons – to inadmissible but persuasive information and then asked to ignore it. See M. Damaska, supra.
The jury then considers the offence charged, the prohibited act and the corresponding law. 27 They then have to apply the law to the facts and consider if the mental element is present and thus if the offence is proved and if the trial process has produced a situation from which they must draw a particular inference. Has the Crown proved its case beyond a reasonable doubt? Further from that, they must now search their consciences to see if the decision they have reached is one that they can live with given all the circumstances of the case. Sometimes, this is in spite of or because of the evidence.

Some jurors may be religious. Others may be atheists. Some may be fundamental in their moral perspectives, yet others might be dispassionate or liberal in their views. Some may believe in strong society values as a whole reflected in a strong government and yet others may prefer the individualistic approach - taking liberty at face value. Then there is the question of culture and community values that intermingle with the desire to achieve social cohesion. The fact of trial by jury is that of judgment by members of one’s society in the company of a judge. The judge stays objective while the jury has the task of mixing objectivity with subjectivity. But a criminal jury gives no reasons. Its answer is in a cryptic general verdict - guilty or not guilty…the process of reasoning by which its decision is reached is never disclosed and can only be a matter of inference’. 28

Given then that the jury is allowed certain amount of evidence, has the right to return a verdict according to its conscience, is allowed all the human qualities necessary for the reasonable man to live and that there are twelve of them randomly selected to hear the case, how do we define perversity?

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27 They may consider the action proved but the law not broken or no offence caused – a classic case of jury nullification of law.
28 Lord Bingham in R V Pendleton ibid.
Perversity in this context is the rendering of a decision so unreasonable that no reasonable observer could support it.\textsuperscript{29}

If this is the case, then the system appears to be held hostage to fortune. The fatality of the above statement lies within itself. First, it implies that having heard all the evidence, a decision has been reached by a ‘reasonable observer’– objectively - and the jury must concur. If we adopt this approach, we have invented a surrogate jury whose role is to determine the case ad rem and the real jury can only countenance such verdict.

Secondly, it arrogates objective isolation to the surrogate jury - this ‘reasonable observer,’ who has deliberated the case entirely on the evidence without the experience and contribution of eleven other people to draw from.

Third, the decision of this single reasonable objective observer, having been made, now awaits countenance by the jury on a subjective level to legitimise it.\textsuperscript{30}

The fourth position is even more troubling for the institution. It is a culmination of the above and assumes that the interpretation of the evidence should only go in one direction. As a result, if the jury does not interpret it in that way, any decision emanating from its deliberation is deemed perverse.

Then, there is the question of reasonableness. How do we define this? Do we not pre-judge 12 people randomly chosen from the community reasonable enough to be members of a jury? Do we not, at the same time, consider them far too ignorant to decide matters we consider complex? How do we justify looking both ways at once?

\textsuperscript{29} Louis Blom-Cooper, Twelve Angry Men Can be Wrong, Sunday October 21 2001

\textsuperscript{30} The decision maker could be the judge bowing to the promptings of his objective analysis and by implication, the position of the prosecutor or otherwise.
Put in this context, it becomes clear that that which is proposed is that all verdicts must be perverse that involve a subjective element. Since all jury decisions involve subjective assessment, all jury verdicts are, by definition, perverse.

This is a rather startling and repugnant proposition.

It is also clear that in this context, on an application of Galbraith, once a judge has decided to put a matter before a jury with the understanding that it might convict, any acquittal would constitute a perverse verdict. As observed, such a point of view usurps the position of the jury and makes a mockery of its independence. As a matter of observation, we have no test for reasonableness. What we do have however, is a presumption of it. Since we do not test for this, how do we know that a jury is or is not reasonable?

