Just Judge: The Jury on Trial

Content note: This paper discusses rape throughout.

Abstract:

In this paper, I consider arguments in favour of jury trials. While I find these generally persuasive, I argue that there can be cases where juries not fit for purpose. In those cases, I argue that they should be replaced by judge-only trials. In doing so, I propose a framework for determining whether a type of case is unsuitable for jury trials. Partly in response to low conviction rates, there have been recent suggestions that rape trials should be conducted without juries. I suggest that there is strong evidence that these offences qualify under the criteria I have described. As a result, I argue that judge-only trials should be adopted for trying rape cases.

The low conviction rates for sexual offence cases have been a longstanding complaint in many legal jurisdictions, e.g., Australia,[1] England and Wales,[2] Scotland[3] and New Zealand.[4] The large discrepancy between the number of rapes[5] and prosecutions has been described as the "justice gap" (e.g., Temkin and Krahé 2008; Lonsway and Archambault 2011). In recent decades, jurisdictions have instated myriad regulations in attempts to resist this trend. These have included developments in legal definitions of sexual offences,[6] restrictions on the kinds of evidence permissible in trial[7] and provision of support for vulnerable witnesses.[8] One suggestion (e.g., Temkin and Krahé 2008; Larcombe 2017; SCTS 2021) for increasing the conviction rates is to remove juries from trials for sexual offences, i.e., hold judge-only trials.[9][10] The Scottish Courts and Tribunals Service (SCTS) recently recommended a pilot scheme of judge-only trials for sexual offence cases (2021: §5.52). During the Covid pandemic, there have also been additional calls for use of

[1] E.g., Larcombe et al (2016), Larcombe (2017).
[2] E.g., Baird (2020).
[3] E.g., Leverick (2020), SCTS (2021).
[4] E.g., Law Commission of New Zealand (2015).
[5] I recognise differences between the crimes of rape and sexual assault in various jurisdictions, but for convenience, and following much of the literature, I will use these terms interchangeably.
[6] E.g., removing the requirement of 'force' in rape charges, legislation on marital rape.
[7] E.g., not allowing questions regarding a victim/survivor's sexual history (Larcombe 2017: 144).
[8] E.g., permitting them to give evidence remotely or have someone sit with them for support.
[9] These are also known as "bench trials" (Bornstein and Greene 2017: 274) or "judge-alone trials" (e.g., Larcombe 2017: 148). Throughout this paper, I will use the term "judge-only trials".
[10] There are alternatives to a jury trial other than judge-only trials. For instance, a trial may have a judge, who sits with assessors, who serve as fact-finders (Law Commission of New Zealand 2015: 115, SCTS 2021: §5.29). Alternatively, a panel of judges might be used (SCTS 2021: §5.28). I do not explore these options in this paper, but concede that variations of these forms may have advantages.

judge-only trials across the board, as a method of dealing with a backlog of cases, which built up while the numbers of court sittings possible was reduced (Gerry 2020). In November 2021, Lord Advocate Dorothy Bain urged Scottish politicians to remove juries in rape cases, on the basis of the serious backlog of cases.[11]

I defend the claim that in some situations, it may be appropriate to depart from the jury trial. By considering the normative case *for* the jury trial, we can determine when this case is undermined. If that occurs, either generally or for a specific offence, this presents a case for jury abolition, which could be general or specific. Unlike some commentators,[12] I do not endorse abolition of juries entirely. My goals are more modest. First, I aim to provide a set of conditions, which, if satisfied by a domain of cases, implies that judge-only trials would be better. I argue that these are jointly-sufficient,[13] i.e., if they obtain within a domain, I argue that we should move away from jury trials within that domain. Taken on its own, I hope this to be a novel contribution, which might be accepted even by those who disagree with my application of it. My second goal is to show that these conditions apply in sexual offences.

In section 1, I consider the reasons for having jury trials. These include epistemic reasons, procedural reasons and moral reasons. I propose four conditions, which I argue are jointly sufficient for it to be appropriate to abandon jury trials: 1) A systematic failure of juries to deliver verdicts warranted by the evidence; 2) The failure must have dire social implications (e.g., a crisis of public confidence); 3) The systematic failure must not be easy to resolve within the jury trial paradigm, and 4) There must be evidence that judge-only trials would fare better in these cases. In section 2, I examine the discussion surrounding sexual offence cases, and argue that there is compelling evidence that the first three conditions are met.

