SIR BRIAN LEVESON

PRESIDENT OF THE QUEEN'S BENCH DIVISION

'CRIMINAL TRIALS: THE HUMAN EXPERIENCE'

FACULTY OF LAWS, UNIVERSITY COLLEGE LONDON, 13 JUNE 2019

1. It is an interesting form of privilege to have been asked to deliver a valedictory lecture. It is one I give after fifty years in the law, substantially although not entirely concerned with crime along with a brief interlude into the world of public inquiries: some might think that interlude was not brief enough but others litigated to say that it was too brief. Each one of you will have your own view.

2. For those who have come expecting some detailed analysis of legal principle, I am afraid you are going to be disappointed. I want to talk about the human side of practising in the criminal law and the real-life consequences of the law on those whose lives, professional or personal, have been involved in it. This is because the real privilege of my professional life as a junior barrister, Queen's Counsel and then on the bench, filling very many different roles, has been the opportunity that it has given me to work with people. These people come in many categories.

3. First, there are those who are troubled by the criminal law, many of whom have had chaotic lives, buffeted by the vicissitudes of life and caught up in real life dramas which they barely understand; that could be the case both for those charged with crime, and for very many others caught up as victims or witnesses in the process. At the Bar, I was privileged to have the time to think about what had led them to the position they were in, how their lives might have affected their recollection or their behaviour and, in many cases, how that translated into advancing or deflecting arguments about proof of guilt. Beyond the allegation itself,

for the families of victims of homicide, when prosecuting, it meant meeting them, explaining what was happening and helping them to understand the process. For the families of defendants, it meant trying to advise on next steps following an adverse verdict, not necessarily expected by them, however much it might have been anticipated by others.

4. That interest in the people involved in the process carried on when I became a judge. Being trusted by the public to judge your fellow man is an important responsibility and requires diligence and humility at all times. Trying cases at first instance puts you in the best position to continue that process of understanding and remembering the advice I offer to every judge I have sworn in: to reflect that the most important person in court is the person who is likely to lose and who has to feel that he or she has had a fair crack of the whip - a fair trial. At the same time, it means ensuring that every witness is at ease in the strange environment of the court and that every victim or family of a victim feels at the heart of the system. It means putting all that together in sentencing remarks, expressed in such a way that they can be understood by all affected by or interested in them. That includes the press and the public. All that became more difficult in the Court of Appeal because everything has to be assessed through the prism of a transcript from which personality and life experience do not easily emerge.

5. And it was not just so in crime. Family law, when I practised in that area in the early years, had similar if not identical challenges, and even behind the driest commercial case or those involving alleged professional negligence, there were people, all with their own frailties, reviewing events sometimes many years earlier, in many cases through their own tinted spectacles. Trying to work through them to the truth is an equally challenging problem both for the advocate and the judge.

6. As a judge, I have additionally come across many other actors on the justice stage and I must mention a number of other critical players. I have dealt with no fewer than nine Lord Chancellors, very many Ministers in the Ministry of Justice and other Government departments, law officers and Select Committees – all have been anxious to do their best for the system, invariably working with decreasing resources. Their objectives, however, have not always been the same and some solutions have also created other problems, particularly in relation to complexity. Similarly, I have had the privilege of working with a very large number of dedicated civil servants, senior police officers and many others, again, all conscious of their perspective and their own strategic objectives, who are doing their best to maintain the principles of fairness that cause our justice system to be held up as an example to others. Their different perspectives have caused me to reflect that there is not one criminal justice system, but a series of criminal justice systems, each going in their own direction, but all of which require a single strategic plan, working for every part of the system and not just their own sector. There is good evidence that Government now also sees the need for this joined up approach and for joined up delivery. This can only be extremely helpful.

7. This lecture is not the place to provide detail of the twists and turns that have encompassed the relationship between the judiciary, the legislature and the executive, but it is undeniably the place publicly, on behalf of the judiciary, to express thanks to all who have done their best for the system. The group I have not yet mentioned are the legal academics, helping us to deal with the problems from the past and challenges for the future. In that regard, I ought to mention the Bingham Centre for the Rule of Law and, in a different area, the IT Adviser to the Lord Chief Justice, Professor Richard Susskind. Focussed on the judiciary, however,

is the UCL Judicial Institute devoted to research, teaching and policy engagement about the judiciary. I would like specifically to mention three people, who have contributed immeasurably to the development of the justice system in recent years, both in an academic and an entirely practical sense. They continue to do so. I refer to the co-directors of the Institute, Professor Dame Hazel Genn QC and Professor Cheryl Thomas QC. I also add another professor at UCL, Professor David Ormerod QC.