Bushell’s case makes the point eloquently. William Penn and William Mead were charged with preaching on a Sunday afternoon to an unlawful and tumultuous assembly. The jury delivered a special verdict deciding that they were only guilty of preaching in Grace Church but not unlawfully. The evidence was enough to support a charge of preaching in Grace Church on a Sunday afternoon, if that indeed, was an offence. There was insufficient evidence that they were preaching to an unlawful and tumultuous assembly. The verdict returned by the jury was entirely consistent with the weight of evidence and as far as interpretation of the evidence and their conscience went, consistent also with the juror’s oath. Yet, if they had just returned a guilty verdict without qualifying it, that might have been the end of the matter. If preaching in Grace Church was an offence, then the defendants were guilty. However, of preaching to a tumultuous assembly, the answer was in the negative. The jury found its conscience sufficiently
aligned to its purpose to qualify its verdict. If it had simply answered guilty, justice would not have been done.

In the case of Pat Pottle and Michael Randle, the jury listened to the evidence which was quite conclusive as to guilt given that the accused wrote a confession of what they did. The jury considered the law that was being applied and decided that the sentence imposed on Blake was ‘so inhuman that it is alien to all the principles with which a civilised country would treat its subjects.’ They acquitted. They clearly sympathised with the actions of the accused in helping Mr. Blake escape though the offence was proved. They also disagreed with the law under which the prosecution was brought.

In the 19th Century, capital punishment was meted out to people for stealing sheep, horses and cattle and for robberies to the value of 40 shillings – raised to £5 in 1827. Juries undervalued goods to avoid the death penalty.\(^3\)

The issue is the definition and degree of perversity as an extension of one person’s interpretation over another. Thus, to the extent that guilt or innocence is a matter for the jury and no one else, calling a jury’s verdict perverse ignores the process of deliberation and subjective evaluation.

If the argument is that the courts or other observers have decided what the evidence is and interpreted it and that the jury has no business deciding otherwise, why not then dispense with the jury altogether or better still have it as a façade but fetter it with Auld LJ’s recommendation?

If the issue is that of allowing twelve randomly chosen citizens to deliberate as they see fit, then the matter of perversity does not arise. Given that evidence can be interpreted in more ways than one, to the extent that we cling to the word, every verdict is potentially

\[^3\] Devlin, P Trial by Jury ibid.
perverse regardless of which court delivers it because some other ‘reasonable observer’ could always disagree with it. Even reasoned judgements, delivered by judges can be attacked as perverse.

As a further attack to juries, Auld LJ commented in his report that:

Sadly, juries did not prevent the miscarriages of justice uncovered in the late 1980s and early 1990s arising, in the main, from falsification or concealment of evidence that so shook public confidence and gave rise to the appointment of the Runciman Royal Commission…

Auld L.J was referring to such high profile cases as the Birmingham Six and the Guildford Four which were full of allegations of police brutality and perjury, Judith Ward and Stefan Kiszko which alleged non-disclosure of relevant evidence, the Darvel Brothers and The Maxwell Confait cases which alleged extraction of false confessions, the Bridgewater Four and the Luton Post Office murder case which alleged witness manipulation.

All these cases show a pattern of deception and evidence gathering that had nothing to do with the jury. If experts conspire to deceive and other experts are deceived, even the jurymen of ‘average ignorance’ will be deceived. One may well wonder why the judges who had more access to the facts did not invoke the concept of due process. Seeing the poor quality of the evidence prepared for trial, they might have determined that there was insufficient evidence to put the matter to the jury. The statement by Auld LJ ignores the rules of evidence that apply to English criminal law. It also ignores the fact that the jury plays a passive role in an adversarial criminal trial. It does not have any investigative

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32 Review of Courts ibid.
powers and therefore must yield to what is presented in court. It does not and cannot cross-examine a witness and therefore must listen with passivity to the court drama. As Damaska put it, ‘what remains open to challenge is the suitability of the database supplied to the inscrutable decision maker’.  

In his defence of the jury and in response to Auld LJ., Zander observed that:

the high profile mis-carriages of justice were, in the main, the result of human factors such as police officers who fabricated evidence, scientists who made mistakes or suppressed evidence. ‘…no system is or could ever be, fully proof against human error or human wickedness.'

Professor Zander appears to be echoing Kant who opined that:

…from the crooked timber of humanity, nothing straight can ever be made.

