Commercial Frauds: Problems and Remedies in the Judicial Process

Commonwealth Secretariat

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Introduction

> "Trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law.....So that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate; not only from all open attacks (which none will be so hardy as to make), but also from secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial; by justices of the peace, commissioners of revenue, and courts of conscience. And however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads into the sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern."
>
> Sir William Blackstone, Commentaries

Despite the considerable growth in the use of administrative sanctions against commercial malpractice, the criminal trial remains the centrepiece of moral condemnation in our society. Lord Devlin (1956, 164) refers to trial by jury as. 'the lamp that shows that freedom lives". Certainly, as Blackstone's grandiose rhetoric indicates, the jury is the symbol of popular legitimation of the Due Process of Law, whereby the criminal justice system is a sort of obstacle course for prosecutors rather than a smooth machine for processing and repressing 'crime'.

Rhetoric, however, can be the enemy of reason. Judge Jerome Frank (1950, 108) observes that whenever he hears the jury praised as the Palladium of liberty, he recalls that palladium is also the name of a chemical element which, in the spongy state,

has the remarkable quality of absorbing up to 1,000 times its own volume in hydrogen gas. One of the aims of this report is to subject fraud trials to some critical analysis: if the consequence is to deflate some of the airy assertions that have been made about jury trial, then this may be no bad thing. However, I would stress that this report deals with the issue of how frauds are and could be tried. Many of the arguments, and much of the evidence, that are adduced here may have no relevance whatever for the trial of other types of crime. Moreover, although it is the author's hope that policy will be informed by the review which follows, this in no way pre-empts the adoption of moral or political views which place different priorities upon the factors to be discussed.

Wider issues of civil liberties will not be dealt with in detail here. Modern States may regard themselves as less prone to oppress their citizens than was the case during the great libertarian age of the English jury, from the seventeenth to the early nineteenth centuries, when increasingly radical (though middle-class) jurors frustrated the will of the Crown and the judiciary. It may be that the long-term legitimating function of the jury is more valuable than the short-term rewards from doing without it, but this is outside the scope of this report. To the extent that time and information availability permit, I will examine the problems in dealing with commercial fraud experienced by Commonwealth countries during and immediately prior to the trial stage.

To some of the smaller and less affluent Commonwealth nations, whose principal problems have been in detecting fraud and in building up cases for prosecution, this may not appear to be a pressing concern. Indeed, there may be a greater need to develop prosecutorial expertise than to improve the trial process, for what is not prosecuted cannot be tried. However, the

difficulties with fraud trials that have been experienced in England, Australia, and Canada provide a timely opportunity for advance planning elsewhere. For as we achieve improvements in legislation, and in policing and prosecutorial competence regarding fraud, the greater will be the strains that will occur at the trial stage. This report is premised upon the nation that criminal justice systems are interdependent mechanisms, in which tensions that appear at any one stage have implications for all the other stages.

In reviewing pre-trial procedures and the mode of trial, a good deal of the analysis will be based on English practices. However, I am well aware of the dangers of a parochial ethnocentrism, particularly when one examines institutions such as jury trial, which have never taken root particularly well in African or in Asian soil, whether because of ethnic conflicts or because of difficulties in securing jurors of the right calibre and motivation. Consequently, an effort will be made to bear these practical aspects in mind when making recommendations.

Concern about the Use of Juries in Fraud Trials

During the past decade, the jury has been subjected to serious critical attack, not only from sections of the judiciary but also from the increasingly politically articulate police (Denning, 1982; Mark, 1973; Thompson, 1980). It has been alleged that, particularly in London, the extension of the jury franchise to the entire electorate has led to the moral pollution of jury panels, which consequently tend to favour acquittal more than they ought to do and more than they were wont to do. The general arguments about the acquittal rates of professional criminals are not relevant here (see Levi, 1981, Ch. IX, XII; Baldwin & McConville, 1979, 1981). However, it is worthy of note that recent English studies show that working-class people are slightly more disapproving than middle-class ones of commercial credit frauds, whether committed against private individuals or against large corporations (Levi, 1982, 1982a; Sparks, Genn, and Dodd, 1977). Even jurors with criminal records for theft cannot be assumed automatically to favour fraud, if one pursues the line of argument that 'crime' is what other people do. The question remains open.

Indeed, in my submission, it is important to preserve a healthy scepticism regarding some of the claims that are made about defects in the separate constituent parts of any criminal justic system. Such claims are found all too often to be a method of displacing attention from defects in the complainant's own conduct. This is not the place for an extended discussion of problems in the prosecution process (see Leigh, 1982; Levi, 1981; and Rider, 1980). However, let us take the all-too-common mode of preparing a case for trial in England.

One or two police officers of relatively junior rank have worked painstakingly and conscientiously upon an investigation

for a long time, often unguided by an experienced lawyer as to the strict relevance of any particular line of examination. The invention of the photocopier has been a mixed blessing, for it permits the easy copying of a mass (some might say morass) of documentation which, when the officers believe there is enough evidence to justify a charge, is conveyed to counsel. Although there is a very rough-and-ready concentration of complex cases among the Old Bailey Treasury Counsel, they are not necessarily fraud specialists by expertise or by inclination, and to set time aside to work continuously on a fraud case for weeks brings insufficient enjoyment or remuneration. Consequently, the documentation is not weeded out at the early stage when it ought to be: the temptation is to leave it to the pre-trial practice directions or even to the trial itself. By the time the case reaches the pre-trial review, possibly in front of an inexpert judge who has had insufficient time to examine the documents or the authorities upon which opposing counsel rely (for judges too operate on the cab-rank system), it has taken on a life of its own. All the documents are neatly bundled and numbered - possibly including all twelve copies for the jury - and there is further disincentive to carry out a drastic pruning (see R. v. Landy and others, [1981] 1 All ER 1172). Under circumstances such as these, and they are by no means untypical, is it any surprise that a jury would have difficulty in sorting the wheat from the chaff? Many prominent counsel and judges have expressed the view to me that some of their eminent colleagues have failed either to understand the case at all or to understand it until it was almost complete. If this is the case (and what motive would they have for lying?) then it may seem churlish to blame the jury for defects that occur in the investigation and prosecution systems. The tendency towards scapegoating is one that should be avoided wherever possible.

It should not be thought that concern about the role of the jury in fraud trials is restricted to 'right-wingers' who are obsessed more with 'order' than with 'law'. The British section of the International Commission of Jurists, Justice, has been asked to help in several fraud cases where the accused have claimed injustice at the hands of juries. In the case of Reginald Marks, a solicitor convicted of conspiracy to defraud, it was argued (unsuccessfully) before the European Commission on Human Rights that the complexity of the in-house dealings and the sheer volume of the evidence had overwhelmed the defence. Conspiracy charges particularly tend to lead to this phenomenon. Some professional advisers such as lawyers and accountants believe that if the judge and jury are not familiar with their work practices and lay parties profess to have relied on them, they face an enormous battle first to explain their work practices adequately and second to show that they operated them honestly.

It has not been alleged that 'common juries', that is, juries which approximate to a representative sample of the non-disqualified electorate, are too prone to acquit business criminals because they share their mores. Rather, objections to trial of frauds by common juries fall under four principal heads: corruptability, competence, cost, and length. It is arguable that these are inter-related. Jury trial may be lengthy and expensive because juries are incompetent. However, a priori, it is equally plausible that such trials may be lengthy and expensive because the prosecution preparation has been inadequate, because the trial judge has failed to narrow down the issues to be decided at the trial, or because (where Legal Aid exists), dilatory defence counsel have a financial interest in stringing out cases to the maximum. In order to permit consideration of these alternative explanations, an attempt will be made here to keep the four principal objections as separate analytically as possible.

Jury-tampering in fraud trials

There is nothing new about jury-tampering in England. Suspicions about the reasons for the acquittal of some prominent London villains precipitated the introduction of majority verdicts, despite complaints that this violated the principle of 'reasonable doubt'. One leading fraudster who worked with the Kray gang, Leslie Payne (1973) boasted in his autobiography about his well-developed techniques of jury-fixing, though somewhat intemperately, since soon afterwards, he was convicted by a jury of car-ringing charges. Recently, there appears to have been a boom in attempted corruption of jurors: between July 1981 and July 1982, no fewer than 12 trials at the London Central Criminal Court have been stopped because of jury-tampering or approaches to witnesses. This had led to a tightening-up of potential contact points between jurors and the public: jurors and witnesses often dined in the same court restaurant as defence lawyers and even defendants, if the latter were on bail! Moreover, juries are now out of sight of the public gallery, though this may make it harder for them to hear the evidence.

Since 1975, there have been four detected attempts to approach jurors in fraud trials in England. Three of these occurred towards the very end of the trial, after the defence had been apprised of the full strength of the prosecution case. In the first, a 55-day long-firm fraud trial which featured seven defendants represented by Queen's Counsel on legal aid, it was plain to those of us present that the principal defendants had a poor case. During the judge's summing up, the sister of one of the accused was observed speaking to one of the jurors, a fact that was relayed to the trial judge, who discharged the jury and ordered a re-trial (to be held in front of himself). In the second, a trial which had lasted 137 days and had cost £1,250,000

in legal fees was stopped when a juror was approached. In the third, two jurors in a tax fraud trial (this time at Croydon Crown Court in London) were offered independently £500 for "swinging it" for certain of the defendants while they were on their way home from court. (In view of the possibility of a 10-2 majority conviction, it is interesting to speculate about the possibility of a third offer.) To the best of my knowledge, none of these cases has resulted in a prosecution for attempting to pervert the course of justice. All of them led to equally expensive re-trials. Clearly, it is a matter for speculation whether there have been many successful attempts to 'fix' juries in fraud trials, but given the sums at stake, it would be naive to rule this out. It is alarming to note that an English TV Eye programme in November 1982 contained interviews with several members of a 'mock' jury who readily admitted that in certain types of cases, such as tax fraud, they would seriously consider, if not accept, an offer of £2,000 to bring in a "not guilty" verdict. When jurors go straight to a champagne reception after acquitting accused after a long fraud trial, suspicions may not be regarded as unreasonable. The expectation must be that such efforts will tend to increase rather than decrease in future.

In some cases, jurors may even be infected with the spirit of fraud. For instance, in 1981, two jurors who had been trying a fraud case were convicted of making false claims for separate travel to the court, when in fact they had travelled together!

The competence of juries in fraud cases

> "It is rare in a working life to undergo a dream sequence of exquisite fantasy, but such has been the experience of one barrister seeking - as a preliminary to more complicated matters - to explain the inwardness of a cumulating non-participating second preference share to a manifestly hostile inspector of sewers, a lady with a bag of knitting, and several others whose gaze of rapt attention would have been more encouraging had they found it easier to read the oath.
>
> I am not sure that in the present condition of things, where it is generally only the more gross and palpable frauds that are prosecuted, that the jury causes much injustice in the end.....by the end of the trial, and by dint of repetition, and of repetition of repetition, the bulk of the jury no doubt obtain some understanding of the facts they are supposed to be trying. What is involved is a most profligate expenditure of time and money on the paper, speeches, and explanations adduced in striving to convey a glimmer to the darkest intelligence present."
>
> Morris Finer, Q.C. (1966)

The competence of juries to try complicated frauds has never been the source of spirited defence. At the highest, the argument takes the form that juries are not all that bad because they generally decide the case in the way that the judge would have done. In this context, the late Judge Morris Finer's remarks are particularly interesting. (It should be noted that they occurred well before the extension of the jury franchise and before the expansion in the number and length of fraud trials)

There is, alas, little sophisticated information regarding the ability of jurors to understand fraud cases. Because of their length, they would be very expensive for the jury simulation exercises which have been a fruitful source of

data on the jury, though during the late 1970s, IBM lawyers hired a marketing professor to bring into the courtroom six ordinary people who heard the case just as a jury did. The aim of this was to give the lawyers feedback during the trial about what was getting through to the jury and also to help any argument on appeal to the effect that the case was too complex for a jury to understand. Although IBM did win this particular civil antitrust suit, on the direction of the judge, confidential sources state that the findings were not very complimentary to the jury.

Elsewhere, reliable information is hard to find. Cornish (1971, 198) tells of one accountant who had been a juror in a fraud trial. The accountant had had to open proceedings in the jury room by giving his own explanation of the sheets of figures that were produced in evidence. He considered that nine of his fellows had been unable to follow this crucial information in any adequate fashion. In the course of my research, I spoke to several jurors who had been on fraud cases lasting from twelve to fifty-five days. One of them was a student of mine, who stated that his fellow jurors had been mystified by what I held to be an only moderately complex case lasting twelve days. He stated that with some difficulty, he had been able to understand most but not all of the evidence. The jury acquitted, because they could not be sure of guilt beyond all reasonable doubt. (I should add that he later obtained an upper-second class degree!) A distinguished academic colleague made the following observations on his experiences:

> "I was on the jury of two of these, and the similarities were rather striking. In the first place, both were rather complex, and the presentation of the evidence was so poor that I don't think any of the jurors understood it. I cannot claim to have understood it myself, because important

> pieces of the evidence seemed to be missing, the right questions were not asked (in my opinion) of the witnesses, and the final outcome was that both the accusers and the accused seemed equally crooked, but for us on the jury it was impossible to discover just precisely what kind of fraud had been committed by whom, or on whom. The only possible verdict therefore was not guilty; we would have preferred 'not proven' but of course that was impossible.
>
> While I didn't understand all of the evidence, I did understand some of it, and that was a great deal more than my jury members did. I though that even if the case had been properly brought and explained, most of them would not have understood a word, and it seems quite clear to me that an average jury, with an average I.Q., would not be capable of understanding the evidence or coming to a reasonable conclusion.....My fellow members seemed to be concerned mainly with whether a given witness or accused person made a good impression, looked as if he were reliable or truthful, etc., all of which are judgements which are clearly irrelevant, and are known not to be very reliable."