8. Hazel Genn's contribution to the understanding and promotion of access to justice has been without parallel. She has championed the use of empirical evidence as underpinning reform. The importance of this is something that it has taken quite some time for those who reform the justice system to grasp properly. Her work with what is now the Judicial College over the last 12 years has improved the training of the judiciary and left a legacy that is lived each day in court rooms throughout the country. As one of the inaugural Judicial Appointment Commissioners, a member of the Lord Chancellor's Advisory Panel on Judicial Diversity, and the author of the very important report on the attractiveness of appointment to the senior judiciary, she has and continues to shape the judiciary for the 21st century. Most recently her work with UCL's Judicial Institute and its Centre for Access to Justice have, respectively, increased public understanding of the judiciary and helped the next generation of lawyers and judges understand the importance of effective access to legal advice, to our courts and tribunals, and the impact that effective and ineffective access can have on individual lives and on the health of civil society.

9. Cheryl Thomas's work has had an equally important influence on the effective delivery of justice. Her research[1] on juries has been quite rightly described as ground-breaking. Her

[1] Academic research into any aspect of juror activity (or involving the judiciary generally) is carried out in very limited situations for specified purposes and only with the authority of the Head of Criminal Justice. Even if

work on information for juries, which she developed to minimise the risks of trials being challenged because of juror impropriety, is in use every day across the country. Her work on the Judicial Attitude Surveys has proved to be invaluable for the senior judiciary, who since the 2005 constitutional reforms have had significant responsibilities for the judiciary as a whole. To be carried out effectively, the senior judges need to be properly informed. Cheryl's work ensures that they are, and that the administration of justice can, more effectively, be carried out. To some of her recent work, which I am very privileged to be able publicly to introduce, I shall return.

10. As for David Ormerod, he has become the pre-eminent criminal academic lawyer in the country. Following on from Sir Rupert Cross, Sir John Smith, Glanville Williams, Brian Hogan, Edward Griew and many others, he has provided assistance to students in Smith, Hogan and Ormerod, to practitioners in Blackstones and a running commentary on all we do in the Criminal Law Review. I would welcome to debate with him and others such as Karl Laird their commentaries on some of my decisions, but, again, that is not the purpose of this lecture. But I must add one further word about David. His most recent work as a Law Commissioner has been to lead on the simplification and clarification of the law and practice of sentencing by the development of a Sentencing Code. In last year's Law Reform Lecture[2], I considered the benefit of introducing the proposed Code expressing the hope that Parliamentary time could be made for it,[3] so that justice could better be done. It is a tribute to him that the Government has recently recognised the incredible advantages by introducing the Sentencing (Pre-consolidation Amendments) Bill 2019, a Bill that as Robert

approved, any research must not ask about the deliberations in the jury room to ensure that an offence unders.74 of the Criminal Justice and Courts Act 2015 which inserted s.20D-G into the Juries Act 1974 is not committed.

[2] Sir Brian Leveson, *Law Reform Lecture*, (4 December 2018) <https://www.judiciary.uk/wp-content/uploads/2018/12/law-reform-lecture-4-dec-2018.pdf>.

[3] Sir Brian Leveson, *Law Reform Lecture* at [35].

Buckland QC, the Justice Minister put it recently, will, if enacted, 'pave the way for the Sentencing Code'.[4] I am delighted that he is now one of our deputy High Court judges.

11. A common but golden thread runs through the contributions that Hazel, Cheryl and David have made and continue to make. That is the desire to improve effective access to justice, to ensure that our justice system is fit for our society. They have always taken the long view. They have sought to understand the approaches we have taken, our aims, and our errors, so that improvements can be made. I hope they continue to do so for many years to come, so that we may all continue to benefit from their insights.