This really sums up the position and our attitude to all our institutions but particularly to lay participation in the criminal justice system. It is worth noting that the fact that perfection or certainty is elusive should not deter us from pursuing it.

Transposing this to the requirement for an explanation, unless we start making some demands of the tribunal of facts relative to its verdict, we will continue to quibble over the supposed perversity of its decisions.

It may well be that Auld LJ is right. Perhaps the jury gave too much weight to the prosecution’s case, took for granted the veracity of the evidence of the police officers and the evidence tendered and convicted given the publicity surrounding the atrocities. Perhaps, had the jury decided, against the weight of evidence, to return a ‘perverse verdict,’ such an injustice might have been avoided and no doubt, the public outcry would have been exactly the same against the jury’s verdicts of acquittal ‘in the face of

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34 Damaska. Ibid at page 44
36 Kant, I. ibid. See also R v Smith (2000) UKHL 4 AE. per Lord Hoffman.
overwhelming evidence, evidence that would be later proved to have been prejudicial and wrong.

This paper takes the position that as a matter of law and fact, the idea of a perverse verdict is inconsistent with the principle of trial by jury.

This is particularly relevant to acquittals since a conviction can always be appealed against on the grounds of some irregularity with the trial, a point of law or indeed the basis of a lurking doubt\(^{37}\) in a trial properly conducted but the conviction quashed because of unease with the verdict.

The Story Board and The Appellate Court’s Perspective

Indeed, section 1 (7) of the Criminal Appeal Act 1907 was intended, not to undermine the traditional role of trial by jury but to give the Court of Criminal Appeals sufficient power to rectify miscarriages of justice. It says:

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\text{…the Court shall, for the purposes of and subject to the provisions of this Act, have full power to determine, in accordance with this Act, any questions necessary to be determined for the purpose of doing justice in the case before the court.}
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If jurors in a significant number of cases are not returning verdicts on the evidence or are influenced by other considerations, should we not find out about it? It certainly is a quest that is worth undertaking,\(^{38}\) but if this is what is desired, it should be stated. It will not do to call a verdict perverse simply because we do not know how it was reached or the reasons behind it. Calling a verdict perverse would suggest that the jury has departed

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\(^{37}\) R v Cooper (1968)53 Cr. App. Rep. 82 per Lord Widgery, CJ who declared that a transcript of a page of the trial was not enough to raise a reasonable doubt, Lawton, LJ in R v Long (1973) 57 cr. App. R. 871 – ‘a transcript of the trial does not capture the atmosphere of a trial’.

\(^{38}\) To the extent that S.8 Contempt of Court Act 1981 will allow.
from a road constructed for it by pretenders. That would be in violation of the separation of powers thus requiring the jury to rubber stamp the opinion of the powers that be. Our criminal trial system reposes the domain of fact finding to the jury and for good reasons. In this task, they are not expected to passively and mechanically apply the law like automatons but are compelled both by a sense of duty and their juror’s oath to do, as they understand it, justice in the light of the law, the evidence and their own experience. Thus, the power to return a perverse verdict is, arguably, comparable to the Irish constitutional concept of 'congruence' or 'normativism'.

In the US, some State Constitutions explicitly provide that jurors shall judge questions of fact and law. The jury thus retains a position as the ultimate arbiter of the state of the law. By having a jury of twelve randomly selected individuals, the ordinary people are admitted into the legal process to assess, for the community, within the confines of a specific case, the laws which determine the parameters of the constitutional traditions and arrangements of their society. In this way, political and moral discourses enter what would otherwise be the exclusive arena of legal discourse. Perverse verdict is inherent in the jury's role as the conscience of the democratic community and a cushion between citizens and overly restrictive legislative intervention. When they return verdicts perceived to be as such, juries justify their very existence.

