

# Kalven: The American Jury

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Later, the reader is left to weigh this man's tangible manifestations of rehabilitation against his refusal publicly to confess his guilt or to express any degree of penitence over what was admittedly a heinous crime. It is during the narration of the events leading up to the hearing of trial that one encounters the inevitable setbacks, such as the preliminary ruling in the *Freubauf* case that "intent" (to violate the law) was not a necessary element of the crime. The climax is reached, appropriately enough, with the return of the jury, although in Faulk's case this proved to be somewhat anticlimactic, as the jury had returned earlier to inquire whether it could award more than the amount of punitive damages which had been asked for.

Clearly, the author had good material to work with, yet the reenactment even of these cases might have been done much less forcefully than it was. Mr. Nizer's flair for the dramatic, which has undoubtedly helped him in no small way in achieving success as a trial lawyer, also has enabled him to recount his experiences in a manner that allows the reader to identify with him as he suffers through the unexpectedly damaging testimony of a witness who was thought to be "friendly," then rejoices in eliciting from a witness, on cross-examination, facts which help him establish his case, and, finally, ponders the techniques to be used during closing argument.

It is at the points where Nizer attempts to combine the essay with the dramatic form that one of the weaknesses of the book occurs. The question, for example, of whether "the law" is a science or an art is a complex philosophical one which has been extensively debated through the years. Nizer's abridged three or four page contribution to this argument, inserted, via the essay form, into various parts of the book, not only disrupts the flow of what is otherwise a rather tightly-knit narration of events, but also distracts from the very same point which has more tellingly been made, albeit implicitly, throughout the descriptive passages. The same flaw recurs during the development of his rehabilitation theme, where suddenly a sketchy two-page discourse on the proper goals of our penal system is thrust upon the reader.

One can read this book, however, without being too distracted by the asides and the homilies ("Resentment often drives a man to superiority, but there is no precise way of determining why the road for some is for good and others for evil"<sup>2</sup>). On the whole, the central ideas are well-developed in what one should find to be an entertaining as well as an enlightening work, a good collection of interesting cases well-retold.

GEORGE J. GLENDENING\*

<sup>2</sup> *Id.* at 2.

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*The American Jury.* By HARRY KALVEN, JR., AND HANS ZEISEL. Boston: Little, Brown and Company, 1966. Pp. 545. \$15.00.

One of the basic tenets of our judicial system is the right of a person accused of a crime to trial by jury.<sup>1</sup> The exercise of this right has always been one of the major tactical considerations in criminal litigation, and there has been much written about the means of receiving the most favorable treatment for a defend-

<sup>1</sup> U.S. CONST. amend VI; ILL. CONST. art. II, § 5.

ant from a panel of laymen serving as the arbiters of his innocence of charges against him by society. While these handbooks have been helpful, there has never been an attempt to examine the jury critically and clinically, and thereby determine what factors are really considered important by it.

For well over a decade, the University of Chicago has been engaged in such an undertaking, known simply as the "Jury Project." This exhaustive study of all phases of the jury was made possible through a magnificent grant to the University by the Ford Foundation. The project was the concern of a large number of professors at the University, the majority of which were in the Law School and in the Department of Sociology. It reflects the rapidly growing trend of analyzing statistically those facets of human life which in the past were considered too imprecise and personal to allow analysis. The most common use of such analytical methods is that employed to predetermine voting behavior.<sup>2</sup> However, the publication of the findings concerning the jury system presents to those of us who depend in some measure upon that institution far more interesting, stimulating, and surprising results.

As a result of the project, numerous articles<sup>3</sup> have been written, and at least four major books either have been published,<sup>4</sup> or will be published in the near future.<sup>5</sup> This review concerns *The American Jury* by Harry Kalven, Jr., a professor of law, and Hans Zeisel, a professor of law and sociology. The general structure of this particular work consists of a detailed discussion of the methodology employed in the study and the areas of disagreement between the verdict rendered by the jury and that determined by the judge to be his verdict if the matter had been heard without a jury. The study is well documented, containing 155 tables, showing statistically the figures upon which the conclusions are based, and five appendices, considering in greater detail certain matters thought to be peripheral to the scope of the study.