12. With that rather long introduction and having spoken about the life experiences that lawyers and judges can take from the operation of the criminal justice system, I have thought long and hard about what I could speak about as a valedictory topic. Although I initially worked on a traditional subject, on reflection, I have decided that it had to be on something new. As Senior Presiding Judge, Chairman of the Sentencing Council, President of the Queen's Bench Division and deputy Chair of the Criminal Procedure Rule Committee and indeed Head of Criminal Justice, I have given many lectures on the modern approach to criminal proceedings, the need to join up the constituent systems of police, CPS, defence communities, courts, and prisons and the law and practice of sentencing. I have chosen, therefore, a topic about which I have never spoken before but which encapsulates much, if not all, that is of critical importance in our justice system. I refer to juries.

[4] Ministry of Justice, Press Release, *Government moves closer to introducing Sentencing Code*, (23 May 2019), '*Justice Minister Robert Buckland said: It is vital that judges have complete clarity when making sentencing decisions, so we want to do all we can to reduce the complexity of the law, some of which is centuries old. This Bill will pave the way for the Sentencing Code, simplifying the statute book and helping the public to better understand the sentencing process.*' <https://www.gov.uk/government/news/government-moves-closer-to-introducing-sentencing-code>.

13. The origins and history of the jury system are well known, contained in the Hamlyn Lectures given by Sir Patrick Devlin and reprised in his book *Trial by Jury*, updated in December 1965: it is somewhat disconcerting to read that even when he was writing in 1965, there was a property qualification in place, the result of which being that most jurors were male because there were far fewer women householders than men. Devlin observes:

> I have never seen more than four women on a jury and you are almost as likely to find none as three; two is the commonest number and one is quite usual. The property qualification is one of the two factors that tend to make the jury middle-class, the other being the exemptions. Low though it is, the qualification must have had the effect of excluding some of the working class while the exemptions cover a large section of the upper and middle classes; the loss of ability resulting from the exclusion of so many professional men and women is especially severe. It is the property qualification again that helps to determine the middle age of the jury, since young men are less likely to be householders: the upper limit of sixty, settled at a time when the average age of the adult population was much lower than it is today, excludes many men and women of vigorous intelligence.

14. These words were first written in 1956 but reveal a world which is entirely alien to our present thinking. As a result, consistent with how I started this lecture, I commence with my own experience in the 1970s and, in particular, with the Juries Act 1974 which provided that all persons registered as parliamentary or local government electors between 18 and 70, were qualified to serve as jurors[5]. There were still substantial exemptions. Thus, judges, barristers, solicitors – anyone concerned with the administration of justice – was disqualified from jury service as were the clergy, those on bail or, in most circumstances, those convicted of crime, along with the mentally ill[6]. Peers of the realm, members of the armed forces and medical professionals (including chemists) were excusable as of right[7].

15. Jurors were subject to seven peremptory challenges by each defence counsel[8] for any or no good reason and could be asked to stand by if the prosecutor was concerned about any

[5] s. 1 Juries Act 1974
[6] Part 1 Schedule 1 of the Juries Act 1974
[7] Part 3 *ibid*
[8] s. 12 Juries Act 1974

aspect of their appearance. It was often said in Liverpool that the way to avoid jury service was to turn up in a suit carrying a rolled-up copy of the Daily Telegraph. Those charged with criminal offences did not view such people as potentially sympathetic, although whether they would have been is utterly unknown. The number of challenges was reduced to three and, by s. 118 of the Criminal Justice Act 1988, abolished. Now, disqualification remains in relation to those convicted of crime and the mentally ill, but all others may – and are obliged to – serve[9]. It has certainly been the case that Lord Justices of Appeal have served on juries, and I know of at least one case in which a judge was summoned to serve on a jury in cases he was due to try. By s. 68(2) of the Criminal Justice and Courts Act 2015, the age of ability to serve as a juror was increased to under 76: the result is that judges and magistrates must retire at 70, but all can serve on juries until the end of their 75th year.