There are many cases of perverse verdicts where the laws involved were not applied because they did not reflect popular conceptions of justice. Such verdicts, it has been

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observed in Colonial Irish Republic and other jurisdictions, indicate the unsavory nature of laws considered unjust by the people but imposed on colonies.\textsuperscript{42}

Such cases include the treatment of black people during the slavery era,\textsuperscript{43} the death penalty,\textsuperscript{44} religious minorities,\textsuperscript{45} abortionists\textsuperscript{46} and infanticides.\textsuperscript{47} There are instances where juries refused to convict contrary to the weight of evidence and directions of the courts. When John Wilkes was repeatedly charged, juries bluntly refused to convict him.\textsuperscript{48} Furthermore juries in rural England refused to convict for poaching. Parliament responded by making it a summary offence.

\textsuperscript{42} In such cases the laws are seen very much as not being those of the jurisdiction in which they are being applied. In respect of Ireland, see Mackey, Windward of the Law (Dublin, 1992), chapter 5. See also the oblique allusions by Kingsmill-Moore J. in Melling v. O’Mathghamhna [1962] I. R. 1, 34 and Henchy J. in The People v. O’Shea [1982] I. R. 384, 432. In respect of the U. S., see Zenger’s Case 17 Holwell’s State Trials 675 (1735), where the accused was charged and acquitted of seditious libel for criticising British Colonial rule and see generally, Alschuler and Deiss, ‘A Brief History of the Criminal Jury’ (1994) U. Chicago L. Rev. 867, 871-875. Indeed, the Diplock courts in Northern Ireland were established partly to counter a perceived 'problem' of jury nullification – Jackson, 'Trial by Jury and Alternative Modes of Trial' in McConville and Bridges (eds.) Criminal Justice in Crisis. Aldershot : Edward Elgar, c1994.

\textsuperscript{43} Trials of defendants 'guilty' of helping to free black slaves have been cited in this respect – U. S. v. Dougherty 473 F. 2d. 1113, 1130 (D. C. Circuit, 1972). Jurors with abolitionist sympathies used their powers as jurors to subvert Federal law that supported slavery and in U. S. v. Morris 26 F. Cas. 1323 (C. C. D. Mas. 1851) (No. 15,815) in considering whether the defendants were guilty of aiding and abetting a slave's escape, the jury passed acquitted. Consequently, the cases against five other people charged with the same crime were dropped – cf. Carrington, 'The Seventh Amendment: Some Bicentennial Reflections' [1990] U. Chicago Legal Forum 33, 45-46.

\textsuperscript{44} In the Nineteenth Century, the practice of nullifying to avoid capital punishment for minor offences became so widespread in England that Parliament had to act to reduce the number of capital crimes – Weinstein, 'Considering Jury 'Nullification': When May and Should a Jury Reject the Law to do Justice?' 30 American Crim. L. R. 239, 242, who also notes that in many States in the U. S. the failure of numerous juries to convict in spite of overwhelming evidence helped to remove mandatory death penalties.\textsuperscript{45} See Bushell’s case, supra

\textsuperscript{45} The cause célèbre of jury nullification in Canada, Morgantaler, involved a physician who was charged several times with setting up free-standing abortion clinics contrary to the law and was acquitted by jury trial, even in the predominantly Catholic province of Quebec – cf. Fennell, Crime and Crisis – Justice by Illusion (Cork, 1993) p. 61.

\textsuperscript{46} A "classic example" of jury nullification, according to Enright and Morton, Taking Liberties – The Criminal Jury in The 1990's, p. 36, is that of infanticides, in respect of which the law was crude and inflexible, involving the death penalty. Jurors frequently did not convict because cases often related to maidservants who had fallen pregnant by their masters.

\textsuperscript{47} cf. Brewer, 'The Wilkites and the Law' in Brewer and Styles (eds.), An Ungovernable People (New York, 1980) p. 128. Wilkes was a politician who helped establish the right of electors to choose their own representatives and he also vindicated the freedom of the press.
This prompted the commentator William Blackstone to lament the imminent demise of the jury. On a wider implication, withdrawal of jury trial for certain offences was one of the catalysts for the American Revolution.

Perhaps the modern British government may learn a thing or two from this experience. From all indications, these verdicts constitute the ultimate social barometer not only leading to changes in the law but having a socio-psychic role in the recognition of rights of those persecuted by such unpopular laws. In returning ‘perverse verdicts’, juries are not being perverse. The perversity lies with the bureaucrats and legislators who fail to see that when a succession of juries refuse to convict in respect of a particular crime, there is more likely something wrong with the law than with the jurors.