His conclusion was that if such cases were to go to a jury at all, it should only be to a jury that was both highly intelligent and had some background knowledge of commerce and accounting.

Two other persons, from less exalted spheres, expressed the same view about the incomprehensibility of the trial. These data are not representative in the statistical sense, and should not go wholly unquestioned. One English judge, for instance, has stated that some juries do appear to follow the case, the indicator of which is that they ask pertinent questions in notes passed to him during the trial. It was his opinion that the problem was less in the lengthy than in the shorter fraud trials, because by the end of a very long case, jurors came to understand it. (However, whether this understanding applied to their

evaluation of the early evidence remains moot). Even here, he stated that the understanding depended largely on whether the case under discussion related to matters (such as conveyancing) which were within the normal jury's experience. On balance, these limited examples do provide independent confirmation of police and judicial rhetoric about jury inadequacies, at least under the current system of trial in England. However, proper research clearly is desirable, and it is a matter of regret to author that the Contempt of Court Act 1981 prohibits the interviewing of jurors for academic research.

Prima facie, the issues facing a jury in even the most complicated of fraud trials are similar to those involved in other types of property crime. After examining the evidence, they have to decide whether or not each accused was dishonest. This is a point that has been put to me by a number of leading members of the English Bar, whose opinions I requested in the course of preparing this report. The matter is put nicely in the important judgment of the Court of Appeal (Criminal Division) in R. v. Landy and others, [1981] 1 All ER 1172, where Lawton L. J. stated (at p. 1181):

> "What the Crown had to prove was a conspiracy to defraud which is an agreement dishonestly to do something which will or may cause loss or prejudice to another. The offence is one of dishonesty. This is the all-important ingredient which must be stressed by the judge in his directions to the jury and must not be minimised in any way. There is always the danger that a jury may think that proof of an irregularity followed by a loss is proof of dishonesty. The dishonesty to be proved must be in the minds and the intentions of the defendants. What the reasonable man or the jurors themselves would have believed or intended in the circumstances in which the defendants found themselves is not what the jury have to decide; but what a reasonable

> man or they themselves would have believed or intended in similar circumstances may help them to decide what in fact individual defendants believed or intended. An assertion by a defendant that throughout a transaction he acted honestly does not have to be accepted but has to be weighed like any other piece of evidence. If that was the defendant's state of mind, or may have been, he is entitled to be acquitted. But if the jury, applying their own notions of what is dishonest and what is not, conclude that he could not have believed that he was acting honestly, then the element of dishonesty will have been established. What a jury must not do is to say to themselves: 'If we had been in his place we would have known we were acting dishonestly, so he must have known he was.' What they can say is: 'We are sure he was acting dishonestly because we can see no reason why a man of his intelligence and experience would not have appreciated, as right-minded people would have done, that what he was doing was dishonest!."

The subjective test of dishonesty has now been approved by the Court of Appeal in R. v. Ghosh, [1982] 2 All ER 689 in relation both to conspiracy to defraud and to theft. The practical problems of inferring dishonesty, however, tend to be greater in fraud cases than in other types of dishonesty, for two reasons. First, the facts and conduct from which dishonesty are to be inferred are more complex. And second, more importantly, the ambience in which these facts and conduct are located is almost wholly alien to the routine or even indirect knowledge of most jurors.

In many jurisdictions, for example, 'recklessness' may be involved in allegations of fraud. In the leading case of R. v. Caldwell, [1981], 1 All ER 961, Lord Diplock observed (at p. 966) that recklessness has

> "a meaning which surely includes not only deciding to ignore a risk of harmful consequences resulting from one's acts that one recognised as existing, but also failing to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was..... If there were nothing in the circumstances that ought to have drawn the attention of the ordinary prudent individual to the possibility of that kind of harmful consequence, the accused would not be described as 'reckless' in the natural meaning of that word for failing to address his mind to the possibility; nor, if the risk of the harmful consequences was so slight that the ordinary prudent individual on due consideration of the risk would not be deterred from treating it as negligible, could the accused be described as 'reckless' in its ordinary sense if, having considered the risk, he decided to ignore it."

Clearly, both the prosecution and defence can adduce evidence on the sorts of matters referred to as indicators of recklessness, but it cannot be denied that this is a more difficult task in some kinds of fraud than it is in driving offences, the subject of Caldwell. All jurors are either drivers or road users, and this makes it easier for them to visualise the situation to which the legal arguments and the evidence are addressed than is common in frauds. There is a danger of treating fraud as a homogeneous category of offences. Matters of social security fraud fall within the province of acts which are readily placed in context by ordinary jurors. Mail-order, conveyancing, carbon-paper, and trade directory frauds, though more complicated, are generally understandable also. In R. v. Greenstein [1976] 1 All ER 1, the Court of Appeal asserted that jurors could easily comprehend the mechanics of 'stagging' on the Stock Exchange, and this may be true. However, accounting frauds and corporate deeds of the kind commonly featured in Department of Trade Inspectors' Reports are a different matter. It may not

take the nose of a connoisseur to smell bad fish, but labyrinthine transactions carried out over a period of years, involving masses of documentation and concepts that few lawyers comprehend are in a different realm of understanding. It is here that due process of law and trial by jury can most rationally be questioned.

Acquittals in fraud trials

There has been a regrettable tendency in some quarters to view the acquittal rate as an index of the extent to which the jury 'is not doing its job'. This represents a profound misunderstanding of the function of the jury or indeed any other judicial tribunal. This function is not to rubber-stamp prosecutorial (which often means police) decision-making but to subject it to critical examination. We must all sympathise with investigators (as we do prosecutors!) when a case is acquitted which appears to us to have been adequately made out. Hence, it is legitimate for us to be concerned about acquittals. However, to call the jury (or judge) to account is not the same as to suggest that the institution is malfunctioning because the acquittal rate is 'too high'. How high is 'too high'?

Nevertheless, it is instructive to examine the acquittal rate in fraud cases to see what it tells us about how juries decide. Certainly, if willingness to convict is our criterion for the competence of a judgement, these acquittal rates provide little apparent cause for alarm. In none of the Commonwealth countries who responded to the questionnaire in time for inclusion here did the acquittal rate exceed one fifth (though sometimes it was impossible to tell whether the proportion was that of persons prosecuted or of not guilty pleas). In many cases, particularly where trial was without jury, the proportion of acquittals was much lower. In Singapore, for example, it was around 4 per cent. In England and Australia, the acquittal rate is higher. My research for the Royal Commission on Criminal Procedure (some of which is summarised in Table 1) found that almost a quarter of these prosecuted were found not guilty by the jury or on judicial direction.

Table 1

All fraud trials committed to the Central Criminal Court, London in 1977

Number of fraud trials	72	
Number of fraud trials with more than one accused	35	
Total number of accused persons	242	
Number pleading guilty to all charges	61	
Number pleading guilty to some but not all charges (all such pleas were accepted and no further proceedings were instituted)	53	
Number pleading not guilty to all charges	128	(53%)
Number of persons acquitted by jury	35	
Number of persons acquitted on direction of judge	10	
Number of persons whose convictions were quashed by the Court of Appeal (Criminal Division)	12	
Persons not proceeded against after notguilty plea	5	
Split verdict trials (i.e. those in which defendents were acquitted of some but not all charges)	43	
Persons acquitted by jury as a percentage of all those pleading not guilty	27.3%	
Persons acquitted by jury and judge, or whose convictions were quashed, as a percentage of those pleading not guilty	44.5%	
Persons found not guilty as a percentage of all those against whom proceedings were taken	23.6%	

Some further insight can be gleaned from examining what sort of people do get acquitted in fraud trials. Unfortunately, information is rather sparse here, the only research being directed specifically at long-firm frauds (that is, businesses that obtain large quantities of goods on credit for which they do not intend to pay). One reason for concern is that the 'Mr. Bigs' might be acquitted while the minnows were convicted. My research showed that this was not disproportionately the case. At the Old Bailey, 21.9 per cent of the alleged principals - those accused of having played a major part in the organization of the fraud or in the disposal of the goods - were acquitted, compared with 22.9 per cent of the non-principals, as a proportion of those pleading not guilty. (They were roughly equally likely to plead not guilty). Moreover, those acquitted (almost invariably of conspiracy to defraud) tended to have lighter criminal records than those convicted: 60 per cent of those acquitted had no previous record, compared with 27 per cent of those convicted.

One of the most interesting periods for examination was 1962-1972, when there was extensive organized crime involvement in long-firm fraud, one effect of which was to inflate the prior criminal records of those charged. Out of the 43 people acquitted at the Old Bailey during this period, 14 had played a minor role in frauds for which others were convicted: only two of these had previous convictions, both for very trivial offences. All nine of those acquitted after accusations of having played moderately serious roles in long-firm frauds had spent over a year in prison previously. Eight of them had been employed in transporting goods to and from the fraud's warehouse: a role which is associated often with that of the 'minder' put in to look after the organiser's interests. One may hazard the guess that - in the absence of knowledge of their previous convictions

- the jury took the view that none of them had the requisite 'guilty knowledge' of the fraudulent purpose of the business. (This is a view which may reasonably be regarded with scepticism). Finally, 14 out of the 20 alleged major role-players who were acquitted had no previous convictions, and of the remaining six, only two had spent more than a year in prison prior to their present charges.

In brief, the prior criminal records of those acquitted of long-firm fraud at the Old Bailey reveal them to be a fairly 'non-criminal' group, if one takes prior convictions as an index of criminality. However, to infer from these data that many long-firm fraudsters do not evade conviction is wholly invalid. The acquittal rate can only be a meaningful base from which to evaluate the avoidance of conviction if

(a) the police know the identities of all criminals;
(b) the police know all about the activities of 'criminals';
and (c) all criminals are prosecuted for all their alleged criminal activities.

In so far as commercial frauds are concerned, none of these criteria apply. First, part of the skill of the fraudster is his or her ability to conceal the fraudulent nature of the loss. Thus, a marine fraudster will create the appearance of an ordinary, accidental loss at sea; a long-firm fraudster will 'massage' his accounts, often in leaque with the liquidator, so that his asset and liability position looks more favourable than it is; the counterfeiter will merge the phoney stock with the genuine. Even if the fraud is detected by the victim, it has a low chance of being reported to the authorities. Consequently, the police (and other regulatory agencies) know only a small proportion of the commercial criminal population.

Second, since the rules of privacy and the relatively low priority given to commercial crime make 'target surveillance' of most fraudsters impossible, the control agencies do not know about all the activities of those whom they believe to be fraudsters. And third, compared with the routine prosecution of 'ordinary' criminals by the police whenever there is *prima facie* evidence of guilt (as seen by them), very much more thought is given before sophisticated frauds are taken to court. The likely cost of the trial, the seriousness of the offence (relative to other frauds), the possible damage to the reputation of the accused if prosecuted incorrectly, extradition and other legal difficulties, and the staleness of the case all influence the decision to prosecute, at least in England. One may question the rightness of some of these criteria: staleness often is engineered by alleged offenders precisely in order to benefit from the policy, and more legal initiative could be put into some cases which are not prosecuted (Leigh, 1982; Levi,1981) However, the differential prosecution policies do exist, and for all the above reasons, it is very misleading to utilise acquittals as the sole basis for discussing the adequacy of the court or prosecution system.

The importance of looking carefully at the data on acquittals is that if it turns out that the more dramatic cases are not the result of jury deliberation but rather are the result of judicial rulings, the case for changing the jury is weakened. (Unless the judge is merely protecting the accused from what he believes will be an incomprehending jury verdict.) Although I have been unable to get comparable data for jury trials of fraud in the United States, it is noteworthy that the acquittal rate in cases where the accused opts for trial by judge alone is higher than that which obtains in most of the Commonwealth. We may also note that if the accused bribes the

police or witnesses so that a prosecution does not come up to scratch, that is not the fault of the jury.

Let us take as an example the case of Sigmund Sperber, (a.k.a. George Pratten), a man whose ability to cross-fire cheques fraudulently has cost European banks nearly £3 million in the past few years. In 1958 he was sentenced to two months imprisonment, and in 1959 he was given five years' imprisonment for fraud in Belgium. After jumping bail there, he was apprehended in Italy and acquitted for fraud. He was extradited and served his Belgian sentence, but in 1969 was convicted *in absentia* in France, whence he had disappeared. He then became involved in a series of frauds in Europe. Among these was his activities in purchasing jewelry. Sperber would obtain jewelry in London on 30-day approval against post-dated cheques on London accounts. When the moment of payment came, other cheques drawn on a Dutch bank would be substituted. Those would take time to clear and so extend the period of credit. The Metropolitan Police finally caught up with Mr. Sperber and arrested him. The jewelry firm lost £250,000. When he was prosecuted for frauds against a Dutch bank and for obtaining jewelry by deception in Autumn 1981, the trial judge dismissed both charges. Although one of the defendants had admitted that there was fraud, he ruled that the Dutch case was outside the jurisdiction of the British courts (though if one follows the logic of Lord Diplock in Treacy v. D.P.P., [1971]1 All E.R. at p. 123, the point is an arguable one). He ruled also that the deception count relating to jewelry must be dismissed, since Sperber had argued that the loss would have been accounted for had the police not stepped in and made their arrests, thus preventing international cheques from being met. The police were blamed for causing the loss to the jewelry firm! In 1982 he was convicted for a fraud in perfume and sentenced to five

years' imprisonment. Plainly, it would have been inappropriate to blame the jury system for these acquittals. What seems to be needed here is rather the reform of substantive and procedural law, particularly with respect to jurisdiction.

