JURY SECRECY AND CONTEMPT OF COURT

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INTRODUCTION

Criminal contempts of court take a variety of forms, but "all share a common characteristic: they involve an interference with the due administration of justice either in a particular case or more generally as a continuing process".[1] Courts having jurisdiction to try and punish such offences[2] may do so summarily, either on the motion of a prosecutor or *ex mero motu*.[3] And, in appropriate cases, they may award injunctions to restrain the commission of a threatened offence or the repetition of an offence.[4]

The law of criminal contempt has been invoked to deal with a range of situations in which improper influences have been brought to bear on jurors or in which jurors have been subject to threats or attacks after the conclusion of a trial for reasons connected with their service as jurors.[5] The extent to which that law may be called in aid to enforce conventions about the secrecy of jury deliberations is, however, uncertain.

It is now generally accepted that a juror who betrays the confidences of the jury room does not, under the common law, commit contempt of court

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[1] *Attorney-General* v. *Leveller Magazine Ltd.* [1979] A.C. 440, 449.

[2] At common law, the only courts having jurisdiction to try and punish contempts are superior courts and inferior courts of record, but the latter's contempt jurisdiction is limited to contempts in the face of the court (*Lefroy* [1873] L.R. 8 Q.B. 134; *R.* v. *Judge of Brampton Court* [1893] 2 Q.B. 195; *R.* v. *Metal Trade Employers Assocn.*; *Ex parte Amalgamated Engineering Union, Australian Sec.* (1951), 82 C.L.R. 208). Superior courts may, however, try and punish contempts of inferior courts over which they exercise supervisory jurisdiction (*Attorney-General* v. *British Broadcasting Corporation* [1981] A.C. 303). See also G. Borrie & N.V. Lowe *The Law of Contempt* (2nd ed. 1983) 316-7.

[3] Borrie & Lowe, op. cit., Chap. 11.

[4] Id. 343-5.

[5] See *Martin* (1848) 5 Cox C.C. 356; *Crowther* v. *May* (1878) 4 V.L.R. (L) 425 *per* Barry J.; *R.* v. *Dunn*; *Re Aspinall* [1906] V.L.R. 493; *Nash* v. *Nash*; *Re Cobb* [1924] N.Z.L.R. 495; *Munro* v. *The Queen* [1971] N.Z.L.R. 122; *Owen* [1976] 1 W.L.R. 840; *R.* v. *Lovelady*; *Ex parte Attorney-General* [1982] W.A.R. 65; *Goult* [1983] Crim.L.Rev. 103; *Registrar, Court of Appeal; Collins* v. *Registrar, Court of Appeal* [1982] 1 N.S.W.L.R. 682; Borrie and Lowe, op. cit., 285-6. Attempting to corrupt, influence or instruct a jury to reach a particular verdict otherwise than according to evidence received and argument addressed in open court, or corruption of jurors is also an offence at common law — the crime of embracery (11 *Halsbury's Law of England* (4th ed, Sydney Butterworths, 1974) "Criminal law", para. 953; 1 *Russell on Crime* (12th ed. London, Stevens, 1964) 357-8)
See also *Criminal Code* 1899 (Qld.) s.122; *Criminal Code* 1924, (Tas) s.93; *Criminal Code* 1913, (W.A.) s. 123; *Jury Act*, 1977, (N.S.W.) s.67; *Juries Act* 1967, (Vic.) s.70; *Juries Act* 1927-74, (S.A.) s.83; *Engl.L.C., Offences Relating to the Administration of Justice* (Report 96/1979), Draft *Administration of Justice (Offences) Bill* , clauses 11, 12, 18 and 19.

or any other punishable offence.[6] He merely violates what has been termed "a rule of conduct".[7] It has been suggested that the position may be different if jurors have been expressly directed by the trial judge not to discuss their deliberations with others.[8] And at least one judge has hinted that a party or his legal representative may be in contempt of court if he seeks to interrogate a juror about the manner in which a verdict was reached.[9] There is, however, no reported case in which contempt proceedings have been brought in cases of these kinds.

Although the obligation of a juror not to reveal to anyone, either during a trial or after it has concluded, anything relating to the trial which has occurred in the jury room after the jurors have retired to consider their verdict may be no higher than a moral obligation, it is nonetheless an obligation to which judges have attached considerable importance. Jurors are continually reminded of it and the judges have reinforced it by refusing to admit evidence from jurors relating to what has passed in the jury room for the purpose of impeaching a jury's verdict.[10] Post-verdict interrogation of jurors by lawyers has been condemned as highly improper.[11]

Conventions about jury secrecy seem to be fairly well understood and, in the main, observed. On the other hand it is common knowledge that jurors do on occasions talk about their experiences if only to members of their families and amongst close friends; for many of them the impulse to share the confidences of the jury room in this way may be irresistible. And whilst it is still relatively uncommon in Australia for jurors to attempt to betray the confidences of the jury room to a wider audience, and for persons not themselves privy to a jury's deliberations to seek to interrogate jurors about what occurred in the jury room, instances in which jurors have either volunteered or else responded to requests to surrender the confidences of the jury

[6] G. Williams, *The Proof of Guilt* (3rd ed., London, Stevens, 1963) 269; Rupert Cross, "The Behaviour of the Jury" [1967] Crim.L.R. 575. See also Sir Patrick Devlin, *Trial by Jury* (London, Stevens 1966) 46-7; Lords Gardiner, Parker & Dilhorne L.C. in debate on an amendment to the *Criminal Justice Bill* on 6 June 1967 (283 *H.L. Deb.* 299); Criminal Law Revision Committee, *Secrecy of Jury Room*, Cmnd. 3750 (1968). The last mentioned Committee included amongst its members Winn & Edmund Davies L.J.J. and Lawton & James J.J.

[7] *Ellis* v. *Deheer* [1922] 2 K.B. 113, 118. See also Criminal Law Revision Committee, *Secrecy of Jury Room*, Cmnd. 3750 (1960) para.2.

[8] *Dyson* [1972] 1 O.R. 744, 751, 753. See also *Macrae, The Times*, 19 Nov. 1982, p. 10: 2 Hawkin's *Pleas of the Crown*, (London, 1795) cap. 22, s. 19.

[9] *Re Donovan's Application* [1957] V.R. 333 at 337 when Barry J. conceded that "no constraint can be placed upon a juror who wishes to discuss his experiences at the trial, and views he formed in the deliberations which took place in the jury room" but added that this was very different from the case where the legal representative of a party seeks to interrogate a juror after verdict.

[10] This rule is discussed in Part I of the author's article "Jury Secrecy & Impeachment of Jury Verdicts" in the (1984) 9 *Criminal Law Journal* 132.

[11] See e.g *Ex parte Hartstein; In re a Solicitor*, A.C.T Supreme Court, 4 June 1971, summarized in (1972) 46 A.L.J. 369; *Prothonotary* v. *Jackson* [1976] 2 N.S.W.L.R. 457. Regulation of post-verdict interrogation of juries by attorney in the United States is dealt with in the article referred to in note 10 above.

room to parties or their representatives, and sometimes to members of the press, are by no means unknown.[12]

The fact that convention can be violated with apparent impunity has, in recent years, become a matter of some concern.[13] In England the depth of that concern became apparent when, in 1979, the Attorney-General instituted contempt proceedings against the publisher of the *New Statesman*. In delivering the judgment of the Divisional Court, Lord Widgery C.J. observed that:[14]

> "until a few years ago it was accepted that the secrets of the jury room had to be treated as secret. The solemn obligation of jurors to observe secrecy was well maintained and breaches of the obligation were kept at an acceptable level. It had never been necessary to invoke the law of contempt in respect of such breaches, but that law has always been available for use in any case in which the administration of justice would have been imperilled. Recently, however, the solemn obligation of secrecy has been shown to be breaking down; a considerable number of publications involving jury room deliberations, some more objectionable than others has occurred. Accordingly, in view of the apparently diminishing respect for the convention of observance of jury secrecy and the risk of escalation in the frequency and degree of disclosures, it has become right for the Attorney-General to invoke the law of contempt in relation to this article in the "New Statesman" since it represents a departure from the norm and is a serious and dangerous encroachment into the convention of jury secrecy.

But "a serious and dangerous encroachment into the convention of jury secrecy" was not, the Court concluded, of itself sufficient to attract the sanctions of the law of criminal contempt, and in result the publishers of the "offending" article in the *New Statesman* were held not to have committed any contempt.

The Divisional Court's decision, the reasons for which will be explained in the next part of this article, prompted an almost immediate response from the Government. A provision to combat the mischief revealed by the case was included in the *Contempt of Court Bill* of 1980, but the provision which emerged at the end of the legislative process – section 8 of the *Contempt*

[12] A recent example is the disclosure by an unnamed juror to journalists of aspects of the deliberations of the jury which convicted Lindy Chamberlain of murder and her husband of being an accessory after the fact. See *The Age*, 12 April 1984, p.3; *The Australian*, 12 April 1984, p.3; *Sydney Morning Herald*, 12 April 1984, p.4; *The Canberra Times*, 12 April 1984, p.l; *The Advertiser*, 12 April 1984. There are also published newspaper reports of jurors' revelations of their experiences as jurors which have not identified either the jurors concerned or the cases in which served: see e.g. T. Munday, "The Circus Syndrome in Our Jury System", *The Age, Saturday Extra*, 28 July 1984, pp. 6-7; J. Munday, "Courtroom Players Sum Up for the Jury System", *The Age, Saturday Extra*, 4 August 1984, p.6. See also E. Devons, "Serving as a Juryman in Britain", (1965) 28 M.L.R. 561.

[13] See e.g. *Re Matthews & Ford* [1973] V.R. 199, 213.

[14] *Attorney-General* v. *New Statesman & Nation Publishing Co. Ltd.* [1981] 1 Q.B. 1, 7.

of Court Act 1981 – was much more draconic than that which the Government had proposed. It is a provision which has attracted a great deal of criticism.

Some valuable lessons are, I think, to be learned from an examination of the legislative history of section 8 of the United Kingdom's Act. That history, set out in the second part of this article, should certainly be considered carefully by any Australian government tempted to introduce legislation along the lines of section 8; likewise the approaches which have been adopted in other common law countries, notably Canada and the United States of America, to the question of how to enforce, if enforce at all, conventions about the confidentiality of jury deliberations.