More recent examples of jury nullification include the aforementioned Ponting case where, on a charge laid under the Official Secrets Act, the jury acquitted the defendant in the face of a judicial summing-up which made it quite clear that in law the defense presented had to be disregarded. More pointedly, there is the U. S. case of State of Massachusetts v. Allain, Carter, Clay & Ors. This involved student demonstrations

52 Devlin, P: 'The Conscience of the Jury' (1991) 107 L. Q. R. 398, 403-404 cites a number of examples where the relatively consistent intransigence of juries prompted legislative reform in England – e. g. the penalties statutorily imposed for certain driving offences, such as mandatory imprisonment for dangerous driving and a seven year sentence for death caused by dangerous driving had to be revised due to the 'perverse' verdicts returned on numerous prosecutions.
53 R. v. Ponting, referred to in Goodrich, Languages of Law – From Logics of Memory to Nomadic Masks, p. 207. Lord Devlin questions the citation of the "unjust and oppressive law" in this case as an example of jury nullification, for the jury did not react inter alia against judicial bias since the unwillingness to apply bad law is not bias – 'The Con-science of the Jury' (1991) 107 L. Q. R. 398, 402
against C.I.A. recruitment techniques on American college campuses. The defense raised against the disorderly conduct charge was one of necessity and it included a claim that the actions were justified on moral grounds in order to prevent more serious crimes by the C.I.A. The jury accepted the submission and acquitted the defendants. Goodrich notes that this was the first reported case in which the defense of necessity, which has been regularly ruled out in nuclear weapons protest cases, was raised successfully. Admittedly, while its admission in a first instance Massachusetts case is unlikely to have significant ramifications in the common law world's conception of the defence of necessity, it does stand as a salutary reminder of the power of the jury.

South Australia provides an equally salutary example in the Axe-Murder Case.55 This involved the killing by a wife of her husband who had subjected her and their family to lengthy periods of physical abuse and, on the night in question, had attempted to rape their daughter. This prompted the wife to murder. A jury acquitted her and effectively seemed to be saying that justice demanded an acquittal in spite of the legal rules,56 illustrating ‘the difference between the application of legal technicalities and public morality.’57

It is further argued that the jury also confers legitimacy, when it convicts on specific prosecutions by the State in that every serious prosecution of an individual must be

56 Primarily relating to the fact that the defence of provocation was not left to the jury. See generally, Donnelly, 'Battered Women Who Kill and the Criminal Law Defences' (1993) 3 I. C. L. J. 161; McColgan, 'In Defence of Battered Women Who Kill' (1993) 13 O. J. L. S. 508
justified by twelve of their peers chosen at random from the community in the form of a guilty verdict.

Devlin posited the common consensus holding that:

No tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen.  

It is the legislative fear of the democratic power of the jury - the forceful opportunity granted the citizenry to give their opinion directly on the laws enacted on their behalf which has led to restrictions on the jury. This is clearly seen in the Criminal Justice (Public Order) Act, 1994, among others, where numerous summary offences gravely restrict such vital political freedoms as rights of expression and assembly. By scheduling them only as summary offences, the danger of the legislature usurping the 'casting vote' of the jury is avoided as is the danger that other non-legal discourses will be introduced into the determination of guilt or innocence. In support of this contention, Cornish asserted that:

Juries have played a minor role in the prosecution of political offenders. In the delicate areas of the right to express public opinions, the activities of Salvationists, suffragettes, Irish Home Rulers, Fascists, Communists and others have kept the courts busy when disturbances have been created, but nearly always it has been the magistrates who have heard the cases.