In other recent cases, judges have dismissed conspiracy charges because, for instance, it has become clear during the course of the trial that a co-defendant was the dupe of the principal rather than a true conspirator. In the highly complex insurance fraud charges against Messrs. Moran and Walker, the trial judge ordered the dropping of some counts after there was such a level of disagreement between the expert witnesses on very technical issues that he thought it unsafe to leave the matters to the jury. (It is of interest that despite their acquittal, Mr.Moran has been expelled from Lloyds for gross professional misconduct, and Mr.Walker has been censured.) In the London and County Securities case, the trial judge ruled that because of the state of custom and practice in the City of London at the time, it was unsafe to leave to the jury the task of assessing whether or not the defendants had been dishonest in their 'window-dressing' of accounts. Some of these cases are discussed later, but it is questionable whether these acquittals would not have been just as likely to occur with trial by judge as with trial by jury.

Of the cases committed to the London Central Criminal Court in 1979 and 1980, only 18 defendants were acquitted by the jury in cases lasting longer than three weeks. In one income-tax case lasting 42 days and costing the taxpayers £655,000, the jury acquitted all 12 defendants. In two other trials of 1980 committals, the jury acquitted one person after 58 days and another after 17 days. (The first trial cost £148, 845.) Of the 1979 committals, two people were acquitted after 49 days, one after 21 days, and another after 37 days. In all of these cases except the income tax one, the jury convicted co-defendants.

These findings confirm those of my earlier study of long-firm fraud trials, namely that juries do exercise some discrimination between defendants when reaching their verdicts. There are relatively few occasions on which juries acquit all the defendants in a fraud trial. Where all the defendants are acquitted, it generally is the trial judge rather than the jury who takes the decision that, in effect, no crime has been committed within the jurisdiction of the courts. Of course, this does not mean that juries come to 'the right decision' in all cases. If, by 'the right decision' one means the conviction of those persons who are 'truly' guilty, then those who are most devious will evade conviction. However, it may be that they would evade conviction even if trial were by judge alone. The conviction of such persons can be assured only if lower standards of proof and/or greater scepticism are introduced into the adjudication decision.

The length and cost of fraud trials

Many Commonwealth countries, ranging in size from Belize to Australia, have expressed their deep concern over the time taken to try frauds and the costs of doing so. Again, we must consider the role of the jury in this, but it should be remembered that it is in the nature of some frauds that intensive and extensive examination of persons and of documents are required. Consequently, it is not surprising that some countries that do not have jury trial do have lengthy fraud trials.

The data that I have been able to collect in England give ample cause for concern. Taking all cases committed to the Old Bailey in 1977 (and tried mainly in 1978 and 1979), we may observe that the average length of contested conspiracy to defraud cases was five and a half working weeks, and that even the relatively simple fraud prosecutions taken out under the Theft Act 1968 lasted an average of more than three weeks. Indeed, one in five contested fraud trials lasted over six working weeks. This, of course, would mean relatively little if defendants usually pleaded guilty. However, only 47 per cent of those accused pleaded guilty to some or all of their charges. (It should be borne in mind also that very few cases are filtered out at Magistrates' Court level in England or in their equivalent in Commonwealth countries that responded to my questionnaire.)

Of the 1978 committals, there were four trials whose taxed costs exceeded £160,000 (two of which lasted almost 200 days). Contested commercial fraud trials committed in 1979 averaged 33 days in length and £111,000 in taxed costs. Those committed for trial in 1980 averaged 24.5 days in length and £103,000 in taxed costs. Out of all cases committed for trial at the London Central Criminal Court between 1978 and 1981 inclusive, only three contested commercial fraud cases cost less than £30,000 to try. There are no comparable data for other offences that

I have had the opportunity to collect, but it seems from inspection that frauds predominate among the lengthy and expensive trials. Although London tends to attract most of the long trials, they are by no means confined there. In 1982 alone, Cardiff, Exeter, Preston, and Winchester have all experienced fraud trials that have lasted longer than five weeks. As in the 1977 cases, these figures are explicable in relation to the understandable reluctance of those accused of fraud to plead guilty. Only 30 per cent of those committed for trial for fraud in 1979 pleaded guilty to some or all of their charges. The equivalent figure for 1980 is 41 per cent, again at the Old Bailey. Of the fraud cases prosecuted by the Director of Public Prosecutions in various parts of the country, which ended in the first eight months of 1982, 41 per cent of those accused pleaded guilty to some or all of their charges. Whether prosecuted by the Director or not, almost all of those who offered to plead guilty to some fraud counts were not proceeded against on other charges.

One may question the extent to which these figures could be expected to change as a result of the abolition of jury trial. It seems likely that most high-status defendants would prefer to take their chances and to plead not guilty in any event, since their reputations and financial future are at stake. However, what is certain is that with jury trials, the length of the cases makes them 'accident-prone'. I refer not only to jury-tampering discussed earlier, but to other factors. In 1981, a trial which had lasted two weeks was abandoned when two ladies on the jury got drunk at lunch-time and one of them began to caress the thigh of a male juror during the afternoon sitting! This cost many thousands of pounds in legal fees. In 1979, a trial that had cost almost £1 million and had lasted over 100 days was abandoned because of a prejudicial newspaper report which revealed that some of the defendants had had previous problems with the courts. (I do not know whether or

not the trial judge ordered discreet enquiries regarding the jurors' reading or hearing about the report in The Guardian, but if no-one had read or heard about it, it might not have been necessary to have a re-trial. Under such circumstances, it would have been irrational for the Court of Appeal to have overturned any guilty verdict.) This trial, like those involving alleged jury-tampering, led to greatly expensive retrials.

Other difficulties arise. Clerks to the Court generally try to ascertain in advance whether or not anyone on the jury has booked their holidays within the estimated length of the trial, but since fraud trials have a habit of exceeding these estimates, this can create problems. If a juror falls ill in the early stages of a trial, the trial is often held up until he or she recovers, since who knows what other misfortunes will occur during the remainder of the case? (Jurors who are excused for some reason towards the end of a long trial often display distress at having dropped out at the last moment.) A multitude of domestic difficulties can crop up in the course of a long trial, all of which need sensitive handling by the Courts Administrator. There is no system of 'shadow' or 'alternate' jurors, as in the United States, who could take over the place of any juror who falls out. It is not suggested that these problems are the exclusive prerogative of fraud trials, but frauds do predominate among the sorts of alleged offences that lead to lengthy trials. (They are not confined to juries. I know of at least one case where the trial judge died towards the end of a very lengthy case.) In some instances, it has been alleged that the judge and prosecutor were influenced to accept a plea of guilty on a minor charge because of the prospective strain upon a jury of sitting for six months or so. The danger is that these strains will deter prosecutions that ought to be brought in the public interest.

An important contributory factor in the length of fraud trials is the inability to obtain substantial pre-trial agreement on legal principles or evidentiary matters. This is not a problem that is confined to England. It arises equally in, for example, Australia and Singapore. However, it is a problem that is particularly acute in England. Two examples will illustrate the issues. In both cases, pre-trial reviews were held, the aim of which is to give the opportunity for all parties and the trial judge to reach agreement as far as the counsel found this consistent with their responsibility to their clients.

(1) The allegation was that there was a conspiracy between a company and several individuals employed within that company to defraud customers throughout the world of monies estimated at £2½ million. There had been an extensive enquiry by Department of Trade Inspectors and, in the event, a prosecution was instituted. The case involved 60 prosecution witnesses, 34,000 pages of exhibits, and the defence were given all the statements of evidence and exhibits 18 months before the trial. Although two pre-trial reviews were held, the defence disclosed no information concerning the matters which related to them, when the summons to parties were issued.

When the trial commenced, over half the time spent in court was concerned with discussion and argument related to defence objections and submissions as to the admissibility of oral and documentary evidence, all of which submissions were made in court without prior notice to the prosecution. The following are examples of these:

(a) The defence objected to the calling of eight witnesses on the grounds that the evidence they were to give relating to the procedures adopted by the defendants in different

offices within the United Kingdom was *"so far removed from the charges as to render them inadmissible."* Many of the witnesses had travelled the length of England to give evidence. One had travelled from South-East Asia solely in order to give the above evidence. In each case, the defence objection was made as the witness stepped into the witness box. (The defence objections were upheld in two out of eight cases, but not in the Asian case).

(b) A week after the case had started, the defence objected to the generality of the conspiracy charges and asked for further and better particulars. These objections, reasonably enough in my view, led to the deletion of the names of five directors from the charge.

(c) The defence made dozens of exhibits the object of requests against admissibility. Each objection was made in court as the exhibit was about to be proved and without prior notice. The consequence was that about five per cent of the documentary evidence was excluded, which had a significant effect on the prosecution case. As each defence submission relating to documentary evidence was successful, those exhibits were removed from the bound copies in the possession of the jury. At an early stage, the defence were successful in procuring the removal of a particularly damning piece of evidence which was removed from the jury's copies. However, although the document had not been referred to in evidence, one alert member of the jury had spotted it, had realized its importance, and had noted its contents.

During the jury deliberations, this note was discussed by the jury who asked the judge if they could examine the exhibit. As a result of this, the judge ordered a re-trial, the first trial having cost approximately £125,000. Moreover, the procedure meant that at the end of each day on which objections were successful, numerous schedules had to be reconstituted, numbered, copied and rebound by the following morning, causing immense strain to those involved.

(2) The allegation related to a building fraud. There were 1,400 complainants. It was intended to call 243 witnesses. There were 1,189 exhibits and 2,000 pages of documents, all of which had to be copied in multiples for the jury. 12 witnesses had travelled already from the other end of England to give evidence. The defence had not replied to the request for agreement on admissions before the trial. On the second day of the trial, the accused pleaded guilty.

All of these (along with motions for severance of counts) were issues that ought to have been raised at pre-trial reviews. There was no question of there having been insufficient notice (at least in objective terms: the date that the papers actually were read by leading counsel is a different matter). Their effect was not only a massive inflation of costs, but also vast inconvenience to jurors, witnesses, and to officers in charge

of the case. Even had the failure of defence counsel to make evidentiary submissions at the pre-trial review not led to the inclusion of the offending evidence and thus to the re-trial, the procedure would have been objectionable.

The tendency has been for these matters to be responded to by exhortation rather than by structural reform. Like similar exhortations to judges to reduce their sentences, these have not been very effective. Lord Elwyn Jones, who was Lord Chancellor during the Labour Government of 1974-1979, has observed that despite his efforts to speed up and to simplify fraud trials, they increased in duration by ten per cent per annum during his period of office.

On May 17, 1980 Sir Michael Havers responded to concern about fraud cases by urging judges to keep their summings-up as 'short as possible' by recommending that courts should sit for the entire length of the day, and by suggesting that the number of defendants should be reduced so that only the 'real villains' in conspiracies to defraud should be charged. However, much as one may sympathise with the pragmatism behind those suggestions, they raise certain dangers for fraud prosecution policies.

Judges who give brief summings up may find that if they fail to give due weight to defence arguments, convictions will be

overturned by the Court of Appeal. (Though lengthy summings up also present that danger. What is needed is more penetrating thought given to this crucial stage of the trial process). If sittings are longer and unbroken, the primarily working-class, inexpert jurors may find even more difficulty in maintaining their concentration than they do at present. Those who are charged undoubtedly will seek to case the blame for the fraud upon those——allegedly on the margins——who are not charged. Defendants will claim that the apparently innocent driver is the real "Mr. Big" who had hoodwinked not only them, the poor naive unwitting agents of his schemes, but also the prosecution. The very fact that there is so little apparent connection between him and the company's misdeeds is proof of the depth of his cunning! This is a risky strategy, since it entails the prospect of a longer sentence from the judge if it does not bring an acquittal. However, the prospects of its use are clear. Still worse, the suggestion opens up all sorts of possibilities for police corruption in exchange for downplaying the apparent role in the crime of the particular individual. Finally, there is the ethical issue. Why should someone obtain *de facto* immunity from prosecution simply because he is a minor co-defendant rather than a minor criminal acting alone? Perhaps we ought not to prosecute any minor offenders, if the seriousness of the offence rather than the desire to save money is the *rationale* (though one could argue that the non-prosecution of co-defendants simplifies the task

facing the jury).

A further risk is that in attempting to shorten the proceedings, judge and counsel resort to a verbal 'shorthand' which is understandable to them and, possibly, to the police and the accused, but is too abstract for the jury. I have referred already to my colleague's deprecation of the quality of counsel's speeches. Those comments apply *a fortiori* to the reactions of his fellow jurors.

In brief, existing reforms of procedure in England may have preserved the ritual at the expense of disregarding the substance of justice. There is no reason to suppose that any of the difficulties that historically have been experienced will be diminished in the future. On the contrary, as substantive and jurisdictional laws are tightened, as investigatory expertise (including the Commonwealth Fraud Office) increases, more complicated fraud cases involving foreign documentation ought increasingly to come to court if the rights of victims are to be protected. Given the issues that I have outlined, I shall review the major options for reforms that are needed to cope with them.