The Canadian and American approaches are dealt with in the third and fourth parts of this article. In the concluding part of the article I raise some general questions about the justifications for the general principle that what transpires in the jury room ought not to be divulged; I discuss the pros and cons of employing the criminal law to enforce conventions about jury secrecy, and offer some comments on the matters to which, I believe, attention needs to be given by those who may adjudge that the time has come for parliaments to translate convention into positive law – commands backed by penal sanctions.

THE NEW STATESMAN CASE

The article in the *New Statesman* which moved the Attorney-General to institute contempt proceedings against the publisher was one of a three-part series of articles which the editor of the journal had commissioned two journalists to write on a number of issues arising out of the trial of *R.* v. *Homes and Others* in the Central Criminal Court between 8th May and 22nd June 1979. The trial, involving as it did the former Leader of the Liberal Party, Mr. Jeremy Thorpe, and likewise the preliminary hearing which preceded it, had received what Lord Widgery C.J. was to describe as "saturation coverage in the daily press".[15] After considering their verdict for 52 hours, the jury acquitted all accused of the crimes with which they stood charged.

Several important issues ventilated in the course of the trial were not, in the opinion of the *New Statesman's* editor, satisfactorily disposed of by the jury's verdict. One of these was, as the Divisional Court put it:

> "the propriety of the behaviour of certain newspapers in offering lucrative contracts to witnesses prior to their testimony in court and the workings of the legal system which had operated in a way which had enabled men who had admitted . . . to discreditable conduct (albeit behaviour not the subject of any charge in the indictment) to emerge without a conviction for a criminal offence."[16]

[15] Id. 5.
[16] Id. 6.

The third, and what was to prove the critical article in the commissioned series, was intended to deal with some of the legal issues raised in the trial, and more particularly "with the question whether the prosecution should have proceeded against the accused upon lesser charges and whether large payments, escalating in the event of conviction, by newspapers to witnesses ought to be prohibited".[17]

Some time after the articles had been commissioned, it came to the notice of the two journalists who had accepted the *New Statesman's* commission – both of them adjudged by the Divisional Court to be "reputable and experienced"[18] – that one of the jurors, believing that certain aspects of the jury's deliberations ought to be made public, was prepared to disclose, without reward, what had happened after the jury retired. The juror was interviewed and, on learning what the juror had said, the editor of the *New Statesman* formed the view that the disclosures "provided important evidence which should be incorporated in the third article of the series"[19] – the article published on 27th July 1979 which the Attorney-General claimed was in contempt of court. That article recorded:

> "the juror as saying, inter alia, that all the jury were agreed that the accused were guilty of conspiracy of some kind; that 11 of them, after a little more than an hour's deliberation on the first day, agreed that it was not proved there had been a conspiracy to murder and that, on a charge of incitement to murder, the jury could not accept the uncorroborated word of a prosecution witness who had agreed to accept money from a newspaper, the amount to be increased in the event of a conviction."[20]

The editor's decision to publish the juror's disclosures was, it was accepted, not taken lightly. Legal advice had been sought before the relevant article went to press,[21] and it was conceded by the Attorney-General that the editor had acted with honest intentions and in the belief that publication would not involve any contempt of court.[22] The Attorney-General also agreed that publication of the article could in no way interfere with the fair trial of Holmes, Thorpe and the other accused, and that the references in the article to the juror's disclosures indicated that the jury had "approached its task in a sensible and responsible manner . . . "[23]

The thrust of the Attorney-General's case was rather that publication of the article involved:

> "an interference with the due administration of justice as a continuing process in that the disclosure of what happened in the jury room tends or will tend: (a) to imperil the finality of jury verdicts and thereby diminish

[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] (1980/1) 6 H.C. Deb 922.
[22] [1981] 1 Q.B. 1, 6.
[23] Ibid.

> public confidence in the general correctness and propriety of such verdicts and (b) to affect adversely the attitude of future jurymen and the quality of their deliberations . . . Nothing must be permitted to be published which might tend to deter a person likely to be called for jury service from playing his full part as a juror in any trial."[24]

The Divisional Court concluded that "any activity of the kind under consideration in this case which . . . tends or will tend to imperil the finality of jury verdicts or to affect adversely the attitude of future jurors and the quality of their deliberations is capable of being a contempt".[25] Indeed if such activities were not checked they "might become the general custom" and if they did "it would soon be made to appear that the secrecy of the jury room had been abandoned . . . "[26] Should that come about, it was "not beyond the bounds of possibility that trial by jury would go the same way".[27]

But the Court was not prepared to say that "there would be of necessity a contempt because someone had disclosed the secrets of the jury room".[28] Rather each case of disclosure had "to be judged in the light of the circumstances in which the publication took place".[29]No exception could, it was said, be taken to non-specific disclosures which did not identify persons involved in particular trials.[30]

In concluding that no contempt had been committed in this instance, the Court seems to have been influenced in part by the fact that the decision to publish the article complained of had not been taken lightly and that the editor had not intended to interfere with the administration of justice. There was the further consideration that although publications of this kind had appeared before and had, on several occasions, been censured by the judges, in no case had proceedings for contempt been taken in respect of them. The Court noted also that the Criminal Law Revision Committee, a committee whose members included several distinguished judges, had, in its report in 1968 on *Secrecy in Jury Room*,[31] proceeded on the assumption that disclosure of the deliberations of a jury was not *per se* a criminal offence. To have held the publisher of the *New Statesman* guilty of contempt of court might therefore have been seen to involve the creation of a new criminal offence and a violation of the principle *nulla poena sine lege*.[32]

[24] Id. 6-7.
[25] Id. 10.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] Cmnd. 3750.
[32] This argument was put to the Divisional Court by counsel for the publisher – see [1981] 1 Q.B. 1, 4. Many years earlier Glanville Williams had concluded that disclosure of jury deliberations was not illegal, but had gone on to say: "If such disclosures become a public evil they must be dealt with by Parliament, not by the judges inventing a new offence" (*Proof of Guilt* (3rd ed. London, Stevens, 1963) 269).

The Court did, nonetheless, indicate that there could be special circumstances in which disclosure of jury deliberations could amount to contempt. What those special circumstances might be it did not say. The Court's decision did not, therefore, do much to clarify the common law on jury secrecy. It did, on the other hand, draw attention to the urgent need for further consideration of whether jury secrecy should continue to be largely a matter of convention. The Divisional Court obviously thought it should not.[33]

SECTION 8 OF THE CONTEMPT OF COURT ACT 1981

In the United Kingdom, jury secrecy is now enforced by the prohibitions contained in section 8 of the *Contempt of Court Act* 1981.

Whether or not there should be statutory provision to enforce jury secrecy had been considered some fifteen years before by the Criminal Law Revision Committee. In July 1967 the Home Secretary (Mr Roy Jenkins) had asked the Committee to consider:

> "whether statutory provisions should be made to protect the secrecy of the jury room; and in particular whether, and, if so, subject to what exemptions and qualifications, it should be an offence to seek information from a juror about a jury's deliberations or for a juror to disclose such information."[34]

The Committee concluded that statutory protection for jury secrecy was not "immediately necessary or desirable . . . " In its opinion secrecy had been well maintained, despite the absence of any law positively commanding it, and that such breaches or attempts to breach it as had become known had "not established a mischief so extensive or serious that it calls for legislation and punishment".[35] A further reason for not recommending any statutory provision was that whereas the convention of secrecy could be "understood and applied subject to any necessary exceptions", a statutory provision would need to be framed so as to allow for the exceptions.[36] For example, allowance would have to be made for those cases where irregularities occur during the trial which ought to be brought to the notice of the presiding judge or which could provide grounds for a new trial.[37]

The Committee added:[38]

> "should any newspaper be tempted to take advantage of the freedom which at present exists to approach jurors for information in order to prolong

[33] [1981] 1 Q.B. 1, 11.

[34] *Secrecy of Jury Room*, Cmnd. 3750, para. 1. The reference followed a debate in the House of Lords on 7 June 1967 on the *Criminal Justice Bill*. It had been proposed by Lord Brooke of Cumnor that a clause be inserted in the Bill that disclosure of jury deliberations be made an offence (283 H.L. Deb. 299), and see Cmnd. 3750, para. 2.

[35] Cnmd. 3750, para. 4.

[36] Id. para. 5.

[37] Id. para. 10.

[38] Id. para. 5.

the sensationalism of a criminal trial, we should hope that intervention by the Press Council, which exercises so valuable an influence in maintaining standards of journalism, would be effectual to check any such abuse.

There the matter rested until the Divisional Court's decision in the *New Statesman* case.[39] Although the Court in that case concluded that the publication of a juror's disclosers was not in contempt of court, it made it clear that in its view the time had come when restrictions on such publications had to be introduced. The Government agreed and in the *Contempt of Court Bill* which Lord Hailsham L.C. introduced in the House of Lords in late 1980, provision was made whereby certain disclosures of jury deliberations could be the subject of criminal proscecutions.

But for the *New Statesman* case the Government's *Contempt of Court Bill* of 1980 would probably not have dealt with jury secrecy at all. The Bill had been designed to give effect to some of the recommendations of the Phillimore Committee on Contempt of Court[40] and to bring the so-called *sub-judice* rule into line with the requirements of article 10 of the European Convention on Human Rights.[41] The Phillimore Committee had not touched on jury secrecy at all; nor had the English Law Commission in its report (1979) on *Offences Relating to Interference with the Course of Justice.*[42]

Clause 8 of Lord Hailsham's *Contempt of Court Bill* provided as follows:

(1) Subject to subsections (2) and (3) below, it is a contempt of court –
  (a) to publish any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings;
  (b) to disclose any such particulars with a view to their being published or with knowledge that they are to be published;
  (c) to solicit the disclosure of such particulars with intent to publish them or cause or enable them to be published.

(2) This section does not apply to publications which do not identify the particular proceedings in which the deliberations of the jury took place, or the names of particular jurors, and do not enable such matters to be identified, or the disclosure or solicitation of information for purposes of such publication.