16. At the start of the trial, as now, the judge warned the jury to focus only on the evidence in court and not to talk to anyone about the case or allow anyone to talk to them. The trial then proceeded and rarely was it apparent that any juror conducted private research on the case. At its conclusion, counsel all addressed the jury as to legal principles – expressed subject to directions of the judge but not infrequently in different terms – and the judge then directed the jury on the law in an oral exposition from which notes could be, but were not very frequently, taken. In cases involving complex facts, days might elapse from the directions of law and jury retirement. Meanwhile, during the trial, jurors were permitted to separate, but only until they retired to consider their verdict or verdicts; thereafter they would end up sequestered and held incommunicado in a hotel. I recollect many occasions when, late in the day, the court had to search for hotel accommodation for juries and their bailiffs. Now, since 1994, they can separate with the result, perhaps consequence, that days or weeks can

[9] para. 15, Schedule 33, Criminal Justice Act 2003

pass while they deliberate[10]. Having returned their verdicts, however, that was it. However traumatic or distressing the trial, little attention was paid by the court to the consequences to the jurors who, if they expressed concern, would be advised to consult their doctor. I vividly remember discussing this subject following the trial of Rosemary West in 1995, which I believe did lead to counselling for at least some of the jurors. Not so for counsel!

17. The problems today are now very different. In the 1970s, to research the history of a defendant would require searching in back copies of newspapers. The internet has now made such research very easy and trials have been disrupted time and again because of over-enthusiastic investigation by jurors keen to learn that little bit more about the case or the defendants they were trying. The result has been that reliance is no longer placed on contempt of court[11], but on statutory change. Thus, by s. 71(3) of the Criminal Justice and Courts Act 2015, a series of offences have been inserted as ss. 20A-20C of the Juries Act 1974, prohibiting research by jurors, sharing research with other jurors and engaging in prohibited conduct. There have been a number of such prosecutions which, given the potential impact upon the judicial process and the cost to the public purse of re-trial, are and have been considered serious.

18. In the *Attorney General v Dallas*[12] a juror was committed to prison for 6 months for researching the defendant on the internet and then sharing the contents of her research with her fellow jurors. Her actions led to a re-trial being ordered with all the significant costs, inconvenience and distress that result for victims, witnesses and defendants. Similarly, in the case of *Attorney General v Davey and Beard*[13] in 2012 where two jurors in separate

[10] s. 43 Criminal Justice and Public Order Act 1994 amending s. 13 Jurors Act 1974
[11] The principles being explained in *AG v Fraill* [2011] Cr App R 21 (page 271)
[12] [2012] 1 WLR 991
[13] [2013] EWHC 2317 (Admin)

trials were dealt with for contempt of court as a result of their actions. Mr Davey had posted a Facebook message where he set out his views on the case he was trying and Mr Beard had conducted research on the internet and then informed his fellow jurors of the findings. Both were dealt with in the Divisional Court and committed to prison for a period of 2 months. It was the postscript to this judgment that prompted the then President, Sir John Thomas to say that a review into the terminology of the material given to jurors must be undertaken to ensure that jurors understand their rights and responsibilities whilst carrying out their civic duty. The Criminal Procedure Rule Committee took on the task, and, given her work with juries, sought the assistance of Professor Thomas.

19. The result has been the creation of a sea change in approach. With input from the Criminal Procedure Rule Committee, Professor Thomas created and tested a new easy read notice entitled "Your Legal Responsibilities as a Juror". A Practice Direction issued by Lord Thomas of Cymgiedd requires judges not only to direct the jury as to their responsibilities, but also to provide a copy to each juror (making a record of service), and jurors are advised to keep their copy of the notice with their summons[14]. As I explained, this form is intended to minimise the risks of trials being challenged because of juror impropriety and is in use every day across the country. It helps to ensure that juries understand the nature of their role and that they can carry it out properly and fairly, all of which is of fundamental importance to the health and integrity of our criminal justice system, and equally vital for victims of crime and defendants.

20. This is not the only recent change to help jurors. It used to be that all directions of law, save in relation to evidence being read, were provided at the end of the case. My Review of

[14] CPD VI 26G.5

Efficiency in Criminal Proceedings published in 2015 recommended[15] that directions should be given when they will best assist the jury to evaluate the evidence. Thus, by way of example, the standard direction on the approach to identification evidence could be given before the witness is called, so that the jury can focus on those parts of the evidence that will assist them to evaluate it. It also recommended that directions should be provided before speeches, so that advocates could tailor their remarks to the law as the judge had propounded it, avoiding repetition (in slightly different language) of the legal principles[16]. Finally, it recommended the preparation of written factual questions or 'the route to verdict' the answers to which would lead logically to an appropriate verdict.[17] These changes are all encompassed in the Criminal Procedure Rules[18].