The authors have done a superb job in presenting the statistical results of over 3,500 jury trial reports from courts all over the United States, these reports being furnished by some 550 judges who participated in the study. To the general reader, treatises of this nature do not present the most interesting reading. Except for statisticians and those who are mathematically inclined (neither category of which this reviewer is a member), a book setting out statistically the results arrived at is not particularly scintillating. Fortunately, neither of these trepidations are applicable here. The authors state the conclusions of the statistics plainly and forthrightly, and intersperse these observations with quotes from the judges concerning the probable forces behind the jury's reasoning. This approach makes the study easy to read and comprehend, while not of-

<sup>2</sup> This represents the area with which the public is most aware, not only in the form of the polls prepared by analysts such as George Gallop, Lou Harris and Elmo Roper, but also in the form of I.B.M. or R.C.A. computers "awarding" states to a candidate before more than 10% of the votes cast have been tabulated.

<sup>3</sup> For a complete list of all articles written on the project as of March, 1966, see the "Project Bibliography," in KALVEN AND ZEISEL, *THE AMERICAN JURY* 541-545 (1966).

<sup>4</sup> ZEISEL, KALVEN AND BUCHHOLZ, *DELAY IN THE COURT* (1958); KALVEN AND ZEISEL, *THE AMERICAN JURY* (1966).

<sup>5</sup> SIMON, *THE AMERICAN JURY—THE DEFENSE OF INSANITY* (scheduled for spring 1967); ZEISEL, KALVEN, AND CALLAHAN, *THE AMERICAN JURY—THE CIVIL TRIAL* (scheduled for winter 1968).

fending those who desire a complete report of the basic factors upon which the conclusions are based.

As mentioned previously, the jury is an established part of the American judicial system. There have been great discussions and debates concerning its efficacy, and Chapter 1 sets out these divergent beliefs in a simplified manner. The reader is thereby given an overview of the criticisms raised.<sup>6</sup> The authors quickly point out that this study is not aimed at presenting answers to this debate, but has as its sole purpose discovering why a judge and a jury reach divergent verdicts in the trial of the same matter. In concluding their statement of the avowed aims of the study, the authors make the following remarks: "The study will have relevance for both the critics and the defenders of the jury system and will provide fresh material for the jury debate. It certainly will not terminate it."<sup>7</sup> This observation is certainly borne out by the conclusions derived from the study.

Chapters 3 through 7 concern the methodology employed to give the basic information upon which the conclusions are based. While these chapters do not in themselves explain the reasons for disagreement between the judge and the jury, they present interesting reading material, in that justification for placing any reliance on the results of the study must stem from the credence which can be placed on these results.

The heart of the book is contained in Chapters 8 through 35, which explain in detail the reasons for the disagreement between the judge and the jury. It must be pointed out that it is not always the jury which is the more lenient in its verdict. Special treatment is given this result also. Speaking generally, five categories are established into which the reasons for disagreement are placed; namely, evidence factors, facts only the judge knew, disparity of counsel, jury sentiments about the individual defendant, and jury sentiments about the law. Disagreement occurs in 24.6% of the cases reported,<sup>8</sup> and of these cases, one of the above categories is the sole cause for the disagreement in approximately 15% of the cases.<sup>9</sup> The categories of issues of evidence and jury sentiments on the law are found to account for 83% of all disagreement,<sup>10</sup> and are thus of the most consequence. The readers will find the discussions of the other categories as enjoyable and informative.

*The American Jury* is one of those few books which all of those who are truly interested in the functioning of the legal process will find stimulating and absorbing. Those not practicing Criminal Law will find that this work will whet our appetite for the soon-to-be published work on the civil jury.

PAUL W. ENGSTROM\*

<sup>6</sup> For a good discussion of the propriety of the jury in civil litigation and alternatives to the requirement of a unanimous jury verdict, see Comments, 15 DEPAUL L. REV. 398, 403 and 416 (1966).

<sup>7</sup> KALVEN AND ZEISEL, *op cit supra* note 5, at 11.

<sup>8</sup> *Id* at 56.

<sup>9</sup> *Id* at table 28.

<sup>10</sup> *Id* at 115.

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