(3) This section does not apply to any disclosures of any particulars –
  (a) in the proceedings in question for the purpose of enabling the jury to arrive at their verdict or in connection with the delivery of that verdict, or
  (b) in evidence in any subsequent proceedings for an offence alleged to have been committed in relation to the jury in the first men-

[39] [1981] 1 Q.B. 1.
[40] *Report of the Committee on Contempt of Court*, Cmnd. 5794 (1974).
[41] This followed the decision of the European Court of Human Rights in *Sunday Times* v. *United Kingdom* (1979) 2 E.H.R.R. 245.
[42] L.C. No. 96.

tioned proceedings, or to the the publication of any particulars so disclosed.

(4) Proceedings for a contempt of court under this section (other than Scottish proceedings) shall not be instituted except by or with the consent of the Attorney-General or on the motion of a court having jurisdiction to deal with it.

Had this clause been enacted it would have taken care of the concerns which had been expressed both by the Criminal Law Revision Committee in its 1968 report and by the Divisional Court in the *New Statesman* case. It would have accommodated the various exceptions which, the Committee had said, would need to be built into any statutory rule on jury secrecy.[43] It would have met the Committee's point that "there is no objection to jurors discussing their experiences in a general way and without identifying cases".[44] It would have taken account of what the Divisional Court had said were "strong arguments in support of the view that certain categories of disclosure fall outside the law of contempt, for example where serious research is being carried out" and where the disclosures for that purpose do not identify particular trials.[45] And the provision whereby prosecutions for breach of the proposed section could be initiated only by the Attorney-General or with his consent, or by a court of competent jurisdiction, would have offered some assurance that proceedings would not be taken against those who were guilty of only minor infractions – disclosures which "few people would regard as deserving of punishment".[46]

But clause 8 in Lord Hailsham's Bill was not to survive the legislative process. Although in the first instance it was agreed to by the House of Lords, it was apparent that many of their Lordships believed that it erred too much on the side of liberality. It was strenuously opposed by Lord Wigoder and Lord Hutchinson of Lullington,[47] both of whom expressed grave concern that if the clause became law, jurors would be harassed by disappointed parties and might even be offered payment for their disclosures.[48] Lord Hutchinson made it plain that he was not persuaded that any concessions should be made in the interests of bona fide research into the workings of the jury system. What, he asked, was to be counted as bona fide research? "We are not talking here", he said, "of respectable professors from Birmingham or even of Marxist professors from the English Faculty at Cambridge: we are talking about any scribbler or any journalist who will have this freedom".[49] As for the academic researchers: what they had written about the inner workings of the jury system was, in his view, no more that "pseudo

[43] Cmnd. 3750, para. 5.
[44] Id. para. 10.
[45] Id. para.7.
[46] Id. para. 10. See also 416 H.L. Deb. 377.
[47] Lord Hutchinson is a Q.C. and Labour peer. He was Recorder of the Crown Court 1971-76.
[48] 415 H.L. Deb. 672-3, 416 H.L. Deb. 369-73, 374-6, 379-80, 382.
[49] 416 H.L. Deb. 371.

scientific" and its purpose to discredit the jury system.[50] The concession the Lord Chancellor proposed to make in the name of scientific investigation would, he added, give an immunity from legal liability to what he chose to describe "as a most dangerous animal, the sociologist".[51]

Debate about the pros and cons of clause 8 was not confined to the Palace of Westminster. Well before the matter was debated in the House of Commons, the merits and demerits of Lord Hailsham's proposal had been the subject of letters to newspaper editors. The proposal had also attracted comment from professional legal associations and from some of the judges. Lord Chief Justice Lane and Lord Scarman, and the Criminal Bar Association made it known that in their view, Lord Hailsham's Bill reflected a far too relaxed attitude towards the issue. On the other hand, the authors of a pamphlet entitled *Changing Contempt of Court*, published under the joint auspices of the National Council of Civil Liberties and Campaign for Press Freedom,[52] argued that the law proposed by the Lord Chancellor was not sufficiently liberal. They agreed that some restrictions ought to be placed on disclosure of jury deliberations, for example disclosures when a trial was in progress. They conceded also that there ought to be laws to prohibit payments being made to jurors in consideration for their agreement to disclose jury secrets, and to prohibit public identification of jurors without their consent. But, in their opinion, a law of the kind proposed by the Lord Chancellor ought to allow a defendant to a charge of prohibited disclosure to plead public interest as a defence. In contrast, the editors of the *New Law Journal* commended clause 8 of Lord Hailsham's Bill as achieving an appropriate balance between all relevant competing interests.[53]

By the time the Bill came on for debate in the House of Commons – mid-June 1981 – the Government had, apparently, been sufficiently impressed by the dissatisfactions expressed with clause 8 to move an amendment to the clause. What it offered, in deference to the worries of Lords Wigoder and Hutchinson, was the insertion of the following words at the begining of the proposed section:

> without prejudice to any rule of law which prohibits disclosures by or approaches to jurors during or after the trial.

The purpose of the suggested amendment, the Attorney-General explained to the Commons, was to allay the anxieties which the dissident peers and others had voiced, and to make it clear that the proposed statutory law would not preclude the courts from employing their common law contempt jurisdiction to deal with cases in which there had been improper dealings between jurors and non-jurors.[54]

[50] Id. 371-2.
[51] Id. 371.
[52] A. Nichol & H. Rogers, *Changing Contempt of Court* (Jan. 1981); noted in (1981) 131 New L.J. 101-2 and *The Times* 29 January 1981, p. 5.
[53] (1981) 131 New L.J. 101-2.
[54] (1980/1) 6 H.C. Deb. 920 *et seq.* (16 June 1981).

The amendment proposed by the Attorney-General was agreed to, and another amendment moved by a private member, Mr. Edward Gardner, was, accordingly, not put to a vote. The Gardner amendment, which had been drafted by the Criminal Bar Association, deserves notice since it was to form a basis for further amendments in the Lords.

What Mr. Gardner proposed was an entirely different section 8 reading as follows:[55]

(1) Subject to subsections (2) and (3) below, it is contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.
(2) This section does not apply where any such particulars are obtained, disclosed or solicited with intent that they should be published and
  (a) the publication does not identify the particular proceedings in which the deliberations of the jury took place or the name of the particular jurors, and does not enable such matters to be identified, and
  (b) the consent of the Attorney-General to the publication has been obtained before any such particulars are solicited.
(3) This section does not apply to any disclosures of any such particulars –
  (a) in the proceedings in question for the purpose of enabling the jury to arrive at their verdict, or in connection with the delivery of that verdict; or
  (b) in any appeal from the verdict of the jury in the proceedings in question; or
  (c) in evidence in any subsequent proceedings for an offence alleged to have been committed in relation to the jury in the first mentioned proceedings.

The clause proposed by Mr. Gardner was much more restrictive than that proposed by the Lord Chancellor. Under Lord Hailsham's Bill, a juror who disclosed particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury, otherwise than in the course of the jury's deliberations or in subsequent legal proceedings for an offence in relation to the jury, would not be guilty of an offence unless it was proved that he disclosed those particulars with a view to their being published or with the knowledge that they might be published. Likewise a person who solicited disclosure of such particulars from a juror would not be guilty of an offence unless it was proved that he did so with the intention of publishing the information or of causing or enabling it to be published. But under Mr. Gardner's proposed clause, a juror who disclosed such particulars, and a person who solicited disclosure of them, could be guilty of an offence even if there was no intention to publish them or any thought that they might be published. The only concession made by Mr. Gardner to the proposal that scholarly research into the workings of the jury system should be

[55] Id. 923-4.

exempted was that no one would be liable to be prosecuted for disclosing jury deliberations or soliciting disclosure with the intention that the disclosures be published, if the consent of the Attorney-General had been obtained before any information was solicited, and the ultimate publication did not identify the particular proceedings in which the deliberations of the jury occurred, or jurors' names, and did not enable such matters to be identified.[56]

Another respect in which Mr. Gardner's proposed law differed from Lord Hailsham's was that whereas under Lord Hailsham's Bill, a prosecution for an offence could not be launched except by the Attorney-General or with his consent, Mr. Gardner's proposal would have permitted prosecutions to be inititated in the ordinary way.

When the *Contempt of Court Bill*, as amended by the Commons, returned to the House of Lords, Lord Hutchinson renewed his attack on clause 8 by moving that it be replaced by another clause similar to that which had been moved by Mr. Gardner in the Commons. The proposed amendment had, he said, the support of Lord Scarman, Lord Chief Justice Lane and the Criminal Bar Association.[57] In the course of debate on Lord Hutchinson's proposed amendment, one of the law lords, Lord Edmund Davies, let it be known that he too was opposed to the Government's proposal, and that though he had been a member of the Criminal Law Revision Committee which, in 1968, had recommended that disclosure of jury secrets not be made a criminal offence, he was now persuaded that what had hitherto been a rule of conduct should be made a rule of law.[58] And, like the mover of the amendment, he did not believe an exception should be made in the interests of scientific research. In his view, the prospect of their being approached to talk about their experiences on juries would make people reluctant to undertake jury service and would inhibit candour in jury deliberations. To prohibit merely the publication of indentifying details would not, he thought "remove discomfiture of juries on being subjected to . . . post trial interrogation".[59]

Lord Hutchinson's amendment to clause 8 was passed by 76 votes to 41[60] and when the Bill was returned to the Commons, the Attorney-General signified that the Government would not continue to press its case for a more liberal law. He accordingly moved that the House agree to the Lords' amendment.[61] This was:

> 8.(1) Subject to subsection (2) below, it is contempt of court to obtain, disclose or solicit any particulars of statements made, opinions

[56] It appears that the Criminal Bar Association was divided on whether research into the jury system should be exempted (id. 925-6).
[57] 422 H.L. Deb. 239-40.
[58] Id. 243-4.
[59] Ibid.
[60] Id. 254.
[61] Id. 252-3.

expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.

(2) This section does not apply to any disclosures of any particulars –
   (a) in the proceedings in question for the purpose of enabling the jury to arrive at their verdict, or in connection with the delivery of that verdict, or
   (b) in evidence in any subsequent proceedings for an offence in relation to the jury in the first mentioned proceedings, or the publication of the particulars so disclosed.

(3) Proceedings for a contempt of court under this section (other than Scottish proceedings) shall not be instituted except by or with the consent of the Attorney-General or on the motion of a court having jurisdiction to deal with it.