21. Forgive me if take a short diversion to comment on the recent decision in *R v Lewis* [2019] EWCA Crim 710, in which the judge referred to the "steps to verdict" document as being "a guide" rather than something that the jury was forced to follow. On appeal, the argument advanced was that the jury were required to follow the "steps to verdict" document. Although it is not suggested that there was any difference between the directions of law and the document, the Court observed that there was no authority which made them mandatory. That may be so and I do not challenge the decision in the case but, in reality, the route or "steps to verdict" must be a logical series of questions which encapsulate the law as the judge has directed it. It should not be possible to put a cigarette paper between the two and, thus, the question of what is or is not mandatory does not, and should not, arise.

[15] Review of Efficiency in Criminal Proceedings, 2015, para 306
[16] para 309
[17] para 307-8
[18] Crim PR 25.14(2) and (4)

22. So far, I have talked about what juries might do during the course of the trial. Let me now focus on the mindset of jurors before they start. That leads to the question: How well do the jury perform and to what extent do they bring their own pre-conceived views into the jury room? In this regard, there has been much recent argument about what are said to be "rape myths", which it is argued, lead juries unfairly and improperly to reject complaints of sexual offending and acquit those who should be convicted. In 2018, there was a petition to Parliament calling for all juries in rape cases to complete compulsory training about rape myths, it being asserted that "research shows that jurors accept commonly held rape myths resulting in many not guilty verdicts".

23. I trust that it will not surprise you that, as Head of Criminal Justice, I was extremely concerned about this so-called research because, as I understood it – and was, in fact, the case – no research had ever been conducted in relation to rape myths involving real juries as opposed to mock jurors. That is to say, members of the public selected to act as jurors in mock trials, without being exposed to the real-life experience. I was also concerned to ensure that the balance was struck between jurors understanding rape myths and the absolute requirement not to encroach on the right that each defendant has to a fair trial.

24. As a result, I asked Professor Thomas to conduct such research, with real juries in England and Wales, after they had returned their verdicts and before they left the court building. So it was that in 2018-2019, research was conducted with over 50 complete juries (involving over 500 jurors) in four different court regions, specifically in order to obtain their views, including the extent to which they believed common rape myths and stereotypes. This research is due to be published later this year, but, on the basis that I asked that it be

conducted, Professor Thomas has given me a preview of the overall conclusions that she has reached and has very kindly allowed me to share those conclusions this evening.

25. Let me start by dealing with an oft repeated assertion, namely that juries acquit more often than they convict in rape cases. It is simply not true. Based on verdicts in all rape charges over 10 years, when juries were asked to deliberate to reach a verdict on such cases, they returned a verdict of guilty 55% of the time. This figure must be considered in the context that these cases often, but not always, depend on the assessment by the jury of the complainant and the defendant alone, with little corroborating or supporting evidence.

26. What about the myths? The fact is that Professor Thomas found that very few jurors believe the obvious myths and stereotypes. Most jurors believe things they should believe, although on some topics there are substantial proportions of jurors who are 'not sure' about these issues. For example, the December 2018 survey by End Violence Against Women reported that 33% of Britons said there must be violence for rape to occur. But the research with real jurors at court shows that:

    - Only 3% of jurors said that rape had to result in bruises or marks
    - Only 5% of jurors said it wasn't rape unless person fought back

    Putting this figure into context, it amounts to less than one person on every jury.

27. Dealing with some of the other myths, virtually no jurors believe that:

    - A woman who wears provocative clothing or goes out alone at night puts herself in a position to be raped.
    - A woman who sends a man sexually explicit texts or messages should not complain of being raped later on.

- Rape probably didn't happen if there are no marks or bruises
- If a person doesn't physically fight back, you can't say it was rape.
- It's difficult to believe a rape allegation that isn't reported immediately.
- Men cannot be raped.

28. Having reported what virtually no jurors believe, I turn to what almost all jurors do believe. That is:
    - There are good reasons why someone who has been raped may be reluctant to tell anyone about it or report it to police.
    - It is a hard thing to do to give evidence about a rape in court.
    - Rape within a relationship can take place over a long period of time before any complaint is made.