The Problems with Fraud Trials in some other Commonwealth Countries

The dangers of over-generalisation are borne out by the replies to the questions on judicial process sent out by the Commonwealth Secretariat. Some illustrations will suffice to show the variations in what constitutes the satisfactoriness of a judicial system. All 21 persons prosecuted for fraud in Vanuatu in 1980 and 1981 pleaded guilty. Had they chosen otherwise, they would have been tried in the Supreme Court before a judge sitting with two assessors, but no dissatisfaction was expressed (at least by the Public Prosecutor) with the trial system. In the Solomon Islands, where 60-70 frauds have been tried over the past three years, about half the accused plead not guilty but only 2 per cent are acquitted. The report to the Secretariat states that "these trials average one week and are usually fairly protracted due to various languages used and the need for interpreters". By contrast, no dissatisfaction is expressed by the Republic of Seychelles, despite the fact that the 45 cases in the last three years lasted an average of 3 months. (There, 9 out of 10 defendants are convicted.) In Ghana, where a Public Tribunal has been set up by the present Government to deal with economic crimes against the State, fraud trials last from months to years depending on their complexity, and considerable dissatisfaction with court procedures exists. In Hong Kong, which has experienced a boom in fraud, and where all but a few currency counterfeiting cases are tried either by a District Court judge alone or by a magistrate, there is no great dissatisfaction with the court process. (In Hong Kong, hundreds are prosecuted annually for fraud, and the acquittal rate is about one fifth of those prosecuted.) In short, 'satisfactoriness' is a subjective rather than an objective concept.

Of course, it may be the case that some cases remain unprosecuted because it is anticipated that the courts will be unable to cope with them. As I have noted, a high conviction rate can mean three quite separate things, depending on the circumstances: excessive prosecutorial caution, judicial and jury competency, or too great a readiness on the part of the judiciary and/or jury to accept the view of the prosecution.

Australia

In both criminal and civil trials, the use of the jury is in decline in Australia. In civil cases, some States of Australia have never used juries or abolished their use early this century, though in New South Wales, it is still an option for defamation and civil fraud. The rise in summary criminal trials in Australia has not yet been applied to commercial frauds. However, in New South Wales, an attempt was made in 1979 to propose trial of certain corporate crimes before the Supreme Court sitting without a jury. This proposal was defeated, after causing a storm of controversy, particularly in the Bar Association. (See the Supreme Court Summary Jurisdiction Crimes [Amendment] Act, 1979 No. 96).

Cost and competence appear to be the criteria upon which concern has been raised. Two cases in Victoria illustrate these themes. In 1980, Mr. Justice Beach presided over a trial known colloquially as the Holiday City fraud. It involved the sale and lease back of caravans. A member of the public would purchase a caravan (or rather, pay for one) and lease it back to the vendor to enable it to be placed at a caravan park where it would then be rented by tourists or holiday-makers. The unfortunate purchasers were always told, if they asked, that their caravan was in another State. In the end, the public was defrauded of some $1 million. The trial extended over a period of 4½ months. Some 111 witnesses gave evidence, and the trial manuscript ran to over 7,000 pages. More than 1,000 exhibits were tendered in evidence. The trial judge had this to say in his sentencing speech (R. v. Reid, Krantz, Ouseley, and Waugh, unreported, 23rd September, 1980):

> "I am appalled by the fact that if my calculations are correct, the financial cost to the community of achieving that end of justice has been little short of the one million dollar loss suffered by the victims of the fraud itself. That fact forces me to ask the question, can the community continue to afford the luxury of jury trials in cases of this nature or should some acceptable alternative be sought? I venture to suggest that had this trial been presided over by a Judge sitting alone or by a Judge assisted by one or more assessors with accounting expertise, the length of the trial would have been halved, if not reduced further, with a consequent saving of expenditure and court time, and in my opinion without causing injustice to the accused.....In my view, it is asking too much of members of the community to require them to sit on juries for months at a time while such matters are dealt with. It is also unacceptable that the community should be burdened with the colossal expenditure involved in such procedures."

Another recent Victorian case which aroused some controversy was the unreported case of R. v. Smart (Court of Criminal Appeal, 12 February, 1982). Smart was charged with 63 counts of fraud and allied offences, in relation to his handling of the monies of the Co-operative Farmers and Graziers Direct Meat Supply Ltd. I will not trouble readers with the modus operandi of the alleged fraud, but the judge directed acquittal on seven counts, and, after a trial lasting 73 days, Smart was convicted on all remaining counts save one, and sentenced to ten years' imprisonment. On appeal, the Court of Criminal Appeal held that, inter alia, the Crown had acted unfairly in presenting the accused on so many counts, as this was bound to have confused the jury, particularly regarding the admissibility of evidence on some charges but not on others. The Court directed a re-trial and made some useful suggestions about how that should be organised. However, the re-trial is expected to last 3-4 months,

and each trial costs approximately $750,000. Although the Court of Criminal Appeal did not state this explicitly, it is clear that the nature of the jury influenced the view it took of the fairness of the proceedings. In January 1982, the Victorian government was reported to be considering reducing the use of juries in some corporate fraud cases. The magazine Age had this to say about the proposed review of jury trial:

> "The jury system has acquired such a mystique in British law that we tend to equate it with justice itself, despite the fact that other European cultures do perfectly well without it. A mystique should not blind us to the practical effects of having matters of guilt and innocence determined by people who have not understood the case - even after a protracted trial costing us $1 million. It would be far better to have allegations of corporate crime decided by a judge and two specialist auditors who would be able to recognise quickly the critical points at issue and determine the verdict on them alone. A trial under such a system would not only be more professional, less laborious, and less outrageously expensive. It would also be fairer to all concerned."

In brief, although there are strong countervailing forces, it is clear that there is some prestigious support for the notion of abolishing jury trials for corporate offences in Australia.

New Zealand

New Zealand has been the subject of views on fraud trials similar to those expressed in Australia. The New Zealand Court of Appeal made the following observations with regard to the difficulties faced both by trial and appellate courts in dealing with frauds, in the case of R. v. James Edward Jeffs et al. (Court of Appeal, New Zealand, 28 April, 1978, unreported):

> "This brings us to the end of a task which has demanded our exclusive attention for a period of three months. As a Court of three judges we have enjoyed many advantages which were not shared by members of the jury who tried the case in the Supreme Court. Unlike the jury we have had constant access to the transcript of the evidence.....which comprises nearly 1,800 pages. On hearing the appeals, in order to follow counsels' arguments we had constantly to compare passages in the notes of evidence with material in the exhibits and to study these and ask for clarifying questions. These exhibits actually copied for the purpose of the appeal were contained in some eleven volumes each of about 500 pages. Even with the advantages of being able to peruse the notes of evidence and ask counsel questions and with easier access to the exhibits than was enjoyed by the jury, we found this process as difficult as it was time consuming. The jury's problems would have been immeasurably greater and we are very conscious of that fact. We add that one of the matters currently under study by the Royal Commission on the Courts is whether trial by jury is an effective machinery for trying the sort of issues that arose in the present case. Our own difficulties have left us with no doubt that this is a question deserving of full consideration. It may be that some way can be found of permitting trial by judge alone, either at the election of an accused person or by special order of the Court.

Without fuller information from New Zealand, it is difficult to tell how often cases such as this occur, but they are unlikely to be frequent. What may be relevant here (as in the Australian examples) is how often cases such as this are not prosecuted because of predicted difficulties at the trial stage. However, the message from the Court of Appeal is clear: given the difficulties experienced by eminent Justices of Appeal, it seems inconceivable that the jury could have given proper consideration to the issues in question.

Fraud trials without common juries: the American experience

In recent years, there has been burgeoning concern in the United States regarding the viability and desirability of jury trial in complex civil litigation. Hitherto, advocates of jury abolition have restricted their arguments to civil cases, probably because constitutionally, the sixth amendment guarantee of the right to jury trial in criminal cases has more authority than the seventh amendment guarantee of the right to jury trial in civil cases. For example, the sixth amendment is binding upon the states, whereas the seventh is not. (See Duncan v. Louisiana, 391 U.S. 145 [1968]; Bloom v. Illinois, 391 U.S. 194 [1968]; Melancon v. McKeithen, 345 F. Supp. 1025 E.D. La. [1972]; Davis v. Edwards, 409 U.S. 1098 [1973].) However, although the specific constitutional issues raised in American cases need not concern us here, it is arguable that if the unsuitability of juries for complex civil litigation is sufficient to override major constitutional obstacles in the United States, this strengthens the case for reform in Commonwealth jurisdictions which can decide the case on its instant merits rather than upon inflexible rules.

The essence of the American cases has been that under special circumstances, jury trial for complex civil commercial suits violates the fifth amendment right to due process of law. In a $900 million antitrust suit, Memorex Corp. v. IBM, No. 73-2238 (N.D.Cal. 11 August, 1978) revolved around the allegation that IBM had monopolised various submarkets within the computer industry. Among the issues that faced the jurors were involved computer technology and business principles. 87 witnesses testified at the trial, many of them experts, and over 2,300 exhibits were admitted into evidence. The trial lasted 96 days, and after a 19-day deliberation, the jury were unable to agree on

a verdict. The court then ordered a retrial before judge alone, tantamount to a trial in equity because the legal remedy was inadequate. Questioning the jury after its discharge, it was plain to the trial judge that the issues had not been understood: most of the jurors agreed that such trials should not be undertaken by juries.

In 1979, the Ninth Circuit of Appeals was asked to review a district court order denying a jury trial in In Re United States Financial Securities Litigation (609 F.2d 411, 9th Cir. 1979). This was a case where 18 securities fraud (civil) cases had been consolidated for trial. It involved 150,000 pages of deposition transcripts, over 10,000 trial exhibits, and the production of more than five million documents through discovery proceedings. The estimate was that the trial would last over two years. While expressing a general faith in the jury system, the district court judge had concluded that a jury could not try this exceptional case in a fair manner (75 F.R.D. 702, S.D.Cal. 1977). The Ninth Circuit Appellate Court disagreed, observing that juries could handle any case and ruling that complexity provided no grounds for an exception to the seventh amendment right to jury trial. The ruling gave no justification for the competence of the jury: it merely asserted the constitutional position.

The other leading U.S. case arose from an antitrust allegation. The plaintiffs asserted a world-wide conspiracy, involving almost 100 firms and lasting over 30 years. Nine years of discovery had generated more than 100,000 pages of deposition transcripts and over 20 million documents, many of which required translation from Japanese into English. The trial was predicted to last over a year. The district court found that "by any yardstick, this case is at least as large and complex as others in which jury demands have been struck"

The Supreme Court has yet to pronounce upon these conflicting appellate rulings. However, Chief Justice Warren Burger has complained that "the jury actually selected (for a big case) is rarely a true cross section.....Overwhelmingly, a great many of the people best qualified to sit on juries are those most eager to escape jury duty." (Time, 3 September, 1979). It seems clear that supporters of jury trial in cases of this kind must rely upon constitutional safeguards rather than upon rational argument. As the trial judge, Judge Lacey, observed in Van Dyk Research Corp. v. Xerox Corp., No. 75-419 (D.N.J. 15 August, 1978):

> Working together we have tried in approximately a month a case which originally we had all predicted would take at least three months to try. That we had tried the matter without a jury was a proximate cause of this. While in most cases capable lawyers and even a capable judge can try a case to a jury in the same time that it could be tried non-jury, there is no question but that a complex anti-trust case, involving thousands of documents, numerous depositions, and technical testimony.....is tried much faster by a bench than a jury trial. Depositions need not be read into the record. Instead, they can be marked as exhibits and submitted to the court along with each side's narrative analysis. Lengthy exhibits can be submitted with counsel simply highlighting appropriate portions, accompanying their submissions with a digest of the exhibits. The testimony of numerous experts can be shortened by submitting as exhibits their written curriculum vitae and abbreviating their testimony by introducing only so much by way of facts and data as is necessary.
>
> These and other trial refinements, feasible in a non-jury trial, though not in a jury trial, enable the former to be tried in a much shorter time than the latter."

The superiority of trial by judge alone, on grounds of understanding as well as speed, was asserted also In Re Boise Cascade

(Zenith Radio Corp. v. Matsushita Elec. Indus. Corp., 478 F.Supp. 889, E.D.Pa.[1979].) However, it concluded that the complexity of a case is not in itself a sufficient constitutionally permissible basis for refusing a litigant's right to jury trial.

This reasoning was followed in part by the Third Circuit Court of Appeals in In Re Japanese Electrical Products Antitrust Litigation (631 F.2nd. 1069, 3rd Cir. 1980). The Court did not rely for authority upon a footnote in the Supreme Court judgement in Ross v. Bernhard (396 U.S. 538 n. 10, 1970), which observed that in determining whether an issue was of a legal (rather than equitable) nature, and therefore was jury-triable, courts should consider "the practical abilities and limitations of juries". It argued as follows (p. 1084):

> "The law presumes that a jury will decide rationally; it will resolve each disputed issue on the basis of a fair and reasonable application of relevant legal rules.....We conclude that due process precludes trial by jury when a jury is unable to perform this task with a reasonable understanding of the evidence and legal rules."

It then remanded the case for further findings with respect to the issue of complexity. In short, it appears that appeals to dispense with the right to jury trial in complex civil cases are to be decided on a case-by-case basis. In Jones v. Orenstein, 73 F.R.D. 604 (S.D.N.Y. 1977), for example, the court determined that a jury was quite capable of dealing with a class action alleging the false disclosure of information in violation of securities laws, since the trial was expected to last only six to eight weeks and did not entail massive documentation. (See also Radial Lip Machine Inc. v. International Carbide Corporation, 76 F.R.D. 224 (N.D.Ill. 1977), for a similar result based on different arguments).

Securities Litigation (420 F.Supp. 99, N.D.Wash. 1976).