The enactment of section 8 of the *Contempt of Court Act* 1981 did not put an end to the debate over the extent to which disclosure of jury deliberations should be a criminal offence. In the closing stages of the parliamentary debate on Lord Hutchinson's amendment the Lord Chancellor made his position very clear. What was being proposed was, he said, "thoroughly bad because it is too draconian".[62] His sentiments were shared by many others. The editors of the *New Law Journal*, in an editorial published on 30th July 1981, were equally critical of the new law. Its effect was, it was suggested, to prevent "jurors from revealing things they perhaps considered ought to be revealed about the administration of justice".[63] Jurors, it was further argued should not be given immunity from reasonable public scrutiny or responsible investigation.[64] H. V. Lowe queried whether section 8 might not violate the freedom of speech article (article 10) in the European Convention on Human Rights.[65] Patricia Hewitt also considered that the new law had gone too far. It had, she commented:[66]

> imposed a complete ban on jury disclosures, whether during or after trial, whether paid for or not, whether anonymous or identified. Research interviews with jurors are prohibited, as are articles by journalists who have themselves served as jurors. Indeed, any juror who refers publicly to his jury-room experiences will be in contempt. It is, of course, necessary to protect jurors from press approaches before a verdict has been given, and it would seem inappropriate to allow researchers or journalists even

[62] Id.

[63] (1981) 131 New L.J. 789.

[64] Id. 790.

[65] "The English law of Contempt of Court and Art. 10 of the European Convention on Human Rights" in Furmston, Kerridge and Sufrin (eds.), *The Effect on English Domestic Law of Membership of the European Communities and the Ratification of the European Convention on Human Rights* (1983) 344-5.

[66] P. Hewitt, *The Abuse of Power: Civil Liberties in the United Kingdom* (Oxford, Martin, Robertson 1981) 92-3. See also J. Baldwin & M. McConville, "The Effect of the Contempt of Court Act on Research on Juries" (1981) 145 J.P. 575.

to pay jurors for interview or to identify a juror without his or her consent. But the risk that a verdict will not be regarded as final if jurors may comment publicly on their decision or how it was reached, or that the institution of the jury will be undermined if jurors' deliberations are open to public scrutiny and comment, seem to be exaggerated. Considerable publicity has been given in the past to jury-room disclosures, without consequent injustice to defendants or injury to the jury itself. Because the jury provides the only democratic element in the enforcement of the criminal law, there is considerable public interest in its conduct and real public value in allowing jurors to discuss their experience, within certain limits, if they choose to do so.

The effect of section 8 of the *Contempt of Court Act* 1981 is certainly to erect an almost impenetrable wall of secrecy around a jury's deliberations. It bans not merely disclosures which are made to the public at large or sections of the public, but also disclosures by jurors to intimate friends or family. It prohibits also approaches to jurors to elicit information about their deliberations. In limiting the power to institute proceedings for contempt to the Attorney-General and to courts, the section does, of course, provide some safeguards, for it is unlikely that anyone would be proceeded against for minor and unpublicized breaches of jury secrecy. And since the section is a penal provision, it is to be expected that it will be strictly construed, so that no offence will be held to have been committed if the information disclosed by a juror or the information solicited from him is not particularized information of the kind referred to in sub-section (1) but rather information of a general character.

Section 8 does not purport to affect the common law regarding the admissibility of evidence from jurors to impeach their verdicts. However the presence of paragraph (b) of sub-section (2) could be interpreted as an indication by Parliament that the only circumstance in which evidence may be received of particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in legal proceedings is when that evidence is tendered in subsequent proceedings for an offence alleged to have been committed in relation to the jury. If that is the case, then such evidence would never be admissible in proceedings for the impeachment of the jury's verdict, and in so far as the common law may allow such evidence to be admitted for that purpose in the exceptional cases,[67] section 8 will have the effect of changing it. One cannot be certain that the courts will treat section 8 as having this effect. It could be argued that if Parliament had intended this result, it would or should have expressed its intentions more plainly.

There is, to date, no reported case of anyone having been prosecuted for an alleged violation of section 8 so its precise meaning and effect is still speculative.

[67] The exceptions are dealt with in the article referred to in fn. 10 above.

CANADIAN LAW

In 1972 the Canadian Parliament amended the Canadian *Criminal Code* by the addition to it of a new section, section 576.2.[68] This provided that:

> Every member of a jury who, except for the purposes of
> (a) an investigation of an alleged offence under subsection 127(2) in relation to a juror, or
> (b) giving evidence in criminal proceedings in relation to such an offence discloses any information in relation to the proceedings of the jury when it is absent from the courtroom that was not subsequently disclosed in open court is guilty of an offence punishable on summary conviction.

Like section 8 of the United Kingdom *Contempt of Court Act* 1981, this section was enacted in response to what was considered to be a gross violation of the conventions about jury secrecy. What had happened was that, following the discharge of a jury which had failed to agree upon a verdict, some of the jurors were interviewed. An article based on the interviews subsequently appeared in the press.[69] This incident was sufficient to persuade the Government that the confidentiality of jury deliberations needed legal protection.

Although section 576.2 of the *Criminal Code* is addressed only to disclosures by jurors, the Saskatchewan Court of Appeal has held that the policy implicit in the section requires that in proceedings to impeach a jury's verdict, a court should not even receive evidence from a stranger who asserts that he has seen or heard the jury deliberating and that the verdict was arrived at by improper means.[70] Section 576.2 was also relied upon by the Quebec Court of Appeal when, on an application for a new trial, evidence was adduced that during the absence of the jury from the jury room, the Crown Attorney had entered the room and had erased words the foreman had written on a blackboard. The Crown Attorney's conduct, the Court held, amounted to an illegal communication with the jury, contrary to section 576.2, and accordingly a new trial was ordered.[71]

In a subsequent case before the Quebec Superior Court, section 576.2 was referred to when the Court adjudged a member of the law firm acting for the defendant guilty of contempt of court for having approached a juror in the case.[72] During a break in the trial, the lawyer in question had spoken to a juror and had asked her what jurors thought of the principal Crown

[68] Ch. 13, s. 49 (1972).
[69] A. Gold, "The Jury in the Criminal Trial" in V.M. Del Buono (ed.) *Criminal Procedure in Canada – A Study* (Toronto, Buttersworths 1982) 429, n. 290.
[70] *Perras (No. 2)* (1975) 48 D.L.R. 3d. 145.
[71] *Mercier* (1973) 12 C.C.C. 2d. 377.
[72] *Papineau* (1980) 58 C.C.C. 2d. 72.

witness. On being informed of this occurrence the trial judge discharged the juror. After her discharge, the juror was approached again by the lawyer who asked her what the other jurors thought about the case up to that point. It was this second approach that was held to be in contempt. In the Court's opinion, the mere approach to the juror was in contempt; it was not necessary to show that the juror had actually responded to the request to reveal the jury's deliberations.

The Canadian Law Reform Commission has recommended that section 576.2 of the Code should be relaxed. In its report on *The Jury*, published in 1982, the Commission recommended that the section be replaced by a section reading as follows:[73]

> Every juror who discloses any information relating to the proceedings of the jury when it was absent from the courtroom, which was not subsequently disclosed in open court, is guilty of an offence punishable on summary conviction, unless the information was disclosed for the purpose of:
> (a) the investigation of an alleged offence under this Act [i.e. the Criminal Code] in relation to a juror acting in his capacity as juror, or giving evidence in criminal proceedings in relation to such an offence, or,
> (b) assisting the furtherance of scientific research about juries which is approved by the Chief Justice of the Province.

This proposed section would alter section 576.2 in two ways. In the first place, it would extend the class of criminal cases in which evidence of jury deliberations may be admitted to prove the commission of an offence in relation to a jury. As section 576.2 now stands, such evidence may be admitted only where a juror is charged with obstructing justice. Under the proposed section, such evidence would be receivable in any case in which a juror is charged with an offence under the Code if that offence is in relation to the juror acting in his or her capacity as juror. The proposed section would also permit those investigating an alleged offence of this kind to interrogate jurors without fear that either they or the jurors would risk prosecution.

The second change recommended by the Law Reform Commission was designed to facilitate scientific research into the jury system, subject to certain safeguards. This proposal was mooted in the Commission's Working Paper on *The Jury in Criminal Trials*, published in 1980.[74] The Commission's argument in favour of it was this[75]:

> speaking to jurors about their deliberations after they have served on a jury could be an effective way of promoting understanding of the process of jury deliberations. Indeed it might be the only way. The findings of

[73] Report No. 16, p. 82.
[74] W.P. 27/1980.
[75] Id. 143.

such a study could be important in revising the law or practice relating to jury trials, or in determining how well the jury is performing its functions. This type of research relating to one of our most important judicial institutions should not be completely foreclosed.

The requirement that any research which would involve disclosure of jury deliberations should, in order to gain exemption from the operation of the general prohibition of such disclosures, have the prior approval of the Chief Justice of the Province should, the Commission suggested, "prevent any frivolous attempts at jury research and ensure that the exception is not abused".[76] Indeed, it doubted whether this exemption would be often invoked.

To date no legislative action has been taken to implement the Commission's recommendations.

AMERICAN LAW

A juror is not, under American law, state or federal, held to be in contempt of court for revealing the jury's deliberations after verdict.[77] He may, however, be guilty of contempt if he discusses the case with outsiders during the course of the trial,[78] or if he disobeys a trial judge's instruction that during the trial members of the jury should refrain from reading newspapers, listening to radio and watching television.[79]

In some American jurisdictions the courts can and do receive evidence to show misconduct on the part of jurors after they have retired to consider their verdict, for the purpose of determining whether the verdict should be overturned. There is, however, considerable doubt about whether such evidence is receivable from jurors when they are charged with misconduct alleged to be in contempt of court.

As regards reception of evidence from jurors about what transpired in the jury room, for the purpose of impeaching jury verdicts, Amercian law has deviated from English law. Under the so-called Iowa rule, enunciated by the Supreme Court of that state in *Wright* v. *Illinois and Mississippi Telegraph*

[76] Ibid.

[77] See 17 *Corpus Juris Secundum* "Contempt" § 22; 17 *American Jurisprudence* "Contempt" § 21; 18 U.S.C.A. § 401, annotation 192; 125 A.L.R. 1274 at 1278 (1940).