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58 Devlin, Trial by Jury, p. 164
59 Cornish, The Jury, p. 128. The potential of the jury as guardian of 'political prosecutions' is recognisable in the fact that, since Ponting, 'secret cases' in England have been pursued through the civil law, notably via injunctive relief thereby avoiding the inquisitiveness of the jury: e. g., Spycatcher (A. G.) v. Guardian Newspapers [1987] 3 All E. R. 316; (No. 2) [1988] 3 All E. R. 545
Cornish’s position is that juries rarely strike a ‘blow for democracy’ and so should not really be celebrated for its stubbornness. But what is the position of the courts?

The Court of Appeal

When the idea was floated for establishing a court of appeal, one of the arguments against such an idea was that allowing an appeal against conviction would undermine the role of the jury. This was, thus, the recognition that following a judicial direction on the law, the jury is charged with the task of deciding the facts of a case and to determine whether or not the defendant has been proved guilty of the crime charged or a lesser crime.

The Criminal Appeal Act 1907 explains the ambit of its authority in section 4 (1):

The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgement of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case, shall dismiss the appeal...

Lord Bingham, in Pendleton, pointed out that the Criminal Appeal Act made provisions for the Court of Criminal Appeal to ‘tamper’ with a jury’s verdict only if ‘it appears’ or ‘they are of the opinion’ that a conviction is unsafe upon a consideration of fresh evidence. A further assessment of his judgement would indicate that in any such case, the matter turns on new evidence. Clearly, the only Court or body reasonably permitted to call a jury’s verdict perverse would be the Court of Criminal Appeal and even then, upon

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60 Radzinowicz and Hood, A History of English Criminal Law, 1986, vol. 5 at p.765
61 S. 2 of the Criminal Appeals Act 1968, ‘The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to whether the evidence appears to the Court to be capable of belief…’
a consideration of fresh evidence on an appeal against a conviction. This latitude to call a verdict perverse, it is submitted, the Court denies itself and for good reason too. The evidence is fresh precisely because it was not available at the jury trial. That being the case, any decision reached by the jury could only, hopefully, have been based on admissible evidence present at the time. The discovery of fresh evidence does not alter that position much less be the premise for declaring a verdict perverse.

There is some currency in the statement that the ‘value of a jury’s verdict lies in its unanimity, not in the process by which they arrived at it’. However, given that unanimity has been undermined, attention may justifiably turn to that process. Louis Blom-Cooper continues:

…there can be no room in the due process of criminal justice for the jury to import factors outside the ambit of factual evidence.

This proposition is most startling in its breath given that juries are used in criminal trials precisely in order to inject democratic values into the CJJS – values which ordinarily, are outside the ambit of factual evidence and mostly outside the court. Those values include the qualities inherent in humanity. If jurors are prevented from importing factors outside the ambit of factual evidence into the trial, it could well be the most powerful argument against the institution and indeed any process that involves human judgement. This is because the subjective element of a

62 Lord Hewart C.J. in R v Armstrong (1922) 2 KB at 568; Ellis v Deheer (1922) 2 KB 113 per Bankes LJ at 118.

63 Louis Blom-Cooper ibid.
trial would become unnecessary. Thus, trial by jury or by experienced judges would become superfluous. Experience would become an impediment to the process.

The issue then relates to evidence. Is there sufficient evidence to return a particular verdict? Is there any evidence to put the matter before a jury? Must the jury convict because the matter has been out to them? Who is best placed to interpret the evidence? Who is best placed to sift the evidence? What is the quality of the evidence presented to a jury? Damaska argues that it turns on what evidence is presented to the fact finder. The Privy Council went further in Crossdale\(^\text{64}\) when discussing procedural issues regarding submissions of no case to answer in jury trials. An extrapolation of the reasoning provides some insight into the argument. That reasoning appears conclusive in support of the argument advanced here that to the extent that a verdict in a criminal trial is a matter for the jury, perverse verdict, as a concept, does not exist.

Lord Steyn:

> A judge and a jury have separate but complementary functions in a jury trial. The judge has a supervisory role. The judge carries out a filtering process to decide what evidence is to be placed before the jury.

This filtering process is the first judgment made in a case and is the basis for the summoning of a jury and the commencement of a trial. Lord Steyn continued:

> …the judge may be required to consider whether the prosecution has produced sufficient evidence to justify putting the issue to the jury.