The danger of these arguments, as this report stresses, is that matters of politics will be reduced merely to matters of administration. It could be countered that antitrust cases involve issues such as the desirability of concentrating economic power in large corporations, and that securities cases involve contemporary moral standards of honesty. These matters are discussed elsewhere in this report. The fact remains that despite major constitutional hurdles, some U.S. courts have been impelled to accept the need for trying complex civil frauds without juries, even where one of the litigants opts for jury trial.

Reforms of the Trial Process

The slightest acquaintance with the history of the jury makes it evident that discussions of its appropriateness tend to be long on platitudinous assertion and short on reasoned argument. This unfortunate fact applies equally to discussions of alternatives to common jury trial. In England, the most recent authoritative report is that of the Departmental Committee on the Jury Service, chaired by Lord Morris of Borth-y-Gest. The Committee made the following comments on the trial of lengthy frauds (Morris Committee, 1965, pp. 107-110):

> "The desirability has even been mooted of proposing that cases of this nature..... should be tried without a jury, possibly by a judge sitting with assessors. This suggestion is outside our terms of reference, but we wish to record our view that it would be unfortunate to make any such departure from the jury system..... We have been told that the problem presented to juries by such cases is aggravated by the fact, as to which we make no comment, that in difficult cases of commercial fraud counsel sometimes challenge just those very jurors who, by reason of their education or professional attainments, might be though to be best qualified to understand the issues. It has therefore been put to us that some procedure should be devised whereby in such cases the judge could order that there should be trial before a jury composed of specially qualified persons. If there were to be any such procedure, questions would arise as to what the special qualifications should be, and as to whether the consent of the defence should be necessary before having such a jury or whether the matter should be in the discretion of a judge. We do not think it necessary to explore these matters. We have already recognised that a heavy burden falls

> upon jurors trying long and complicated cases, but apart from our recommendations as to permissible allowances, we know of no way in which the burden could be lightened without introducing some new method of trial. Trial without jury in such cases we have already rejected. As to trial by specially qualified jurors, we think it right to say that we have discerned a trend of opinion among our witnesses against the adoption of such a procedure. Furthermore, witnesses who have been able to speak with experience have expressed the view that the average jury today is able to cope even with long and difficult cases. It must be remembered that, especially if a case is involved and complicated, a jury has great assistance in following and understanding it. The facts are fully explored and examined by both sides while evidence is being given, and are dealt with in the speeches of counsel. The main features of the case are recapitulated in the summing-up. We therefore recommend that no system should be established for having special juries in criminal cases. "

Almost two decades have passed since the Morris Committee came to these conclusions, during which time the number of frauds dealt with in the English Crown Courts has trebled and the complexity and length of cases prosecuted have increased in line with the greater readiness of the police to pursue some of the more difficult allegations. In the light of this experience, it is not easy to be as sanguine as the Committee about fraud trials. Significant sections of the police, the judiciary, independent organisations like Justice, and even the Law Society (in the 1981 Memorandum on Criminal Procedure) have expressed strong support for alternative ways of trying frauds. Indeed, there has been a "trend of opinion" away from trial by jury in general, a fact strongly regretted by many cogent critics (Devlin, 1979; Thompson, 1980). However, the desirability and practicability of alternatives remains a matter of dispute.

After lengthy consultations with interested parties within and without the Commonwealth, the following options emerge:

(1) Trial by special jury, whether comprised solely of people with relevant expertise or higher education, or comprised of a mixture of such persons with 'ordinary' jurors:

(2) Trial without jury at the election of the defentant(s);

(3) Trial by judge(s), with or without the assistance of expert assessors:

and (4) Piecemeal improvement of the current system, by simplifying indictments, providing more forceful pre-trial disclosure and practice directions, more sensible hearsay rules, and less traditional trial procedures.

These options need not be mutually exclusive. For instance, one could replace the present jury with a special one, but still give the defendant the option of trial by judge alone. Piecemeal improvements could (and should) take place irrespective of any radical change in the mode of trial. However, I shall seek to examine the advantages and disadvantages of each of the options in turn.

(1) Trial by Special Jury

History

The most traditionalist of the changes in the mode of trial, at least for those jurisdictions which presently have trial by jury, is the re-institution of trial by 'special jury'. The special jury is an institution of great antiquity. There are cases from medieval times in London where cooks and fish-mongers were summoned to try persons accused of selling bad food, and many mercantile disputes were decided by juries comprising merchants in allied trades. The principle here was the original one whereby jurors decided cases by applying their own direct knowledge. In the civil sphere, Lord Chief Justice Mansfield developed the principles of mercantile law in conjunction with a special jury of City of London merchants.

In the late seventeenth century, the Court of King's Bench regularly summoned juries composed of higher social standing than ordinary juries. By 1730, any litigant could summon a special jury, provided he could pay the fee. More controversially, special juries were summoned in many criminal trials, particularly of sedition at the time of the French revolution. The Juries Act 1825 laid down that special jurors should be of the rank of "Banker, merchant, or esquire", and in 1870, a property qualification was added, namely that persons occupying houses having a net rateable value of £100 in larger towns and £50 in smaller ones, or who occupied business premises with a net annual value of £100 or farms of £300, could qualify for the special jury panel. Such qualification certainly was seen as a status symbol. At that time, any misdemeanour, which included conspiracy to defraud and falsification of documents (but not forgery, which was a felony) could be tried by a special

jury. Such trial was possibly only if the indictment was in the Queen's Bench Division or had been moved there by certiorari. Both the Tichborne claimants and the Jameson raiders were tried in this way.

More recently, however, the use of special juries fell into desuetude. One reason for this was the dilution of the panel by publicans and by small businessmen who called themselves merchants. Lord Mersey, in the course of interrogating the Law Society's representative before his committee on the jury in 1913, observed (p. 128) that

> "It is the common opinion.....of the judges who sit to try cases, that there is in these days very little difference, if any, in the quality of the common and special juries."

Indeed, those who gave evidence before the Mersey Committee got into a dreadful tangle about what constituted the terms 'esquire' and 'merchant'. Some jury summoners uncritically accepted the self-definitions of those eligible for jury service. Mr. Justice Channell observed that the qualifications for special jurors were (p. 68)

> "a very rough and ready way of getting at the people who may be supposed to have more intelligence than the others, and supposed also to be in an independent position and independent of the result of a particular case."

However, the rateable value criteria for special jury eligibility ruled out many otherwise able people. One witness stated (p. 112) that he

> "would increase the status qualification very largely in the City by making such business men as chartered accountants, surveyors, architects, and engineers,

> members of the Stock Exchange, members of Lloyds and of the Baltic, insurance brokers, produce and colonial brokers, shipowners and shipbrokers, special jurymen by reason of their calling, without any regard to rental qualification. They are the men that are wanted for special jurymen, and in a great many cases a man may be a chartered accountant and have two partners, we will say, but he only occupies offices at, say, £200 a year. None of these men would be eligible for special jury service by the existing law."

The last major criminal fraud trial that I have found which was tried by special jury was that of Horatio Bottomley, M.P.

In the United States, too, the special jury has disappeared, not by legislation but by the egalitarian principles that have accelerated over the past thirty years. Earlier, however, they were used occasionally to try complicated frauds. During the 1870s, they were used in over a dozen cases related to public officials in the municipal corporation of New York City, who conspired to defraud the city of public funds totalling millions of dollars. (See, for example, People v. Tweed [1872] 13 Abb.Pr. (N.S.) 25; People v. Tweed [1876] 50 How. Prac. (N.Y.) 262, 280; People v. Tweed [1877] 11 Hun. (n.Y.) 195.)

The special jury was used most frequently in civil litigation where banking or securities issues were at stake. However, its use in criminal cases survived. In Lockhart v. State [1924] 145 Md 602, a special jury was used in a Maryland criminal prosecution of members of a firm of bond and stockbrokers on charges of conspiring to defraud customers. The qualifications for special juries differed from State to State. In New York, for instance, the so-called "blue-ribbon jury law" of 1896 stated that a special juror had to be a citizen of ten

years' standing, at least 30 years of age, and have an adequate knowledge of the duties of his office. Furthermore, it was incumbent upon him to show that he had never been convicted of a crime, or found guilty of fraud or other misconduct by a civil court. (Italics are mine). The special jury could be obtained only when the appellate division of the state supreme court was satisfied that (1) a fair and impartial trial could not otherwise be had, (2) the importance or intricacy of the case demanded it, (3) the matter had been too widely commented upon to be tried before an ordinary jury, or (4) for some other reason, the due, efficient, or impartial administration of justice necessitated a panel. Soon afterwards, in 1901, these qualifications were reduced, and the trial rather than the appellate branch of the Supreme Court was given the power to decide on special jury trial. By 1940, the distinction between special and common jurymen had nearly died out. (See, more generally, Thatcher, 1947, and Baker, 1950).

Advantages of trial by special jury

Two criticisms of trial by common jury for frauds are particularly relevant to trial by special jury: that jurors are unfamiliar with commercial concepts and practices, and consequently trials take far longer than necessary; and that some frauds are extremely complicated practically and conceptually, and therefore most jurors are not intelligent enough to follow the case properly. The first criticism could be answered by having a special jury of business and/or professional people. For the second, however, not all business and professional persons might prove adequate. It may seem reasonable to expect that they would be cleverer than present juries on average, and to that extent would be an improvement, but it would be foolish to claim that all businessmen, or even accountants, are capable of following the most complex cases. As I have observed already (and as the perusal of the Law Reports confirms) there are grounds for suspecting that even some judges may not have as thorough a grasp of fraud as is desirable. Nevertheless, on the principle that the good should not become the enemy of the best, the special jury, in whatever form, might be considered to be a better option than the current system. The English Director of Public Prosecutions has been reported as preferring this (Daily Telegraph, 21 January, 1982):

> "I don't think this is against the constitutional right of trial by your peers. Aren't you dealing with your peers in a case like this if the jurors have financial expertise?"

Disadvantages of trial by special jury

There are a number of possible objections, both in principle and in practice, to trial by special jury, particularly if this is chosen on the basis of professional relevance rather than intellectual ability.

(a) The jurors may tend to judge cases from their own experience and knowledge rather than on the basis of evidence presented in court. There is a certain historical irony in regarding this as an objection, since direct knowledge of the circumstances surrounding the offence was the original rationale for the jury. However, in the modern bureaucratic age, this sort of knowledge tends to be regarded negatively as 'bias' rather than positively as practical reasoning. In some cases involving national or local dignitaries, it may be hard to find jurors who do not know personally, or who have never had any commercial dealings with, the accused. For example, had he not died following the issue of a summons for fraud, could Sir Denys Lowson, a former Lord Mayor of London, have been tried by his commercial peers in the City in a way that would have satisfied outsiders as to its impartiality? In some cases, not even a change of venue would suffice. (This is a particular difficulty in the smaller Commonwealth countries such as those in the Caribbean, where the accused, if locals, are likely to be known to all prospective jurors.)

This source of objection to trial by special jury may be more pertinent to, say, stock exchange frauds than to the less close-knit fields of accountancy or business. However, the point remains that it may be more difficult for experts or quasi-experts than for amateurs to place themselves in the position of particular accused, rather than to speculate on what they

themselves (qua 'reasonable men') might have believed or done. (Though is this not equally relevant to jurors who try other types of dishonesty?)

(b) Special jurors drawn from the professions might become bogged down in discussing theoretical issues, such as what ought to constitute a 'true and fair view' of accounts rather than what the law actually states and what the accused believed. The criminal jury does not have the function of developing principles of law, as did Lord Mansfield's special jurors in the eighteenth century with mercantile law, so this might be inappropriate and might lengthen trials unduly.

(c) Special juries, if drawn from cognate professions or from businesspeople, might be unduly sympathetic to those accused of commercial offences. The standards of integrity that are adopted in these 'subcultures' may not conform to those required by law or those held in the wider society. Let us examine one public limited company whose activities were subject to a Department of Trade Inspectors' Report.

In Roadships Limited (1976), the Inspectors found that the company commonly had paid bribes to the servants of other companies to obtain road haulage work. They observed (p. 20) that

> "some witnesses appeared to think that underlying many of our questions was an assumption on our part of an unreal standard of commercial conduct, but after giving due regard to such views, we maintain our own. In fact, no constant pattern of attitudes emerged from the evidence. Some transport operators from fairly rough commercial backgrounds regarded such payments as disgraceful. Some operators - and, indeed some professional men - viewed them with

> equanimity or at least with philosophical acceptance as a necessary evil. McLintocks (the auditors) thought that the scale on which they were practised here was 'not large' for a transport undertaking"

It is fairly plain that if these 'sweeteners' had been proven to have occurred, they would have been offences against s.1(1) of the Prevention of Corruption Act, 1906. If the special jury had contained many of those of a tolerant disposition referred to above, they might well have acquitted.

In the same report, the Inspectors discussed the culpability of the issuing house for permitting the public flotation of Roadships in spite of, inter alia, the doubtful conduct of its 'leading light' with regard particularly to tax matters. Criticising the issuing house, the Inspectors stated (p. 58):

> "We have not arrived at this adverse conclusion without considering whether we have not overestimated the results which can be achieved by the sort of screening processes carried out by the average issuing house, whether in fact some merchant bankers on reading our comments may not intone to themselves, 'There, but for the grace of God, go we.'. "

Here again, though the question of criminal liability is by no means so clear, would such a jury of merchant bankers have acquitted against the dictates of strict application of the law to the facts?

Let us take another example, the window-dressing of company accounts. The object here is to inflate the cash figure at the year's end by borrowing money short-term (even overnight), thereby deceiving creditors, shareholders, and (in the case of a bank or deposit-taker) depositors as to the state of the company.