[78] *In re Edward S. May*, 1 F. 737 (D.C. E.D. Mich. 1880); *Murphy* v. *Wright*, 148 N.W. 785 (S.C. Iowa 1914). In *Re Hogan*, 209 S.E. 2d. 880; cert den. 211 S.E. 2d. 794 (N.C. C.A. 1974) a spectator at a trial who telephoned a juror during the course of a trial was adjudged guilty of contempt. The basis for this ruling was that the trial judge had, in open court, instructed the jurors not to discuss the case with outsiders. This order, it was held, applied equally to spectators.

[79] *Wilson* v. *State*, 217 N.E. 2d. 147 (S.C. Ind. 1966); *People* v. *Blackwell*, 64 Calif. R. 642, 649 (C.A. 5th Dist. 1967).

Co. in 1866,[80] evidence from jurors may be received "for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself . . . " Matters regarded as not inhering in the verdict include an improper approach to a juror by a party or his lawyer or agent; discussion by witnesses and others of the facts or the merits of the cause, out of court, but in the presence and hearing of jurors; and determination of a verdict "by aggregation or average or by lot, or by game of chance or other artifice or improper manner . . ."[81] Under rule 606(b) of the *Federal Rules of Evidence*, enacted by the United States Congress in 1975,[82] the exclusionary common law rule has been altered to permit a juror, in any inquiry into the validity of a verdict or of an indictment (i.e. a grand jury indictment) to "testify on the question whether extraneous prejudicial information was brought to bear upon" him, and to allow the reviewing court to admit juror evidence on that question. Several State legislatures have adopted this federal rule.[83]

Rule 606(b) of the *Federal Rules of Evidence*, it should be noted, is expressed to apply only in cases in which the validity of a verdict or indictment is the subject of judicial inquiry. That being so, it probably has no relevance at all when jurors are proceeded against for misconduct alleged to be in contempt of court, and evidence of that conduct is sought to be adduced from other jurors and in relation to events occurring in the jury room. In the case of *In re Cochran* (1924)[84] the New York Court of Appeal held that in contempt proceedings against a juror, evidence relating to the juror's conduct in the jury room could not be received. But in a more recent case, *Bays* v. *Petan Co. of Nevada Inc.* (1982),[85] a United States District Court concluded that in contempt proceedings against a juror it was not debarred by rule 606(b) of the Federal Rules of Evidence from receiving evidence about a jury's deliberative processes, for that rule applies only in proceedings to impeach a verdict. Nonetheless, it held that in contempt

[80] 20 Iowa 195; extracts from in J.H. Wigmore, 8 *Evidence* (1961 ed.) pp. 699-700. On American law generally, prior to 1975, see 8 Wigmore § 2346-57; "Chance and Quotient Verdicts", (1951) 37 Va. L.R. 849; "Admissiblility of Jurors' Affidavits to Impeach Jury Verdicts", (1956) 31 Notre Dame Law 484; "Impeachment of Jury Verdicts", (1958) 25 U.Chic.L.R. 360; A.S. Becker, "Admissibility of Evidence to Impeach Jury Verdicts", (1968) 22 U. Miami L.R. 729; D.E. Tungate, "Impeachment of Jury Verdicts by Jurors": A Proposal" [1969] U.Il1.L. Forum 388; M.J. Greenberg, "Impeachment of Jury Verdicts", (1970) 53 Marq.L.R. 258; "Invasion of Jury Deliberations": Existing Rules and Suggested Changes", (1971) 23 Baylor L.R. 445; N.B. Ledy and E. Lefkowitz, "Judgment by Your Peers? The Impeachment of Jury Verdicts and the Case of the Insane Juror", (1975) 21 N.Y.L.F. 57. pre-1975 developments are also surveyed in R.L. Carson and S.M. Sumberg, "Attacking Jury Verdicts: Paradigms for Rule Revision", [1977] Ariz. St.L.J. 247.

[81] 20 Iowa 195, 210.

[82] 28 U.S.C.A. § 606(b).

[83] See R.L. Carson & S.M. Sumberg, "Attacking Jury Verdicts: Paradigms for Rule Revision", [1977] Ariz. St.L.J. 247, 250 n.19, 269-70; J.D. Buchanan, "Impeachment of Jury Verdicts in Arizona" (1979) 21 Ariz.L.R. 821.

[84] 143 N.E. 212 (C.A. N.Y. 1924).

[85] 94 F.R.D. 587 (U.S.D.C., Dist.Nev. 1982).

proceedings, a juror can properly refuse to answer questions about the jury's deliberations, on the ground that the deliberations are privileged.[86]

Whether or not a statutory ban on disclosure of jury deliberations of the kind found in section 8 of the United Kingdom *Contempt of Court Act* 1981 would survive challenge in American courts on constitutional grounds is uncertain. Arguably a qualified ban would not contravene the First Amendment. A federal Court of Appeal has held that the requirement that grand jurors swear an oath of secrecy does not offend against the constitutional guarantee of freedom of speech.[87] It has also been held that trial jurors' First Amendment freedoms are not violated by judicial orders restricting post-verdict interrogation of jurors.[88] On the other hand, in *United States* v. *Sherman* (1978)[89] the First Amendment was successfully relied upon by a newspaper to secure the reversal of a judicial order that no one, including journalists, should speak with jurors about their verdict. Such an unqualified restriction, it was held, was an illegitimate prior restraint on the newspaper's constitutionally guaranteed right to gather information. A rule of court embodying an equally blanket prohibition of post-verdict interrogation of jurors has also been held to violate the First Amendment.[90]

The First Amendment has not, however, stood in the way of the development of a practice whereby if parties or their representatives wish to interrogate jurors about their verdicts, they must first seek the court's leave to do so and in seeking that leave indicate the nature of the inquiries proposed to be made and show good cause why they should be made.[91] The assertion by the courts of authority to regulate and supervise post verdict interrogation of jurors is justified as an exercise of the courts' inherent jurisdiction.

In deciding whether leave to interrogate should be granted and if so, on what terms, the courts are, a United States District Court held in *United States* v. *Franklin* (1982),[92] bound to consider not merely the values enshrined in

[86] Citing *United States* v. *Clark*, 289 U.S. 1, 13, 17; 77 L.Ed. 993, 999, 1001 (1933) and *Northern Pacific Railway Co* v. *Mely* , 219 F. 2d. 199, 200 (9th Circ. 1954). In the instant case it was held that the juror had waived privilege. See also *United States* v. *Freedland*, 111 F. Supp. 852 (D.C.N.D. 1953).

[87] *Goodman* v. *United States*, 108 F.2d. 516 (C.A. 9th Circ. 1939); cf *Atwell* v. *United States* 162 F, 97 (C.A. 4th Circ. 1908).

[88] *Gagliano* v. *Ford Motor Co.*, 551 F.Supp. 1077 (D.Kan. 1982); *United States* v. *Wilburn*, 549 F. 2d. 734 (10th Circ. 1977).

[89] 581 F.2d 1358 (U.S. Ct. App. 9th Circ. 1978).

[90] (1983) 96 Harv.L.R. 902, n. 100, noting two unreported decisions.

[91] *Bryson* v. *United States*, 238 F.2d. 657 (9th Circ. 1956); *United States* v. *Driscoll*, 276 F. Supp. 333 (S.D. N.Y. 1967); *Miller* v. *United States*, 403 F.2d. 77, 81-4 (2nd Circ. 1968); *United States* v. *Sanchez*, 380 F.Supp. 1260, 1265 -6(N.D. Tex. 1973), aff. 508 F.2d. 388 (5th Circ. 1975); *United States* v. *Brasco*, 385 F.Supp. 966, 970 (S.D.N.Y. 1974); aff. 516 F. 2d. 816, 819; *King* v. *United States*, 576 F. 2d. 432 (U.S. Ct.App.2nd Circ. 1978); *United States* v. *Sherman*, 581 F.2d. 1358 (U.S. Ct.App.9th Circ. 1978); *United States* v. *Moten*, 582 F.2d. 654 (2nd Circ. 1978); *United States* v. *Cauble*, 532 F.Supp. 804 (U.S. D.C., E.D. Texas 1982); *Wheeler* v. *United States*, 649 F.2d. 1116, 1123 (9th Circ. 1981); *United States* v. *Franklin*, 546 F.Supp. 1133 (N.D. Ind. 1982).

[92] 546 F. Supp. 1133 (N.D. Ind. 1982).

the First Amendment, but the privacy traditionally accorded to jury deliberations. Were there no constraints at all on post-verdict interrogations or on publication of information elicited by such interrogations, the free expression of opinion in the jury room which the privacy of those deliberations is meant to ensure, would, the court observed, be inhibited.[93] "Jurors", it was said, "have a fundamental right to retain as part of their own privacy the contents of deliberation . . ." Indeed "there is . . . an overlay between the privacy of one juror and that of another. It is very possible for one juror to engage in post-trial violation of the privacy of another".[94] Additionally there were many decisions of the United States Supreme Court which had established that the First Amendment does not guarantee the Press a special right of access to information not available to the public at large.[95] It did not, for example, secure them a right of access to private communications between judges when they are considering their judgment. Communications between jurors in the jury room were in similar case. The jury is, the District Court pointed out, "a judicial body whose most important processes are historically and constitutionally private".[96]

The extent to which American courts may use their contempt powers to enforce their attempts to regulate post-verdict interrogations of jurors has not been tested. There is precedent for the issue of injuctions to restrain unauthorized interrogations,[97] and under the federal contempt of court statute,[98] one of the offences declared to be punishable summarily by federal courts is disobedience to or resistance to a lawful order of the court. But, as the decision of the United States Supreme Court in *Cammer* v. *United States* (1952)[99] demonstrated, in the absence of any specific judicial order forbidding or restricting communications with jurors after verdict, a person who interrogates jurors after verdict is not guilty of an offence under the federal law. The subsequent decision in *Unites States* v. *Rees* (1961)[100] revealed that the federal contempt law was equally deficient to deal with jurors who are prepared to disclose the secrets of the jury room to the world at large. The circumstances of this case were as follows.