\(^{64}\) Crossdale v R (195) 1 WLR 864, 871-3 (PC)
In other words, might a jury, presented with such evidence and properly directed convict?\textsuperscript{65}

Lord Devlin was succinct in declaring that:

\ldots there is, in truth, a fundamental difference between the question whether there is any evidence and the question whether there is enough evidence. I can best illustrate the difference by an analogy. Whether a rope will bear a certain weight and take a certain strain is a question that practical men often have to determine using their judgement based on their experience. But they base their judgement on the assumption that that is what it seems to the eye to be and that it has no concealed defects. It is the business of the manufacturer of the rope to test it, strand by strand if necessary before he sends it out to see that it is has no flaw; that is a job for an expert. It is the business of the judge as an expert who has a mind trained to make examinations of the sort of test the chain of evidence for the weak links before he sends it out to the jury; in other words, it is for him to ascertain whether it has any reliable strength at all and then for the jury to determine how strong it is\ldots The trained mind is the better instrument for detecting flaws in reasoning; but if it can be made sure that the jury only handles solid argument and not sham,\textsuperscript{66} the pooled experience of 12 men is the better instrument for arriving at a just verdict. Thus logic and common sense are put together to make a verdict’.\textsuperscript{67}

This passage receives approval and is cited by Lord Steyn in the Privy Council case of Crossdale cited above.

As observed, proof beyond a reasonable doubt is a matter for the jury and not the judge.\textsuperscript{68}

The judge will decide on whether or not there is sufficient evidence to go the jury. The

\textsuperscript{65} Or in the event of an appeal against a conviction and the admission of new evidence, the matter might be resolved by the Court asking ‘whether the jury, if they had knowledge of the fresh evidence would necessarily have come to the conclusion that they did’. R v McNamee (unreported), December 17 1998, Court of Appeal Criminal Division at page 5 and quoted by Lord Bingham in R v Pendleton ibid.

\textsuperscript{66} Damaska argues that attention should thus focus on the quality of the evidence the jury has to consider.

\textsuperscript{67} Devlin P ‘Trial by Jury.’ The Hamlyn Lectures, 8\textsuperscript{th} Series (1956 republished 1988)

\textsuperscript{68} The standard of proof in a civil case is ‘on a balance of probability’.
jury will decide if the evidence presented is enough to reach a decision. If it has any doubt, it is expected to give the benefit of it to the defendant.\textsuperscript{69}

Once that is done, the weight to be given to the evidence and the outcome of the case are matters for the jury. Neither the judge nor any one else is as equipped or placed to return a verdict. If the judge determines that there is insufficient evidence to be put before a jury, he will declare a no case to answer. If he decides there is enough, the matter is left to the jury. If the judge thinks the matter should be stopped for reasons of due process, he will rule accordingly. If he is not prepared to stop the case, he will reject the submission of no case to answer and say that the matter is one of credibility and weight for the jury.\textsuperscript{70}

For as long as trial by jury remains a central part of our criminal justice system, the notion of a perverse verdict is a myth. It may be convenient to label a verdict perverse, but as Viscount Dilhorne observed in Stafford\textsuperscript{71}:

\begin{quote}
While…the Court of Appeal and the House of Lords may find it a convenient approach to consider what a jury might have done if they had heard the fresh evidence, the ultimate responsibility rests with them and them alone for deciding the question.
\end{quote}

By extension and as a matter of observation, in the absence of fresh evidence and subsequent consideration by the Court of Appeal, there are only four other people that can legitimately call a verdict perverse.

\textsuperscript{69} Reverse onus cases are fatal to this ruling.
\textsuperscript{70} A Samuels, ‘No Case to Answer: The Judge Must Stop the Case: Galbraith’, Archbold News, 14 November 1996, 6,6.
The first would be the guilty defendant who, due to what we might call ‘technicalities’, has been acquitted and who knows of his guilt. The second would be the victim in the event that he categorically knows of the defendant’s guilt but unable to prove it in court. The third would be an innocent defendant who has been convicted and the fourth would be the jury who, having agreed or unable to agree on guilt or innocence, nonetheless decides to acquit or convict for reasons best known to it. However, since the acquitted ‘guilty’ defendant is unlikely to complain, the matter rests there. Since the ‘knowing’ victim has failed, by his counsel, to discharge the burden of proof, that is the end of the matter. And since the jury does not have to explain itself, the decision rests.