One secondary bank, London and County Securities Ltd., indulged in such practices, and when interrogated by Department of Trade inspectors, a director sought to justify them in the following terms (London and County Securities Group Ltd., 1976, 173):

> "Q: If you say you did not regard the effect of the transactions as misleading, what did you think the purpose of it was?
>
> A: I thought it was that they could show a better cash position at the end of the year.
>
> Q: Than they actually had?
>
> A: Than they actually had. It did not alter their assets and liabilities position; just their cash position.
>
> Q: It showed a million pounds greater liquidity than they in fact enjoyed?
>
> A: I suppose that is right.

In the case of London and County, prosecutions of some persons in respect of window-dressing charges were halted by the trial judge on the grounds that these practices were sufficiently tolerated in 1973-1974 that it would be unsafe to try to assess the degree of criminality involved, if any. In this instance, acquittal was directed by the judge, but on the assumption that his empirical observation about toleration of window-dressing in the City is accurate, a special jury composed of such persons presumably would have acquitted also. Whether they ought to have done so (and the judge to have ruled thus) is moot. It may depend upon whether one is an accountant or an unfortunate depositor or investor. This applies equally to the subject of company directors who finance personal amusements out of company funds, as has been alleged in recent commodity trading cases. Ralph Hilton, the man who built up Roadships, ran a boat at the company's expense, justifying this by its publicity value

to the company. The Department of Trade Inspectors referred to this (Roadships, 1976, 128) as

> "a view which...will be regarded with scepticism by those who are obliged to pay for their recreations out of their taxed income, but with considerable sympathy by many honest and shrewd company directors who are fortunate enough to find that the interests of their shareholders are consistent with them pursuing their own recreations partly at the expense of the shareholders and partly at that of the taxpayers."

Here too, then, the conduct might lead to an acquittal if tried by a special jury composed of such "honest and shrewd company directors".

In fairness, there are some counter-arguments on these points. If commercial men were so indiscriminately tolerant of business crime, there would be no attempts by defendants to make peremptory objections against their presence on fraud juries (unless, as may well be the case, defendants and their counsel are misguided in seeking to eliminate such persons from juries). It may be that instead of identifying sympathetically with the accused, special jurors would tend psychologically to distance themselves from conduct which has been the subject of official sanction by prosecution; that they would adopt a 'holier than thou' attitude towards their fellows; or even that they might wish to eliminate potential competitors while carrying out the dishonest practices themselves! I am not impressed overall by these counter-arguments, though they may illustrate the danger of regarding 'fraud' as a homogeneous category. Certainly, any blatant rip-off of creditors or investors, whether these be businesses or individuals, might be expected to be condemned severely by a commercial special jury. Cases of window-dressing or of insider trading that were well beyond the pale might be

rejected forcefully by such jurors, who unlike a judge or common jury, would know full well that they were not custom and practice. However, there are other sorts of cases, including many not prosecuted at present, where excessive sympathy might lead to acquittal.

One line of defence of jury 'equity verdicts' is that, when brought by the mini-Parliament which the jury supposedly represents, they can be a valuable temper to the harshness of the letter of the law. However, where the public are not assured that such verdicts are arrived at for the general good rather than out of group self-interest, they must be regarded as contrary to public policy. If special juries comprising professional and business persons were to acquit in fraud trials, the danger is present that this will be seen as an example of in-group preservation, thus undermining the impartiality of the Rule of Law. This aspect must be given careful attention in any revision of fraud trials, though clearly it is less relevant where the jury might comprise well-educated people rather than merely those in business or the professions.

(d) The objection may be raised that special juries are elitist in concept. This is undeniably the case. However, all non-random selection processes for anything, including Attorney-Generalship, are elitist! The point here is that a given form of special jury must be rationally defensible on the grounds of its capacity to do the job in a way that is demonstrably superior to what exists at present.

And (e) The recruitment of special jurors might present great practical difficulties. I shall not detail here the manner in which this might be accomplished, since Commonwealth practices vary widely. However, professional bodies such as the Institute of Chartered Accountants or the

Chambers of Commerce might keep a register of potential jurors. When electoral registers are compiled, people might be asked to indicate whether they have degrees or advanced levels, or whether or not they have any knowledge of accounting, which would at least improve the pool from which jurors are drawn for fraud cases. Unless the use of special juries served to shorten fraud trials (as one would expect), possibly by inducing pleas of guilty to some cases, and unless adequate remuneration were forthcoming, it might still be difficult to obtain volunteers for special juries. However, businesspeople and professionals who successfully plead to be excused jury service at present may in fact be no more unwilling to serve on a fraud trial than those who are not able to produce a justification for service which the court will accept. Although all the evidence suggests that most jurors accept their task responsibly, jurors in fraud cases, whether interviewed by me or as reported in the press, display a marked lack of enthusiasm subsequent to the trial. It may be more desirable to have a willing than an unwilling jury, but it is an open question whether those who serve are any more willing than those who do not.

These, then, are the objections to the introduction of trial by special jury for the more complicated kind of frauds. Readers must judge whether the advantages outweigh the disadvantages, both internally and in relation to the other proposals for change. There appear to be fewer disadvantages to trial by the well-educated than to trial by commercial and professional people, but there are also fewer advantages (for instance, familiarity with terminology and practices) in the former than in the latter. This discussion of special juries has concentrated on reasoned arguments, but one final point is germane here. However objectively an expert jury did in fact adjudicate in a criminal trial, an acquittal (or even, in some cases, a conviction) might be the object of suspicions by the

general public that the verdict was 'fixed' according to whether or not the accused were part of the 'in-group'. Public confidence in the judicial process, however irrationally based, has to be considered. Indeed, it is arguable that public confidence is a part of what one means by the rationality of a judicial system.

(2) Trial without jury at the Election of the Defendant(s)

It is rather curious that in English law, the defendant has no right to elect trial by judge alone, though for many company and bankruptcy offences, he may elect trial without jury in the lower courts. In the United States, such waivers on felony charges date from 1829 (in the State of Maryland). Indeed, in 1852, a Maryland statute extended the right of waiver to all criminal cases, including capital ones. In Patton v. United States, 281 U.S. 276 [1930], the Supreme Court held for the first time that a defendant had the right to trial by judge alone in federal cases. However, it warned (at 312-3) against the excessive use of such waivers:

> "Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable and undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity."

All of the States have adopted jury waivers, and though the sober warnings of the Supreme Court about careful scrutiny of all applications to waive jury trial are honoured more in the breach than in the observance, the courts sometimes refuse waiver. In Singer v. United States, 380 U.S. 24 [1965],

the request of the defendant charged with mail fraud for jury waiver was objected to by the prosecution, and the court, not being satisfied that the prosecution's objection was motivated by a desire to deny impartial justice, ordered jury trial. The defendant was convicted.

In Canada, the Federal Code gives the accused the right to opt for trial without jury before a county or district court judge in a large number of offences, including fraud (Laskin, 1969, 47). No figures are available, but I understand that this option is utilised quite frequently, particularly where juries may be believed to be prejudiced (for instance, anti-semitic), or where the trial judge is expected to be more sympathetic than a jury to the sort of defence to be put forward. (It is important to note that this 'judge-spotting' is central to the choice of mode of trial in Canada and in the United States. It would be intriguing to find out what difference it would make if counsel had to make their election without knowing who the trial judge would be!) However, even where there is believed to be local prejudice, the accused do not always wish to exercise their right to trial by judge alone. A recent fraud in Canada involved a number of persons who were accused, inter alia, of swindling elderly people out of their life savings. Not surprisingly, this attracted unfavourable publicity during the trial, which was the longest trial and jury deliberation ever held in Middlesex County. Not long afterwards, there was to be a further trial in relation to the same set of offences, and the defence commissioned a survey which found that 42 per cent of the local population expressed beliefs of irrevocable prejudice or at least uncertainty that they could set aside any prejudices (Vidmar and Judson, 1981). Armed with this information, the defence successfully applied for a change of venue.

What impact might the right of defendants to elect trial by judge alone have upon the present problems of fraud trials? The hardened observer might suggest that however meritorious in itself, the proposal is designed to give the appearance that 'something is being done' without bringing any substantial change. All of the English judges and some of the senior counsel who co-operated in this research expressed a certain scepticism about the proposal, and foresaw few defendants taking this path. Some counsel argued that accused with technical defences might prefer trial by judge alone, on the grounds that the jury might convict such persons for their odious conduct rather than on the strict application of the law to the facts. However, I am not impressed by this argument. It is presently the duty of trial judges to dismiss cases that they feel are unsafe to be left to the jury, and my research indicates that they are far from reluctant to do this in England: the experience of other Commonwealth countries may differ. If anything, English trial judges err on the side of generosity in directing acquittals, and it is difficult to envisage trial without jury transforming this figure upwards. It is possible that the need to give reasons for findings on the facts might induce a greater degree of circumspection among the judiciary than exists among the jury, but this is far from certain.

Prima facie, the analysis of the American experience might offer some insight into the likely impact on the Commonwealth of the right to waive jury trial. Kalven and Zeisel (1966, 24-30) offer an interesting analysis of this. They found that overall, although there is enormous regional variation, no fewer than 34 per cent of those charged with fraud and embezzlement waived their right to jury trial. It is not possible to deduce whether these were more or less than normally complex cases, though given the small number of complex cases, they must have been mainly less complex. In examining the

rationale for jury waiver, the authors suggest that the hope of sentence discount on conviction by judge alone influences the decision, much as it does in the plea-bargaining process. Thus, the defendant who does not wish to deprive himself of the chance of being acquitted, but who wishes to assure a modicum of leniency in case of conviction, might waive his right to jury trial: a sort of each-way bet! In particular, defendants might hope for a suspended rather than an immediate prison sentence if convicted by judge alone.

Another reason why an accused might opt for trial by judge alone is the fear that a jury might be prejudiced against him because of his alleged offence or because of his personal reputation. Kalven and Zeisel say nothing about this reason, but it is interesting that when the Reverend Moon (the sect-leader) was prosecuted in the United States for income tax fraud in 1982, his counsel initially sought trial without jury, on the grounds that any jury might be prejudiced against the 'Moonies' Universal Church. In such a case, a mere change of venue would not suffice to ensure a fair trial, since the unpopularity was national rather than local.

A third reason for the choice of trial by judge alone is that in criminal trials, prosecutors vet juries quite routinely for criminal convictions and prior convictions of the accused are revealed to the jury, so many defendants feel that this might place them at a disadvantage. In other words, they would prefer a judge to a 'prosecution-minded' jury (though more wealthy defendants can combat this by extensive use of voir dire and by employing psychologists to advise on the selection of a jury panel).

The final reason for opting for trial by judge alone is alleged to be the possibility of corrupting judges in the United States, particularly in the State courts. It has been suggested to me that such corruption is made easier when the judge is a finder of fact as well as a finder of law, and when the judiciary are elected and come not so much from a sheltered elite as from the hurly burly of political life. I am not in a position to evaluate these claims, but they are ironic in view of the jury corruption referred to earlier. Perhaps the message is that when such large sums and professional standing are at stake, the opportunity and incentive for corruption increase correspondingly.

In short, although the United States figures reveal a surprisingly high proportion of jury waivers in fraud trials, they are less useful than one might have hoped as a guide to what might happen if such a system were introduced elsewhere. This is because the data are not broken up to enable one to distinguish between the more and less complex cases of fraud, and because some important features of the American criminal justice system are not present in many of the Commonwealth jurisdictions. If there were grounds for suspecting that extensive use would be made of the right to elect trial by judge alone, one would expect to see a substantial number of accused electing summary trial at present but , with the possible exception of bankruptcy fraud, this does not appear to be the case. Few initial sceptics will be converted to the proposal as a means of reducing substantially the problems associated with fraud trials, though this does not mean that it is objectionable in itself.

(3) Trial by judge(s) alone

Provided that both the trial and the judgment took place in open court, judicial trial certainly represents the most clear-cut of the options for radical reform of fraud cases. No system can be better than the people who operate it, but a competent judge could cut a swathe through the mass of documentation referred to earlier. The hearsay rule, which causes particular difficulties in international cases and which leads to frequent trials-within-trials, could be by-passed. The tedious and quite spurious defences familiar to all those who attend lengthy fraud cases, which are devised deliberately to confuse the jury so that they cannot be satisfied beyond all reasonable doubt, would diminish in number. Moreover, there would be some advantages to the defence, inasmuch as the requirement that a judge give reasons for his verdict would enable the appellate courts to go beyond the convention that a jury's verdict is sacrosanct. There would be no diminution of the responsibility of summing up the law and applying the facts to it. Moreover, the high status of many (though by no means all) fraud offenders should protect them from the prosecution-mindedness that has been alleged to afflict stipendiary magistrates in their dealings with lower-class offenders, partly through the human tendency of discrediting explanations that are advanced too frequently. Provided that the trial judges were taken from the Queen's Bench Division rather than the Chancery Division, and thus were familiar with the criminal process, this might result in considerable improvements to fraud trials without any major disadvantages, however odd it might be to try criminal cases without a jury.

Whether such trials ought to be accompanied by assessors (expert or lay magistrate) as a matter of routine is moot. This may depend on whether or not it is possible to recruit persons of sufficient calibre. If retired persons were to be used, they might be out of touch with current custom and practice in, say, accounting standards (an objection which applies a fortiori to the use of expert special juries), and it may be better to recruit practising persons, as is done in Department of Trade enquiries under Section 165 of the Companies Act 1948. We might extend to criminal trials the provisions of Section 70(1) of the Supreme Court Act 1981, which state that

> "In any cause or matter before the High Court the court may, if it thinks it expedient to do so, call in the aid of one or more assessors specially qualified, and hear or dispose of the cause or the matter wholly or partially with their assistance."