Melvin Douglas Rees Jr. had been tried in a United States District Court in Maryland for rape-murder. The jury convicted him but did not, as it was entitled to do, recommend that he be capitally punished. The case had attracted a great deal of publicity and about a week before Rees was due to appear in court for sentence, nine members of the jury had assembled in the studios of a local television station to re-enact what had occurred in

[93] Id. 1142.
[94] Ibid.
[95] *Branzburg* v. *Hayes*, 408 U.S. 665; 33 L.Ed. 2d. 626 (1972); *Pell* v. *Procunier*, 417 U.S. 819; 41 L.Ed. 2d. 495 (1974); *Saxbe* v. *Washington Post*, 417 U.S. 843; 41 L.Ed. 2d. 514 (1974).
[96] 546 F.Supp. 1133, 1144. (N.D. Ind. 1982).
[97] *United States* v. *Driscoll*, 276 F. Supp. 333 (S.O.N.Y. 1967).
[98] 18 U.S.C.A. § 401.
[99] 350 U.S. 399; 100 L.Ed. 474 (1956).
[100] 193 F.Supp. 864 (U.S. D.C.Md 1961).

the jury room when the verdict was being considered. A video-tape of the re-enactment was broadcast on the evening before Rees' appearance in court, "without any advance information to or consultation with the court or counsel who participated in the case".[101]

The broadcast was preceded by a statement by the manager of the television station that viewers were about to witness "something that had never before been seen or heard in public". They were to "sit with the men of a federal jury as they deliberate the fate of a defendant accused of kidnapping and murder". They would "see and hear what actually goes on behind the guarded doors of the jury room as the men turn over in their minds each bit of evidence to determine whether another human being shall be set free or spend the rest of his life in a federal penitentiary".[102]

After that introduction the nine jurors, including the foreman, proceeded to discuss the case for almost an hour. They commented on the evidence, expressed opinions about the guilt or innocence of Rees and on about whether or not he should receive the death penalty.

The next day counsel for Rees requested the court to defer passing of sentence. He subsequently filed motions to set aside the conviction. It was argued that:[103]

> the broadcast might influence the court in imposing sentence, and that it had prejudiced a possible retrial of the accused in the event an appeal were successful, had prejudiced the accused's opportunity for a fair trial under related indictments now pending in the states of Maryland and Virginia, and had demonstrated that the jury in its consideration had given weight to matters not admitted in evidence and had given improper weight to evidence admitted for limited purposes.

The Court rejected these pleas and proceeded to sentence Rees to life imprisonment. It did, nevertheless, consider the conduct of the television station sufficiently reprehensible to warrant inquiry into whether or not action for contempt of court might be taken. Two members of the Maryland Bar were appointed *amici curiae* to conduct the inquiry and report to the Court.

The *amici curiae* reported that in their view, the broadcast in question clearly constituted an interference with the orderly processes of justice:[104]

> The fact that the sentencing had to be deferred and that the time of the court had to be employed in disposing of additional motions makes this clear. Moreover, the effect of such a spectacle on the administration of justice is, we think, bound to be unfortunate. While jurors who sit in criminal cases on petit juries are not bound to secrecy, it is certainly true that the interests of justice are better served if what takes place during the deliberations of the jury are not publicly revealed. For many prospective

[101] Id. 866.
[102] Ibid.
[103] Ibid.
[104] Id. 866-7.

> jurors a new burden will be added to jury service if the discussions which take place in the jury room are to be publicized in this sensational fashion. Jurors may well hesitate to express their views freely under such circumstances. Morever, witnesses called on to give disagreeable or embarrassing testimony may be reluctant to do so voluntarily if they know that their testimony and their credibility may subsequently be discussed by the jurors on a television program.

Under English common law, the broadcast in issue here would, in all liklihood, have been held to be in contempt of court. But in the case of *Rees* the District Court was constrained by a federal statutory law, dating back to 1831, which limits the summary contempt jurisdiction of federal courts to defined offences, none of which covered the present case. The federal law did, it was true, cover "misbehaviour of any person in . . . [the] presence [of the court] or so near thereto as to obstruct the administration of justice".[105] But the United States Supreme Court had held in *Nye* v. *United States* (1941)[106] that this law applied only to acts done in the presence of the court or so physically near to it as to disturb order and decorum in the court.[107]

The District Court accepted the advice that it had no power to take any punitive action against those responsible for the broadcast or those who had participated in the programme or its preparation. It did nonetheless endorse the view of the *amici curiae* that the broadcast had interfered with the administration of justice. And, the Court added: "It seems beyond question that such a broadcast is against the public interest and should not be repeated or imitated."[108]

Although no action could be taken against the broadcaster or against those who had participated in the programme, the Court considered it appropriate to refer the case to the President of the Maryland State Bar Association for consideration by the Association's Grievance Committee of the question whether or not disciplinary proceedings should be taken against the counsel who had advised the television station and who had been present when the video-tape was recorded. At the same time the Court asked the President of the Association to appoint a committee, representing Bench and Bar, to consider whether the necessity or desirability of enacting legislation or a rule of court to deal with cases of this kind.[109]

Some years before the *Rees* case, another gross invasion of the privacy of the jury room had come to notice. This case created much consternation and led the United States Congress to enact legislation to deal specifically with the mischief which had been brought to light, namely, eavesdropping on federal juries.

[105] 18 U.S.C.A. s.401.
[106] 313 U.S. 33; 85 L.Ed. 1172 (1941).
[107] For applications of this decision see annotations to 18 U.S.C.A. s.401.
[108] 193 F.Supp. 864, 865. (U.S.D.C. Ed. 1961)
[109] Id. 865-6.

The events which gave rise to the enactment of the federal eavesdropping statute in August 1956[110] were these. During 1955, a federal District Court at Wichita, Kansas, had allowed persons associated with a research project then being conducted by the University of Chicago Law School, with backing from the Ford Foundation, to "tap" the deliberations of six juries. None of the jurors had knowledge that their deliberations were being monitored in this way.[111] News of what had occurred produced many expressions of outrage.[112] Bills were introduced into the Congress to make eavesdropping a criminal offence and congressional inquiries ensued.[113] About the need for legislation to prohibit the kind of activity engaged in by the Chicago researchers a sub-committee of the Senate Committee on the Judiciary had no doubt. "Knowledge by any group of jurors", they said, "that the sanctity of their deliberations may be invaded in this or any other manner cannot fail to affect adversely the free and full discussions necessary to the formation of a proper verdict".[114]

The eavesdropping statute declares that a person is guilty of a federal offence if he:

> knowingly or wilfully, by any means or device whatsoever –
> (a) records, or attempts to record the proceedings of any grand or petit jury in any court of the United States while such jury is deliberating or voting, or
> (b) listens to or observes, or attempts to listen to or observe the proceedings of any grand or petit jury of which he is not a member in any court of the United States while such jury is deliberating or voting . . . [115]

ENFORCING JURY SECRECY

Whether or not it is necessary or desirable to reinforce the convention of jury secrecy by penal legislation will obviously depend in large part on the degree of importance attached to that convention and on whether or not that convention is generally observed. In 1968 the English Criminal Law Revision Committee was satisfied that the convention had generally been respected

[110] 70 Stat. 935; 18 U.S.C.A. s. 1508.

[111] For legislative history see 1956 U.S. Cong. & Admin. News 4149; *United States* v. *Franklin*, 546 F.Supp. 1133, 1141 n. 3 (1982).

[112] See e.g. *U.S. News & World Report*, 21 Oct. 1955, p. 28; quoted in E.W. Tompkins, "The Sacred Curtain", (1956) 60 Dick.L.R. 251. See also L. Granat, "Jury-room Eavesdropping" (1955-56) 7 Brooklyn Bar 44, 121; A.W. Fitzgerald, "Jury-room Eavesdropping – Does the End Justify the Means?" (1956) 7 Brooklyn Bar 98.

[113] Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of The Senate Committee on the Judiciary (84th Congress 2nd Sess.) *Report on the Recording of Jury Deliberations* (1956). The hearings before this Sub-committee took place in 1955 (see (1983) 96 H.L.R. 886 n.5.).

[114] Id. 27.

[115] 18 U.S.C.A. § 1508.

by both the press and members of the public. Its view was "that criminal legislation in general should not be introduced unless serious mischief has been established or there are other compelling reasons".[116]. There had, in the opinion of the Divisional Court and the Government, been too many recent instances of disclosure of jury deliberations by the press which had been permitted to pass without censure. If this kind of activity were not checked, the Divisional Court warned, "it would soon be made to appear that the secrecy of the jury room had been abandoned, and if that happened, it is not beyond the bounds of possibility that trial by jury would go the same way".[117]

Other judges have on previous occasions stressed the importance of maintaining the secrecy of the jury room. Juries, it has been pointed out, are not required to give reasons for their verdicts and are positively discouraged from doing so. "If one juryman", Lord Hewart C.J. observed in *Armstrong* (1922):[118]

> "might communicate with the public upon the evidence and the verdict so might his colleagues also, and if they also took this dangerous course differences of opinion might be made manifest which, at the least could not fail to diminish the confidence that the public rightly has in the general propriety of criminal verdicts.