29. Completing the picture, I ought to add that Professor Thomas found that there are some factual issues in respect of which a substantial proportion of jurors are uncertain what to believe. For example, we know that most people who are raped are raped by someone they know – not a stranger. And while the research found that the majority of serving jurors know this is the case, just under a third said they were not sure about it. Further, we also know from psychological research that a person may not always be visibly upset when they are asked to recount a traumatic event like rape. But the research found that over a third of serving jurors were not sure about this.

30. Obviously, therefore, these are areas where better guidance for juries would assist to clarify the factual situation and I am very pleased that Professor Thomas has started to pilot some

new guidance to jurors on these issues. Early indications are that such information can help to reduce the number of jurors who are not sure about these factual issues.

31. Conducting this research using those who had actually served on juries, rather than volunteers who acted as jurors in mock research, was critical, and revealed information which, to my mind, is of vital importance not merely to this research but to our understanding of the value of the jury system in this country. You may be surprised to hear that, amongst all those who served on a jury, no fewer than 87% said that if jury service had been voluntary they would have chosen not to do it when they had initially been summoned. That demonstrated beyond argument that it is simply not possible to understand what real jurors believe by getting volunteers to act as jurors in mock jury research. It is also clear from the very significant differences between public opinion poll results on rape myths and the results with actual serving jurors, that opinion polls are not an accurate reflection of the views of those who serve on juries – in other words, the people making the decisions.

32. This takes me to an even more important finding and statistic. Although 87% of people who served on a jury in said they would have opted out of jury service when they were summoned if they had a choice, by the end of their jury service their view had changed. Of those same jurors, no fewer than 81% of those who served on a jury said they would be happy to serve again if summoned. That is over a six-fold increase. Why? Because most described their experience of jury service as interesting, educational, informative and challenging.

33. When I was a trial judge, I used to thank jurors at the conclusion of a trial by saying that I believed that they had fulfilled the highest duty of citizenship – to put aside their daily lives

and sit in judgment on a fellow citizen, without pre-judgment or case-hardened views about criminality. I continue to believe that and cannot overemphasise the importance of this finding. Speaking to school children and others, I emphasise the critical importance of the public in the criminal justice system: without witnesses willing to come forward and tell the police what they have seen, without jurors willing to undertake the arduous duty of deciding whether the state has proved guilt to the criminal standard, our criminal justice system would fail.

34. That brings me to a final point concerning juries and individual jurors. We can no longer take them for granted. It is beyond argument that some of the cases they try require consideration of very disturbing evidence. Whether dealing with a murder with gruesome evidence or allegations of sexual criminality, covering the most obscene and distressing images or allegations, it must be beyond argument that many jurors will be affected emotionally. It is no longer sufficient to advise about the Samaritans or help from the general practitioner. The court needs to signpost jurors to professional counsellors to provide assistance in those cases in which such help is necessary.

35. The Ministry of Justice and HMCTS are both very much alive to this issue and I am grateful to the officials there for engaging with judges and court staff around the country to gain a better understanding of what their view is about the sort of care and support jurors may require on completion of their civic duty. Unsurprisingly, it is the serious sexual offences that troubles jurors the most, but of course disturbing and distressing evidence can be a factor in many types of cases. And we must recognise that the impact of the verdict on the defendant, and on the victim, and their respective families, can also prove to be distressing for jurors. We also know that jurors do not find it easy to come forward to talk to staff about

the emotional upset they may be feeling, and we hope that the juror notice has gone at least some of the way to clarify what a juror is able to discuss during and after the trial, and what they must not. What is clear, however, is that more must be done to support people who have fulfilled this great responsibility, and I am delighted that both the Ministry and HMCTS have started to undertake work in this regard.

36. I started this lecture by referring to the tremendous privilege and responsibility that the law placed on me – as with all other practitioners and judges – to have a part to play in the life events of others, making critical decisions that can affect their lives and liberty. It is clear from this last research that jurors feel that responsibility as well. There is no better way of maintaining respect for the rule of law and the ability of the state to protect its citizens with fair processes for determining guilt, than the efficient and effective operation of the criminal law. That runs from the moment of complaint to the police to the moment of verdict and, if adverse to the defendant, sentence.

37. After nearly 50 years, I remain very firmly of the view that we risk that at our peril. As I said in the Slynn Memorial Lecture yesterday, I will look on with great interest to see what the future has in store. I wish you well – the future is in your hands.

38. Thank you.