Several Commonwealth countries already use assessors in this way and, although he doubtless intended to restrict his comments to civil cases other than patent or admiralty ones, Devlin J. observed in Esso Petroleum Co. Ltd. v. Southport Corporation [1956] A.C. 218 that there was no bar on the broader use of assessors. Proper remuneration would be needed, as it is at present in civil cases at the discretion of the court, but it certainly is arguable that service is part of the communal responsibility of those who complain about their losses from fraud.

The impact of such a system upon the length of trials may not always be great. In long-firm frauds and the more ordinary cases, the effects might be considerable, as it is there that the most long-winded and irrelevant defences tend to arise. However, in some banking, insurance and accounting frauds, it

may not take an appreciably shorter time to explain norms and technicalities to an inexpert judge than to an inexpert jury (though hopefully, at least the judge will understand it afterwards!) Judicial trial would also improve pre-trial preparation by counsel.

There are two principal objections that may be raised to this proposal. The first relates to the principle that all criminal cases should be made understandable to the general public. However, this principle is not cardinal. After all, the verbatim reporting of the full details of fraud trials is not something that has preoccupied media reportage hitherto (except where there is a sex appeal aspect to the case). In any event, any competent financial journalist will be able to produce a succinct analysis. There are many technical issues of a scientific or financial nature that do not reach the public, and fraud trials are no exception. In trial by judge(s) alone, or by judge with assessors, there would be opening speeches and a summing up, so apart from the occasional drama of police or juror or political corruption (which would occur still), there would be little change to the public's perception of fraud trials.

The political (and legal organisational) objections are things that have to be taken into account. The debates upon the Criminal Law Act 1977 and upon the Supreme Court Act 1981 are an indication of the difficulties facing reformers. In the course of the debate upon the latter, Mr. Frank Dobson, M.P. stated that

> "Jury service is more important to the preservation of individual liberty and the preservation of our judicial system than all the scurvy race of lawyers put together."

The Law Ministers doubtless would take a different view. When the House of Commons defeated the proposal to abolish trial by jury in civil cases where the length of the trial makes the action one which cannot conveniently be tried with a jury, Lord Hailsham (who previously had accused Lord Rawlinson of being "too conservative with a small 'c'") observed that

> "there are times when one is wise to retreat before the troglodytes, reactionaries, and pterodactyls, and other strange creatures in the undergrowth who oppose law reform."

Despite the furore over the length criterion for abolition, Section 70 of the Supreme Court Act 1981 provides

> "(1) Where, on the application of any party to an action to be tried in the Queen's Bench Division, the court is satisfied that there is in issue -
>
> (a) a charge of fraud against that party.....the action shall be tried with a jury unless the court is of the opinion that the trial requires any prolonged examination of documents or accounts which cannot conveniently be made with a jury."

There seems to be no good reason why the 'prolonged examination of documents or accounts' criterion cannot be extended to the criminal trial also, though some might prefer the initiation of such a move to rest with the defendant and/or prosecution rather than with the judge.

Whether this option of trial by judge without jury would be attractive to the judges of first instance is a different matter. Some of those whom I consulted among the English judiciary were less enthusiastic than the higher judiciary, perhaps because they were cognisant of the extra responsibility that this would entail for them personally. I

refer here not only to the need to give reasons for a verdict but also to the moral responsibility that would accompany the change. In my view, there would be an advantage in having a two or three-person panel of judges, since the testing of argument and of belief is an important part of the judgment process. (Expert assessors, however, should not be involved in the decision, since the public might feel that the verdict was an 'in-group' one.) There may be pragmatic arguments regarding judicial resources which prevent there being more than one trial judge, but the superiority of a larger tribunal does not constitute a sufficient reason to abandon the change to trial by a single judge. Many of the arguments in favour of abolishing jury trial for frauds also point towards greater specialisation in fraud among the judiciary, where expertise and specialist knowledge is at a premium.

(4) Piecemeal Reforms of the Trial Process

It would be both tedious and pointless to seek to review in detail the variety of procedural rules which exist in all Commonwealth jurisdictions. Rather, I shall present in broad outline what I regard as some of the key reforms that might prove to be beneficial.

(a) Pre-Trial Reviews

The cornerstone of any reforms must be the improvement of the pre-trial procedures for frauds. More efficiently conducted trials will imply shorter delays for the accused who, whether they be in custody or on bail, will have their cases concluded sooner. Interviews with those convicted in fraud cases reveal that the waiting period was one of such anxiety that it was almost a relief to be convicted (Breed, 1979; Levi, 1981). Witnesses will be able to give their evidence when it is relatively fresh in their minds. The concentration of juries should not be distracted by constant breaks for legal argument between counsel on admissibility and by irrelevant and long-winded cross-examination. Those cases that are of doubtful strength will be dropped even before the trial rather than after, say, 100 days of prosecution evidence. The difficulty is to achieve these aims.

Whilst accepting that a certain amount of gamemanship is inevitable (and maybe even desirable) in any legal system, this appears to have reached unacceptable levels, particularly in fraud cases but also in organised crime cases. Numerous instances have been cited to me (not only in the United Kingdom) where witnesses have had to be brough from abroad or from distant parts of the country to give evidence which has not been disputed

in court. It is plain that the only motives for this are to try to induce the prosecution to drop a case (on cost grounds), to induce them to accept a plea bargain, or even to obtain a directed acquittal if no formal proof can be made of vital evidence. This is contrary to commonsense, however pleasant it may be for accused persons. There are no formal interlocutory procedures in English criminal courts and, given the delays that these often occasion, particularly in Chancery, this may be no bad thing. What are required are incentives to deal with major issues before the trial and disincentives for not doing so.

Among the most promising possibilities for improvement of the trial process without creating undue inroads into the rights of the accused are

(i) within, say, two weeks from committal for trial, the prosecution should indicate the counts on which it intends to proceed and the defence should indicate their pleas to the counts in question.

(ii) At this stage, the defence should indicate what evidence and witnesses need not be called to appear in person.

(iii) In cases of any complexity, pre-trial reviews, oral or written, should be held, which should deal with all legal issues, including arguments on admissibility and severance, which are to be raised during the trial. Prosecution counsel should not be permitted to fudge on the particularity of their indictments by arguing, for instance, that all will be clarified in the Opening Speech. Experience gives no grounds for such optimistic pronouncements!

(iv) The judge at the pre-trial review should always be the trial judge. I reject the counter-argument that this might lead him to pre-judge the case unduly. Preferably, the trial judges should be reasonably expert in the area of fraud, since this tends to generate some of the most difficult issues.

(v) The counsel who deal with practice directions should in all cases be the senior ones who are to appear at trial. If this is not the case, the tendency is for neither prosecutors nor defence representatives to concede anything, lest they be criticised subsequently by their leaders.

(vi) There should be sanctions for non-compliance with the practice directions. One way of strengthening their impact would be to impose a sort of exclusionary rule, whereby no legal argument on any of the matters accessible before the trial can be raised during the trial. If this is too severe, then such argument could be admitted at the discretion of the trial judge. However, at the minimum, the trial judge and taxing officers should be empowered to impose financial penalties upon counsel who do not respond to pre-trial directions and/or who draw out their conduct of the case in plainly irrelevant directions. These sanctions may be imposed upon both prosecution and defence. There should be increased fees for adequate pre-trial preparation by counsel on Legal Aid, so that there is some incentive for them. Defendants who are not Legally Aided might be required to pay some of the Court and Prosecution costs if they fail to respond to practice directions, though in England and Wales, there are very few privately funded defence counsel anyway.

(b) Disqualifications from Jury Service

General disqualifications of all previously convicted persons are extremely crude instruments for the selection of impartial juries. There seems no good reason to suppose that thieves and robbers are any more tolerant than the unconvicted of, say, child molesters, nor that petty persistent offenders are well disposed towards corporate fraudsters. Given the very low rates of prosecution for fraud and for corporation regulatory offences (including tax fraud in particular), it would be excessively optimistic to take the absence of convictions for these offences as an indicator of moral or legal probity. Assuming that the jury is to be retained, the issue of disqualification becomes a difficult one.

It seems reasonable to exclude from jury service on a fraud case those who lack regard for the legitimacy of laws governing commerce. On this criterion, we should disqualify all who have been convicted of any offences involving deception or any other relevant quasi-administrative offences such as those under the Companies Acts, Bankruptcy Acts, Fair Trading, Health and Safety at Work, or Public Health Acts. We might wish to include also those who have been censured in Department of Trade Inspectors' Reports (or their equivalent abroad), or by any of the self-regulatory bodies such as the Institute of Chartered Accountants, the Law Society, Lloyds of London, the Council for the Securities Industry, and the Stock Exchange. From a practical viewpoint, however, this might be difficult to do under a common rather than a special jury system. One might even wish to extend the ban to anyone who has ever been bankrupt or a director of a company that has gone into liquidation, on the grounds that some degree of deception is common in these situations. However, this too may be impractical, as well as being an undue violation of civil rights. For example, unless

all people eligible for jury service were to be required to answer such questions, those called might have to answer in open court, which would be embarrassing.

In my view, those convicted of fraud or 'regulatory' offences should be disqualified whatever the sentence that was imposed upon them, since for these offences, the sentence (actual or maximum) bears little relation to the seriousness of the acts. This issue is expressed nicely in a different context by the City of London magistrates in the case of R. v. Altman et al. (unreported, but see The Guardian, 22 April, 1978):

> "A City stockbroker and his company involved in a £2 million currency fraud..... were ordered to pay more than £220,000 in fines and costs yesterday.....The magistrates, in a written judgment, said they were anxious about the proper sentence, and said that although Altman was a first offender who should not be imprisoned unless there was no suitable alternative, he had committed breach of trust and aided a very substantial fraud.....In the event, they concluded, a very substantial monetary penalty was the right sentence.
> The magistrates protested that there was an anomaly in the laws designed to help rehabilitation of offenders. Because they had decided not to imprison Mr. Altman, he would become 'rehabilitated' after only five years, and no-one would be allowed to refer to his conviction. Society would wish to regard serious white-collar fraudsmen of this type as 'second-class' citizens for a long time, they said."

(For an extended discussion of related issues, see Levi, 1981, Ch. XII).

(c) The Peremptory Challenge

It is not unnatural for defence counsel to seek to maximise their client's chance of acquittal by procuring a jury favourable to the defence. Although there is a substantial body of evidence on the relationship between juror characteristics and verdicts, principally in the United States, opportunities for voir dire and for objections 'for cause' are highly circumscribed in most Commonwealth jurisdictions. Moreover, prosecution practices vary widely with regard to jury-vetting. New Zealanders, who fairly routinely omit from jury panels all persons with previous convictions, may regard with amazement the furore with which jury-vetting is treated in England. Between 1975 and 1978, the Director of Public Prosecutions, who prosecutes most major fraud cases in England and Wales, authorised only two cases of fraud - both international frauds - where juries were vetted in advance for previous convictions. Other jurors may have stood down because they obeyed the bans on service for those with certain sorts of previous records, but no official check took place. These factors clearly make a difference to the initial jury panel.

Beyond that, however, there exists the right to make a peremptory challenge. In his Commentaries, Blackstone (IV, 353) observed that the peremptory challenge applies only to capital cases. The accused should be able to object to a man if he does not like the look of him. This right is

> "a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous.....As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when

> put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike."

Over the centuries, the number of peremptory challenges has declined, from twenty in 1509 to seven in 1948 to three in the Criminal Law Act 1973. However, s35 of the Criminal Justice Act 1948 extended the peremptory challenge to misdemeanours as well as to felonies, thus making it available for non-felonious frauds. In 1973, Lord Hailsham withdrew occupations from the jury list available to counsel, thereby diminishing the potential for using this as a basis for peremptory challenge.

Despite the reduction in the number of peremptory challenges, and in the information available to counsel making this decision, it is used not infrequently in fraud trials. The Morris Committee (1956, para 343) observed that "In difficult cases of commercial fraud counsel sometimes challenge just those very jurors who, by reason of their education or professional attainments, might be thought to be best qualified to understand the issues." My own interviews with counsel and solicitors, and direct observations in court, confirm the tactic adverted to by the Committee, though on rare occasions, counsel may prefer an 'upper-crust' jury. Readers of the Daily Telegraph, or military-looking persons certainly tend to be excluded on peremptory challenge, as do inhabitants of areas of the city thought to be less sympathetic to the type of fraud under trial. Professional livelihoods and reputations may be at stake in fraud prosecutions, but readers may question the rationale behind the retention of the peremptory challenge. Lord Denning (1982) and many recent letter-writers to The Times take the view that it should be abolished. In frauds where there are multiple

defendants, the systematic use of the challenge can eliminate a substantial number of persons from the jury panel, though this can misfire, as when the defence mistakenly permitted onto the jury a rather scruffy-looking individual who turned out to be a qualified accountant in a distinguished London firm, while objecting to a man wearing a pinstriped suit, with a bowler hat and rolled umbrella, who was in fact a market porter in his Sunday best! (Levi, 1981, 210). The right to challenge is therefore more significant than the reduction to three per defendant might suggest. If the principle of randomisation is taken to its logical conclusion, the peremptory challenge (and the stand by for the Crown) should disappear, and only objections for cause should remain.

There is, however, one reason why this proposal should be looked at with care, even by those who do not cling to traditionalism for its own sake. As one judge pointed out to me in discussion, if the peremptory challenge were abolished, there might be more pressure to institute an extension of objections for cause. This has begun to happen already in England, even with the present right of peremptory challenge, but few people would like to see the adoption of jury selection processes akin to those in major United States trials.