An associated argument which is sometimes advanced to justify the rule that evidence as to what has transpired in the jury room is not admissible to impeach a jury's verdict is that without such a rule the finality of verdicts would be imperilled.[119] Maintenance of the confidentiality of jury deliberations, it is also argued, is necessary to ensure that debate among jurors is not unduly inhibited, to ensure that jurors are not pressured into casting votes in a particular way for fear of the consequences that might ensue if their dissent were to be made known to the world at large,[120] to minimize the risk of their being harassed and beset by disappointed parties "in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict".[121] If jurors cannot be assured that their deliberations will be treated as completely confidential, and are not protected against

[116] Cmnd. 3750, para. 5.
[117] [1981] 1 Q.B. 1, 10.
[118] [1922] 2 K.B. 555, 589.
[119] *Ellis* v. *Deheer* [1922] 2 K.B. 113, 121-2; *Burnside* v. *the Queen* [1963] Tas. S.R. 174, 175; *Boston* v. *W.S. Bagshaw & Sons* [1966] 1 W.L.R. 1135; *Papadopoulos* [1979] N.Z.L.R. 621, at 626; *Attorney-General* v. *New Statesman and Nation Publishing Co. Ltd.* [1981] 1 Q.B. 1, 10; Criminal Law Revision Committee, *Secrecy of Jury Room* Cmnd. 3750 (1968), para. 9.
[120] *State* v. *La Fera*, 199 A 2d. 630 635 (N.J. 1964). See also *Clark* v. *United States*, 289 U.S. 1, 13; 77 L.Ed. 993, 999 (1932). See also *Papadopoulos* [1979] N.Z.L.R. 621 at 626; *McDonald* v. *Pless* 238 U.S. 264, 268; 59 L. Ed. 1300, 1302 (1915); *King* v. *United States*, 576 F.2d. 432, 438 (U.S.C.A. 2d Circ. 1978); *United States* v. *Franklin*, 546 F.Supp. 1133, 1142 (N.D. Ind. 1982); Criminal Law Revision Committee, *Secrecy in Jury Room*, Cmnd. 3750 (1968) para. 9. See also *Brown* (1907) 7 S.R. (N.S.W.) 290, 299.
[121] *McDonald* v. *Pless*, 238 U.S. 264, 267-8; 59 L.Ed. 1300, 1301 (1915).

post-verdict interrogations, they will, it has been further suggested, "almost inescapably [be] influenced to some extent by . . . [the] anticipated annoyance" of post trial inquisitions;[122] and "the attitude of future jurors of the quality of their deliberations" might well be adversely affected.[123]

Whilst one may concede the force of all of these arguments, one needs also to have regard to the kinds of arguments which have been advanced in support of some degree of relaxation of the conventions of jury secrecy and the law which reinforces those conventions, in particular the rule concerning reception of evidence from jurors to impeach their verdicts. An unqualified rule excluding such evidence can mean that serious miscarriages of justice resulting from gross violations of the ground rules of jury trial are incapable of being corrected. A jury many have reached its verdict in a totally improper manner, e.g. by the toss of a coin; it may have been heavily influenced by evidence not received in open court and, moreover, evidence which had it been tendered, would have been ruled inadmissible; it may have been guilty of bias; it may have totally disregarded the evidence and the law. But the view taken by English and Australian judges has been "that the interest of the community in ensuring freedom of debate in the jury room and finality of verdicts outweighs" the interests of the community and of litigants "in seeing that the accepted rules and formalities of a fair trial are maintained and enforced".[124]

Not all would agree that the choice between the competing interests is as clear cut as this or that it must be made unequivocally one way or another. The prohibition contained in section 576.2 of the Canadian *Criminal Code* on disclosure of jury deliberations is declared not to apply when a juror has been charged with the offence of obstructing justice, and in its report on *The Jury* (1982), the Canadian Law Reform Commission recommended that this exception be extended "to include the situation in which a juror is charged with any offence under the Criminal Code if it is in relation to the juror acting in his capacity as a juror".[125] In the United States, as has already been noted, the exclusionary rule has been modified both by judicial decision and by statute.[126] Under rule 606(b) of the *Federal Rules of Evidence*, for example, on any inquiry into the validity of a verdict, a court may admit juror testimony "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror."

Pleas for relaxation of jury secrecy have come not merely from those who believe that the exclusionary evidentiary rule pays insufficient regard to the

[122] *Rakes* v. *United States* , 169 F.2d. 739, 745 (D.C. Cir. 1948).
[123] *Attorney-General* v. *New Statesman & Nation Publishing Co. Ltd.* [1981] 1 Q.B. 1, 6 (argument for prosecution.)
[124] *Re Ford & Matthews* [1973] V.R. 199, 211.
[125] Page 82.
[126] See 80-83 above.

interests of those who may suffer from palpable jury error or misconduct. The more radical critics of jury secrecy contend rather that legal restraints on disclosure of jury deliberations, whether by jurors themselves, or by non-jurors with whom jurors have voluntarily communicated, inhibit freedom of speech and communication, and accordingly cannot be justified unless it can be shown that such restraints are necessary in order to uphold other equally important values. A further objection to jury secrecy is that it runs counter to the principle, now underwritten to some extent by statute, that public agencies invested with powers to make decisions affecting individual's legal rights and liabilities should be obliged to furnish reasons for their decisions.[127] To continue to allow juries to deliberate in private without requiring them to account publicly for their decisions, the argument runs, is to accord them a privilege denied to most other public tribunals; a privilege inconsistent with prevailing notions of public accountability.[128]

There are, as yet, no constitutionally entrenched Bills of Rights in Australia which elevate freedom of speech to the status of a guaranteed right. But Australia is now a signatory to the International Covenant on Civil and Political Rights and in the exercise of its external affairs power, the Commonwealth Parliament may legislate to ensure that domestic laws, both state and federal, conform with the standards and precepts which that Covenant enshrines.[129] Even without such legislation, Australia's subscription to the Covenant and the action subsequently taken by Australian governments to ensure that regard is had to its provisions,[130] has served to bring to the forefront of public debate issues of high principle that in the past have sometimes been overlooked.

Article 19 of the Covenant declares freedom of expression to be a fundamental right, but it recognizes also that this freedom "carries with it special duties and responsibilities" and that it may therefore "be subject to certain restrictions". These restrictions are to be only "such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals". A legal rule which seeks to protect the confidentiality of jury deliberations merely by rendering the evidence of jurors as to the nature of those deliberations inadmissible in a court of law could hardly be regarded as a restriction on a juror's freedom of expression. Prohibitions

[127] See e.g. *Administrative Appeals Tribunal Act* 1975, (Cth), ss. 28, 37, 43; *Administrative Decisions (Judicial Review) Act* 1977, (Cth) s. 13; *Administrative Law Act* 1978 (Vic.), s. 8.

[128] This argument is put and answered in "Public Disclosures of Jury Deliberations" (1983) 96 Harv. L.R. 886, 893.

[129] The Covenant appears as a schedule to the *Human Rights Commission Act* 1981 (Cth). Any doubts about Commonwealth Parliament's power to enact legislation to give effect to Australia's obligations under the Convention would seem to have been resolved by the High Court's decision in the *Franklin Dams Case – The Commonwealth* v. *Tasmania* (1983) 57 A.L.J.R. 450.

[130] See *Human Rights Commission Act* 1981 (Cth) s.9.

of the kind contained in section 576.2 of the Canadian *Criminal Code* and in section 8 of the United Kingdom *Contempt of Court Act* 1981, on the other hand, are clearly inhibitions on an individual's freedom to communicate and measured against article 19 of the International Covenant might, conceivably, be held to be unjustifiable.[131] Invocation of the common law on criminal contempt of court to penalise jurors and non jurors on account of disclosure of jury deliberations might equally be held to violate article 19.

Excessive secrecy in relation to the internal workings of juries, it is further argued, inhibits scholarly research on juries. "There can be few fields of scientific inquiry", McConville and Baldwin observed in 1979,[132] "in which research is so heavily circumscribed and few institutions which are to such a degree protected as the jury". In their own researches into the jury system in England they had been obliged to adopt methods of investigation which they themselves acknowledged to be second best and somewhat artificial. Even so, their inquiries had:

> "thrown up a variety of important questions, ones that ought not to be side-stepped and ones that are best answered by research involving jurors themselves. Do juries, for example, understand what is meant by proof beyond reasonable doubt? Do juries commonly mistrust police evidence concerning interrogations? Do juries understand the evidence in complex cases? Are juries sufficiently aware of the pitfalls of convicting on the basis of uncorroborated evidence? Do juries sometimes exhibit racial bias? And do juries often refuse to apply the strict letter of the law in the interests of what they take to be the justice of the case?[133]
>
> Inquiries into the jury system, through direct access to jurors, they continued, would not necessarily lead to any undermining of public confidence in the jury system, nor would it involve any significant dilution of the principle of juror anonymity. It was quite possible that further research would show that "the jury reaches a fair and just determination as often as can reasonably be expected of any tribunal . . . " and that what were perceived to be shortcomings in the jury system were really shortcomings in rules of evidence and procedure, or even in the lawyers' prosecuting and defending cases.[134]

The events leading to the enactment of section 8 of the United Kingdom *Contempt of Court Act* 1981 have already been described. Having regard to the fate which ultimately befell the Government's preferred measure and to the many criticisms which were levelled against the measure which finally became law, one wonders whether the Government's better course might not

[131] See N. Lowe, "The English Law of Contempt of Court and Article 10 of the European Convention on Human Rights" in Furston, Kerridge & Sufrin (eds.), *The Effect on English Domestic Law of Membership of the European Communities and of Ratification of the European Convention on Human Rights* (1983), 344-5.

[132] J. Baldwin & M. McConville, *Jury Trials* (Oxford, Clarendon Press 1979) 132.

[133] "The Effect of the Contempt of Court Act on Research on Juries" (1981) 145 J.P. 575.

[134] Ibid.

have been to defer the introduction of the legislation which the Divisional Court had urged upon it pending inquiry and report by the Law Commission or by an *ad hoc* committee. Even if it was generally accepted that the time was ripe for legislative action, and moreover, legislation which would bolster conventions of secrecy by the apparatuses of the criminal law, the form that legislation should take was obviously a matter of some difficulty. There were various competing interests to be considered and weighed. There could be no assurance that all of these had been taken into account by those responsible for framing the measure the Government proposed, or that they would be brought to notice in the course of parliamentary debate. Conceivably some assistance might also have been obtained from an examination of what measures had been adopted in other common law jurisdictions to protect the secrecy of jury deliberations. And more mature reflection on the problem might have suggested that the question of whether disclosure of jury secrets should be visited with penal sanctions and, if so, in what circumstances, could not be considered in isolation from the rules which the courts had developed in relation to the admissibility of testimony regarding events occurring in the jury room.

As it was, consideration of appropriate ways and means of protecting the confidentiality of jury deliberations was left almost entirely to the parliamentary arm of government. Interested parties, it is true, did make their views known at various stages of the Bill, but the fact remains that debate on clause 8 of Lord Hailsham's Bill and on the amendments to it was nowhere near as well informed as it might have been.

None of those who contributed to the parliamentary debates on clause 8 of the *Contempt of Court Bill* of 1980 questioned the need for legislation on jury secrecy. All that was in issue was how far that legislation should extend. The Government for its part wished to deal only with the kind of mischief exemplified in the *New Statesman* case. The measure it proposed was directed only against those who publicised jury deliberations, those who solicited particulars of jury deliberations with intent to publish them or to cause or to enable them to be published, and against those jurors who disclosed such particulars with a view to their being published or with knowledge that they might be published. Publication was defined to include "any speech, writing, broadcast or other communication in whatever form, which is addressed to the public at large or any section of the public".[135] Jurors who disclosed jury secrets in the course of conversations with friends and family would therefore rarely if ever risk prosecutions. Additionally, the Government proposed that scientific research into the workings of juries should not be unnecessarily impeded. To accommodate the researchers it was proposed that publications which did not identify particular trials or the names of jurors should be exempt from the statutory prohibitions.