If the convicted defendant is able to identify an irregularity in the trial process or a question of law raised by the trial, he can resort to the appeal process to challenge the verdict.

It is argued that the use of the word ‘perverse’ to describe a profound disagreement with a jury’s verdict based on an objective assessment of the evidence is an understandable one. However, it should be vigorously resisted as an affront to the principles of trial by jury. Thus, it might be helpful to refer to a verdict as ‘unsatisfactory’ rather than perverse. This is because an objective assessment, limited to factual admissible evidence, may predict the outcome of a trial. However, if on a combination of objective and subjective assessments, the jury delivers a verdict deemed inconsistent with the factual evidence, the objective observer may be forgiven for referring to that verdict as being an unsatisfactory outcome of a trial.

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72 Since S.8 Contempt of Court Act 1981 makes it an offence to divulge events during jury deliberations, we are to be informed by any jury that its decision was perverse. The only people likely to find out are those close enough to sit at the various dinner tables where each juror discourses his experience away from prying eyes and ears.
Unsatisfactory would be the description of a result whose subjective element explains the leanings of the jury and recognition that it may or may not have paid homage to factual evidence. Perverse, on the other hand, acknowledges the usurpation of roles. However, as has been stated above, the weight to be given to any piece of evidence and a decision as to the outcome of a trial is a matter for the jury alone – at least until we change the role of the jury in our criminal trials.

In the recent case of R v Wang, the law Lords were confronted with the question

**In what circumstances, if any, is a judge entitled to direct a jury to return a verdict of guilty?**

The appellant had argued that the judge may never do so. The Crown contested that view. The ruling is worthy of note. Citing Stonehouse, the Lords stated:

- It is common ground that if a judge is satisfied that there is no evidence which could justify the jury in convicting the defendant and that it would be perverse for them to do so, it is the judge’s duty to direct them to acquit…it is agreed that a judge should withdraw a defence from the consideration of the jury if there is no evidence whatsoever to support it and he need not direct the jury on an issue not raised by any evidence.

Finally, a jury’s verdict can never be said to be perverse unless the same jury judges it accordingly at a later date based on the same circumstances. This, of course, would be an impossible feat because those jurors would be operating with the benefit of hindsight quite apart from the fact that once a jury has been discharged, the matter is closed and they are never summoned as the same collective to rehear the case. Furthermore, the exact trial moments could never be recreated.

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73 R v Wang, (2005) UKHL 9
Nonetheless, judgement according to conscience appears to undermine the notion of a perverse verdict. This is because there is, inherently, a trade-off between the subjective and objective elements of assessment, we must assume, during deliberation. In such cases, a ‘perverse verdict’ is easier traced to the collective conscience of the jurors. The question to be determined is whether a modern society should allow such conscience to be part of a democratic process and what benefits, if any, there are.

In an age of accountability, the mirage of legitimacy conferred upon a jury by tradition appears unstable. Yet, verdict according to conscience appears to be the ‘catch all’ phrase used as the only way to explain the system’s failure to make robust demands of the tribunal of fact. On the other hand, if the jury is prevented from returning a verdict according to its conscience, there would be no need to have the system.

The matter would be left in the hands of experts who are better able to articulate a reason and dispense justice according to the letter of the law. But the matter is not left in the hands of professional non-deliberating judges. The jury must decide and according to Wang the jury has the last word and this remains:

   An insurance that the criminal law will conform to the ordinary man’s idea of what is fair and just...

This theory of the perverse verdict advances the argument for a system of transparency and jury accountability in the form of an explained verdict as a way of bringing further understanding to the English Criminal Justice System. This will also remove the legal non-event referred to as a ‘perverse verdict’.