(d) The Taking of Notes

It has become common in the London Central Criminal Court for juries in fraud cases to be provided routinely with paper and writing implements. This should be universal, particularly in long and complex cases. There is no substance in the objection that it may be distracting for people who are not used to taking notes. If necessary, the trial judge may tell jurors of the dangers of being thus distracted, but no-one is compelled by the mere presence of pen and paper to take notes.

However, it probably would be unwise for jurors to attempt to set down all the evidence on paper. It might be useful for counsel to present the jury with a copy of the opening speech and a summary of the principal lines of defence.

(e) The Routine Introduction of the Previous Convictions of the Accused

Americans often express amazement at the fuss that has been made over the proposals of the Criminal Law Revision Committee to introduce more readily the prior convictions of the accused. However, such concern by civil libertarians is well founded, as such a measure would increase the risk of convicting the innocent. Juries are more likely than judges and expert assessors to be gulled by faux naif claims by the accused, but even there, one should not overestimate the impact upon convictions in fraud trials of the proposal to introduce previous records routinely into evidence.

One quarter of those convicted at the Old Bailey between 1962 and 1972 in connection with long-firm fraud (businesses set up to obtain large quantities of goods on credit without intending to pay for them) had no previous convictions, and almost half had less than two previous convictions. Of those acquitted during this period, no fewer than 60 per cent had no previous convictions and only a quarter had received total prison sentences of longer than twelve months prior to their present conviction. If we examine the prior criminal records of nine alleged 'professional long-firm fraudsters' who were acquitted at the Old Bailey between 1950 and 1976, we may note that at the time of their acquittal, only three had received sentences totalling more than twelve months' imprisonment, one had a previous one-year sentence, one had two previous convictions but had never been sent to prison, and four had no previous

convictions at all. However, all five who had criminal records had at least one conviction for commercial crime and, in their cases, the introduction of previous convictions might have had some impact upon the decision of the jury. Whether this is a good or a bad thing depends upon one's values: they may have been innocent. We may assume too readily that all of the subsequent activities of convicted fraudsters are fraudulent, just as we may be too reluctant to label the unconvicted as 'fraudsters'.

There is one possible consequence of the introduction of previous convictions into evidence: that it will encourage the prosecution of persons who otherwise would not have been prosecuted. The police or Public Prosecutor might think that the prejudicial effect of the jurors' knowledge of the accused's previous convictions might lead to a conviction where, under the present rules, there would be an expectation of an acquittal. Ironically, if this view proved ill-founded, there might be an increase in the acquittal rate for frauds. Since, with the exception of cheque and credit card fraudsters, long-firm fraudsters are more likely than corporate criminals generally to have prior convictions, the net effect of any change in the previous conviction rules probably will be negligible. If we were to take the 'similar fact' or 'moral character' arguments seriously, we would have to go further and introduce information about prior business failures which did not necessarily lead to any prosecution. Again, there is a conflict here between the desirability of possessing relevant information and the risk of creating undue prejudice which becomes more acute as one moves from a "due process" model to one more closely akin to a "people's court".

(f) Time limits on opening and closing speeches

The opening speech for the Crown probably is a major part of the trial, particularly a jury trial, since it places in perspective the relationship between all the bits of evidence and, in conspiracy trials, between all the accused. Therefore, it may be considered undesirable by some to impose a strict time limit. However, since a little pressure concentrates the mind wonderfully, it may be recommended that except with the express permission of the trial judge, an opening speech should never exceed one working day. The same principle should apply to the closing speeches of all counsel, whether for the defence or for the prosecution. The tendency for each counsel to see it as his or her duty to review laboriously all the evidence relating to each individual client and count is one that should not be encouraged. Jurors report that it adds little to their understanding and, if anything, makes them irritable at what they see as redundant argument. Its major impact probably is to increase the costs of Legal Aid. Lengthy judicial summings up are also to be discouraged, but it is doubtful if there should be such strict controls on length as there are, for example, in the United States.

(g) The use of alternate jurors

One final possibility to reduce the strains to jurors suffering from illness or domestic contingencies or even those whose holidays are threatened by trial over-runs is to introduce a system of 'alternate juries', as happens in the United States. If, say, three extra jurors were to sit on frauds which were expected to last longer than one month (or whatever period were deemed appropriate), then this might ease the social and organisational stresses that crop up in some long trials. The jurors would sit separate from the 'proper' jury.

Summary and Conclusion

In his brilliant essay at the turn of the century, Microcosmographia Academica, Professor Cornford defined the principle of the 'dangerous precedent' in the following terms:

> "you should not now do an admittedly right act for fear you, or your equally timid successors, should not have the courage to do right in some future case which, ex hypothesi, is essentially different, but superficially resembles the present one. Every public action which is not customary, either is wrong, or, if it is right, is a dangerous precedent. It follows that nothing should ever be done for the first time.

When evaluating proposals to reform fraud trials, we should beware of following this 'dangerous precedent' line, and also of concentrating on the defects of the alternatives to the exclusion of the defects of the present system. For some countries, such as Singapore and Hong Kong, which do not have jury trial but do have a substantial number of fraud trials, the difficulties may be mainly procedural, though judicial competence presumably is still a relevant concern. In countries which have both 'common jury' trial and Legal Aid, the issues of competence, cost, length, and, perhaps, corruption may be more prominent. It should also be noted that improvements in educational standards (in Nigeria, for instance) may make jury trial more feasible than hitherto. Similarly, reductions in ethnic and tribal conflicts may increase the suitability of jury trial. One should not underestimate the importance of the jury in confirming the popular legitimation of the Rule of Law, even though it is used in only a tiny minority of trials.

Partly for this reason, it is difficult to separate cleanly in practice the rational arguments for any given proposals from the way in which they are likely to be perceived by the general public. With very limited time and zero budget, I have been unable to survey public opinion on any of these proposals, even in England. However, it is possible to make some reasoned estimates. With these in mind, the following recommendations are made for discussion by the Law Ministers.

Recommendations

(1) The proposal to try frauds by special juries composed only of businesspeople and professionals should be rejected. There are two principal grounds for this:

(a) in the event of an acquittal, the public may feel (however unjustifiably) that the accused have been protected by their own group, against the weight of the evidence;

and (b) there is a danger of undue leniency where the customs and practices of cognate professions are more lax than the criminal law requires or, per contra, that professionals may be too severe and may judge the accused by the standards of their professional codes, which codes may be more rigorous than the law requires.
It should be noted that these objections do not apply to the presence of some professionals and businesspeople on juries: the issue is one of control.

(2) The trial of frauds should take place before a judge or a panel of judges where, in the opinion of the trial judge, the case is too complex or too specialised to be tried by an ordinary jury. The decision of the trial judge should be accompanied by a statement of reasons and should be subject to appeal by any defendant or by the prosecution. (The latter proposal should satisfy the public that there is no corrupt or partial relationship between the judge and the prosecution or the accused). By formulating the proposal in this way (for countries which presently have trial by jury), the aim is to ensure that only genuinely difficult frauds will be tried without jury. This is a recognition that 'fraud' is not a homogeneous category.

In cases where judicial trial occurs, it should be the right of any party to demand the presence of expert assessors to assist the judge in his decision, possibly subject to the proviso that if no such person is available, and the request is made during the trial, the judge may at his discretion continue the trial without an assessor. A panel of suitable assessors should be drawn up, with the assistance of recognised professional bodies in accountancy, banking, insurance, etcetera.

Ideally, since critical testing of beliefs is an aid to good decisionmaking, there should be a panel of three judges (or even two, with a unanimity requirement, as in the Court of Appeal). However, if this is not feasible, a single judge would suffice.

(3) The grounds on which fraud trials are held to be unsuitable for 'common jury' trial are that they are too difficult and alien to be readily understandable by such a jury. Therefore, unless there is to be a general move to grant defendants the right to trial by judge, it is recommended that this be possible only if the trial judge accepts that the particular case in question is not suitable for jury trial. Moreover, to ensure that the decision to elect for trial by judge without jury is made on grounds of principle rather than tactical expediency, the choice of forum should have to be made upon committal, before the particular trial judge's identity is known. It appears that the major virtue of the proposal to give defendants in fraud trials the right to elect trial by judge without jury is the fact that it is more in line with constitutional precedent. Whilst accepting that this is the case, the proposal should be looked at with care, lest it give rise to accusations of partiality among the judiciary. In principle, it appears that the judge should decide, not the accused, though this factor might be less significant if there

were greater judicial specialisation on the basis of expertise.

(4) Although legal and procedural complexities are by no means the exclusive prerogative of fraud trials, they crop up with distressing regularity in such trials. Therefore, it is desirable that there should be greater specialisation in the choice of judges for fraud trials than exists generally within the Queen's Bench Division, with a panel of judges whose principal task it is to try frauds. In Commonwealth countries and in geographical areas which do not have many complicated frauds to try, it would be impractical to set aside a judge exclusively for this purpose. However, the argument for specialisation still applies, as it does at all stages of the investigation and prosecution process in relation to fraud. Such specialisation should help to combat the tendency to generate a morass of unnecessary and irrelevant documentation. It is recognised that this may not be a popular move among the judiciary themselves, but the interests of optimal justice should be paramount. Given the importance of economic crimes and the cost of such trials, the temptation to entrust such cases to less experienced judges should be resisted. Arrangements presumably could be made for periodical rotation of primary responsibility for trying frauds, if judges find this too irksome.

(5) Irrespective of whether or not there is trial by jury, the trial judge should always conduct a pre-trial review to give practice directions in complex frauds. This is essential if the issues are to be narrowed down to make them triable. At these reviews, there should be a hearing of all disputes over the admissibility of evidence, and all cases that are to be cited by prosecution or defence counsel in relation to legal submissions must be disclosed. It may be too radical to bar the bringing during the trial of any legal arguments not

disclosed at the pre-trial review, but there must be sanctions for non-compliance. The best ways of achieving this are by financial penalties and, after the verdict, through judicial censure in open court. The latter invariably is found to be attractive to the media. There should be improved remuneration for adequate pre-trial preparation. These rewards and sanctions should apply equally to the defence and prosecution, for the latter are not always blameless in the generation of unnecessary delays. Where the defendant is not legally aided by the State, it should be possible to make him or her pay for prosecution costs that are caused by wilful delay. The move towards pre-trial clarification of issues heralded by Lord Donaldson MR in civil cases is a useful precedent for what might happen in criminal fraud trials, though I am less convinced of its suitability in other cases of a criminal nature.

(6) It is a truism to state that justice delayed is justice denied, but trial delay is too often used as a tactic by the defence in the hope that the case will be dropped altogether or what witness memories will become unreliable or that the sentence will be reduced because of the staleness of the prosecution. Sometimes, delays are caused by the obsession of the prosecution with complete and often unnecessary documentation. There should be some time limit imposed, perhaps one year from committal, within which trial must commence. If the counsel that is wanted cannot be available within that time, then another must be selected. It is difficult to decide what penalties are feasible or appropriate for non-compliance, but the increased importance of pre-trial reviews and the danger of having to select new counsel at very short notice should be a sufficient deterrent.

(7) All persons with previous convictions for fraud or for infringements of relevant regulatory legislation, for example under the Companies Acts, Bankruptcy Acts, and Fair Trading Acts, should be disqualified from serving on a jury in a fraud trial.

(8) The peremptory challenge should be abolished.

(9) The taking of notes by jurors should be encouraged in all cases.

(10) There should be strict time limits of, say, one working day, upon all closing speeches by counsel and, perhaps, of the Opening Speech by the prosecution also. Judicial summings-up should not be restricted as to time, though brevity should be encouraged.

(11) There should be reforms of the rules requiring strict oral proof of evidence except where agreed by the defence. For example, the rationale behind the requirement that Government or Company Registrars must testify in person that X is a company or a bank is obscure in the modern climate of record-keeping. Far greater use should be made of affidavit evidence. Since some nations forbid their officials from giving evidence abroad, any cross-examination that is necessary should be made on videotape and replayed before the trial judge and/or jury. Without diminishing the fairness of trials in any way, this facility could usefully be extended to other witnesses whose presence in court is difficult to arrange. If this were possible, then there would be fewer non-prosecutions and acquittals on purely technical grounds and more victims and witnesses would be willing to come forward. My interviews with victims and investigators indicate that prospective inconvenience and financial loss is an important influence upon the reporting and the pursuit of fraud. This is one area where modernisation and fairness are by no means

incompatible.

These proposed changes will not effect a 'cure' for white-collar crime on their own. They must be accompanied (a) by organisational and personnel improvements in the investigatory and prosecution processes; and (b) by a change in the approach of those with a duty to investigate and prosecute, so that fraud is not treated as if it were an act between consenting adults. However, it is my considered opinion that they will bring the trial of such crimes to a more rational footing without unduly prejudicing the civil liberties of accused persons. The care taken with the reputations and liberty of persons charged with white-collar crimes is indicated by the substantial number of judge-directed acquittals (even where there is jury trial), a fact whose importance is magnified by the reluctance of the authorities to prosecute without strong prima facie evidence.

If this attitude is as general as my surveys have suggested, I am reassured that the rights of those accused of commercial crime will not be violated by the modest suggestions that I have placed before this meeting. If these issues are not treated seriously, we run the risk that more radical critics will claim that the operative principle of the criminal law is not de minimis but de maximis non curat lex. The victims of fraud, including the State itself, deserve greater protection from fraud than they currently receive. For as Jonathan Swift observed in Gulliver's Travels

> "Care and vigilance, with a very common understanding may preserve a man's goods from thieves, but honesty hath no fence against superior cunning."

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