[135] Sec. 19.

The measure ultimately enacted was much more draconic. It made no allowance at all for research into the operation of the jury system. It made it an offence even for a juror to disclose jury secrets in the most private of conversations. The only real exception to the general ban on disclosure of jury deliberations was disclosures made in the course of evidence in legal proceedings for offences alleged to have been committed in relation to a jury.

Clause 8 of Lord Hailsham's Bill, arguably, did not go far enough, but section 8 of the *Contempt of Court Act* 1981 is equally open to criticism. Had it become law, clause 8 would have allowed certain disclosures to be made with impunity. The permissibility of some disclosures would, as Borrie and Lowe have pointed out, have potentially opened the door to harassment of jurors, particularly by parties and their agents.[136] A law which did not require absolute confidence of jury deliberations might also "inhibit jurors expressing their views in the jury room".[137] Section 8 not only requires jurors to keep their deliberations secret but prohibits any form of solicitation of them to divulge those deliberations, subject only to the exception already mentioned. It imposes very severe restraints on research into the jury system and denies those who are victims of gross misconduct on the part of jurors, likewise those responsible for enforcing the laws to do with misconduct by jurors, the facility to discover any evidence of that misconduct consisting of "particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings".

In defence of his proposal Lord Hailsham had reminded the Lords that not all conduct considered reprehensible deserves to be made criminal. Sins were not to be confused with crimes. He did not deny that disclosure of jury secrets, even in private conversation, should continue to be discouraged. His concern was rather to limit the scope of the proposed offence so as to catch only those cases in which serious mischief was likely to be done. He himself knew of many instances in which jurors had divulged jury secrets to family and friends. But the jury system had not, he suggested, been visibly undermined by disclosures of that kind.[138]

An American commentator expressed much the same point of view when he wrote:[139]

> "Postverdict revelations of deliberations may undermine the jury system, but unless a law aimed at jurors were wholly effective as a deterrent, it would punish the very public servants without whose meagerly compensated sacrifice the system could not exist. The law could be enforced, selectively, fine-tuned to ignore the inevitable dinner-table disclosures to families and close friends. Yet the mere existence of a restraint may itself hold

[136] But harassment of jurors might, apart from Clause 8, be in contempt of court.
[137] G. Borrie and N.V. Lowe, *The Law of Contempt of Court* (2nd ed. 1983) 248.
[138] 415 H.L.Deb. 663-4; 416 H.L.Deb. 377; 422 H.L.Deb. 246-53.
[139] "Public Disclosure of Jury Deliberations" (1983) 96 Harv.L.R. 886, 904-5, footnotes omitted.

> dangers for the system. Such a statute might make jury service more onerous to the average citizen; it might even give the community the impression that the system has something unseemly to hide.
> . . . The situation calls for a sanctionless standard, a sensitization of jurors to the mischief of revealing their deliberations to the world outside. The trial judge is in the best position to accomplish this task. The judge can impress upon the jurors the gravity of their office; he can acknowledge their right to talk while explaining why the law may ultimately be ill served by the exercise of that right. Judicial admonitions are likely to prove extremely influential, without risking the rebellion, the cynicism, and the sense of oppression that might be engendered by an order and without putting the law to the discomforting test of enforcement."

Section 8 of the United Kingdom *Contempt of Court Act* 1981 is capable of being selectively enforced, for prosecutions for breach of that section may only be instituted by the Attorney-General or with his leave, or on the motion of a court having jurisdiction to try and punish for contempt. It is unlikely that jurors would be prosecuted for private, unpublicized disclosures, even when those disclosures come to official notice. But a law which is so selectively enforced that it is rarely if ever invoked against a particular class of offenders is surely a law ripe for revision. Indeed those who have adopted a policy or practice of not prosecuting a particular type of case could be said to have arrogated to themselves what is, in essence, the dispensing power outlawed by article 2 of the *Bill of Rights* 1689.[140]

The objections which were raised in the House of Lords to Lord Hailsham's proposal that provision be made whereby the statutory bans should not extend to publications emanating from research into the jury system, so long as they did not identify trials or jurors, seems not to have been based on intimate knowledge of the kind of research that had already been carried out in the United Kingdom. There also appears to have been little appreciation of the benefits which might be gained from a better knowledge of the inside workings of juries. Lord Hutchinson, the mover of section 8, was clearly unimpressed by what he termed the "pseudo scientific" nature of some of the work the researchers had undertaken, but his main reason for opposing the exception proposed by the Lord Chancellor was that it would extend also to journalists.[141] The possibility of modifying the exception so that those who sought the benefit of it had first to obtain some kind of official approval for their inquiries was, apparently not considered.

Such a possibility had already been mooted by the Canadian Law Reform Commission in relation to the non-disclosure rule contained in s.576.2 of the *Criminal Code*.[142] The Commission had suggested that the rule be

[140] For a modern instance of the use of this power see *Fitzgerald* v. *Muldoon* [1976] 2 N.Z.L.R. 615 and in relation to the criminal law see *R.* v. *Commissioner of Police; Ex parte Blackburn* [1968] 2 Q.B. 118.

[141] 416 H.L.Deb. 371.

[142] See p. 19 above.

relaxed to exempt disclosures for the purpose of "assisting the furtherance of scientific research about juries which is approved by the Chief Justice of the province". It had not, however, suggested that any legal restrictions be imposed on the kinds of details which might be published in consequence of such research. In that respect, the Canadian proposal is, in my view, less satisfactory than Lord Hailsham's. And while there is some merit in the notion that the conduct of serious research about juries which involve disclosure of jury deliberations should, in order to receive exemption from any statutory ban on disclosures, first be authorized by an official agency, it is questionable whether that agency should be an officer of the judiciary. The task of vetting research proposals is not, I think one which most judges would welcome. Indeed, some might say that it is not one they are especially well-fitted to perform. In Australia, it might be thought more appropriate to repose that function in the principal law officers – the Attorneys-General. Whilst the ultimate responsibility for approving or disapproving projects would be theirs, they would have the facility to obtain informed advice from what sources they thought fit.

So long as jury secrecy is, as it is in Australia, still largely a matter of convention, those who may wish to interrogate jurors for the purpose of research into juries are left in some uncertainty about what is and what is not permissible. On the other hand, one of the virtues of conventions is that they are capable of adaptation in a way in which statutory rules are not. As the English Criminal Law Revision Committee noted in its report on *Secrecy of Jury Room:*[143]

"A rule of conduct . . . can be understood and applied subject to any necessary exceptions . . . " Under a largely conventional regime it is not beyond the bounds of possibility that a major research project involving post verdict interrogation of jurors might, subject to undertakings being given to ensure that jurors were not harassed, their anonymity preserved and the identity of particular trials not publicized, receive official backing. A statutory regime of the kind exemplified in section 8 of the United Kingdom *Contempt of Court Act* 1981 permits none of this.

The section did not, as McConville and Baldwin, the authors of *Jury Trials* (1979) were the first to admit, "sound the death knell for researchers though it . . . [was] a severe blow to their aspirations", cutting out as it did "one unexplored, and potentially vital, line of investigation, that involving direct line of communication with jurors".[144]

Researchers would, in the future have to continue to employ the rather unsatisfactory methods of investigation they had been forced to use in the

[143] Cmnd. 3750, para. 5.

[144] M. McConville & J. Baldwin, "The Effect of the Contempt of Court Act on Research on Juries" (1981) 45 J.P. 575.

past.[145] And, they ventured to suggest, section 8, far from protecting juries, would make the jury system more vulnerable than it ever was. "With jurors prevented from speaking in their own defence, public confidence in the jury room may be more easily shaken by attacks based on partial information, atypical cases, unjustified inference and innuendo".[146]

The jury system may well be worth protecting; and the survival of that system may well depend on jurors being assured that their deliberations will be held confidential and that they will not be subject to pressures to divulge those deliberations. But once it is acknowledged that a jury in retirement may not always do its duty according to law and that certain actions on the part of jurors in the seclusion of the jury room are so untoward as to warrant upsetting of their verdicts, the law must surely be fashioned in such a way that means of discovering whether serious irregularities have occurred are not completely foreclosed. Jurors are, doubtless, entitled to some form of legal protection against the importunings of disappointed litigants and of journalists bent on penetrating the privacy of the jury room in search of newsworthy stories. But, one may ask, should jurors be deterred by the threat of criminal sanctions from communicating to anyone information about what has occurred in the jury room, even when the occurrences to which they have been privy or have witnessed have led them to conclude that basic rules have been transgressed and justice thereby denied? Is jury privacy to be valued so highly that it is to be maintained at all costs?

The competing interests and values can, I believe, be accommodated, but not in the simplistic way attempted by the authors of section 8 of the United Kingdom's *Contempt of Court Act* 1981, or for that matter, in the way proposed by the Canadian Law Reform Commission.

[145] For examples of British research on juries see S. McCabe and R. Purves, *The Jury at Work* (Oxford University, Penal Research Institute, 1972); Se. McCabe "Jury Research in England and the United States" (1974) 14 Br. Jo. of Criminology 276; S. McCabe, "Discussions in the Jury Room: Are They Like This?" in N. Walker (ed.), *The British Jury System* (Cambridge University Institute of Criminology 1974) 22; S.McCabe and R. Purves, *The Shadow Jury at Work* (Oxford University, penal Research Institute, 1974); A.P. Sealy & W,R. Cornish, "Jurors and their Verdicts" (1973) 36 M.L.R. 496; A.P. Sealey & W.R, Cornish, "Juries and the Rules of Evidence: L.S.E. Project" [1973] Crim.L.Rev. 208. On jury research in the United States see H.S. Erlanger, "Jury Research in America: Its Past and Future" (1970) 4 Law & Society Rev. 345 and Bibliography in J. Baldwin and M. McConville *Jury Trials* (Oxford, Clarendon Press, 1979).

[146] (1981) 45 J.P. 575, 576.