In section 3, I focus on the advantages and disadvantages of judge-only trials. While there are problems associated with judge-only trials, I argue that none of these are decisive. Furthermore, I argue that there is good evidence that the fourth criterion is satisfied, i.e., that judge-only trials would be more successful in delivering good verdicts in sexual assault cases.

1. The Case for the Jury

Jury trials are common all over the world, particularly for serious criminal offences. In the US, the Constitution's Sixth Amendment states that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." The only exception is for "petty crimes" (which carry a

[11] https://www.bbc.co.uk/news/uk-scotland-59151540

[12] E.g., Simon Jenkins in *The Guardian*: https://www.theguardian.com/commentisfree/2021/jan/22/justice-system-crisis-abolish-jury-trials-covid. Richard Dawkins also makes a case for replacing juries entirely (2003: 38-41), but his argument rests on arguments from jurors not being independent evaluators, so he may be sympathetic to Hedden's suggestion (2017) of removing jury deliberation (discussed in section 2).

[13] In a previous version of this paper, I attempted to make the case that these were necessary and sufficient for favouring judge-only trials. This, however, would be a more difficult task. It would require an argument for the jury trial superiority in general, which is beyond my scope here. I also want to allow that there may be other – perhaps very different – reasons for not using juries in a particular instance (e.g., reasons of national security). My argument is now more modest.

maximum prison sentence of sixth months), which may be heard by a judge alone (Dressler 2015: §1.02[A][1]). Similar provisions exist in various other jurisdictions. In New Zealand, for instance, a right to be tried by jury is guaranteed for any crimes which carry penalties of two years imprisonment.[14]

There are good reasons why the use of juries has become the default for serious criminal trials. Jury trials deliver a range of benefits. In this section, I consider three categories of benefits – epistemic, procedural and moral – before suggesting a set of conditions, which, if present for a type of criminal case, provide us reason to abandon jury trials in favour of judge-only trials.

There are several epistemic arguments that support the use of jury trials. When a criminal charge is brought to trial, some method for arriving at a verdict is required, and the epistemic arguments suggest that using juries is effective and truth-tracking way to do it. One classical argument for juries comes from the Condorcet Jury Theorem (CJT). According to the CJT, if two conditions are satisfied, increasing the size of the group making a judgment increases the likelihood that the group judgment will be correct. The conditions are 1) that individuals are better than random chance at assessing the truth of the matter, and 2) that individuals' judgments are probabilistically independent of each other. Given the theorem, we might suppose that increasing the size of the group assessing a case will make it more likely that the group will get it right, and so a jury of 12 will be better suited to the task than, say, a single judge. Unfortunately, for this argument, we have reasons to doubt that jurors have a better than random chance at reaching the truth in some cases (which I will turn to in section 2), and the fact that juries are typically asked to deliberate means that the juror judgments are not independent; jurors will influence each other during deliberations.[15]

The deliberation process itself may also be seen as carrying epistemic benefits. Brian Hedden considers three potential benefits from jury deliberation (2017: 369).[16] First, jurors come from different backgrounds, and will have different perspectives on a case. Via deliberation, these various perspectives will be made available for each juror. Second, with more people involved in the process, it might be less likely that certain details will be missed. Individual jurors may forget certain facts of the case, but could be reminded by other jurors. We might also imagine that some observations or insights from individual jurors could allow the jury to notice inconsistencies in a witness's testimony or lies. In *Trial By Jury* (1956), where he gives a prominent defence of jury trials, Lord Devlin picks out the ability to spot lies as one major advantage of a jury over an individual:

> "I think it must be agreed that there are some determinations in which twelve minds are better than one, however skilled, and most people would accept that the determination whether a witness is telling the truth is one of them" (1956: 149).

The jury is utilised as a lie detector (Fisher 1997). If a jury is particularly well suited for the task of assessing whether witnesses are giving honest testimony, this constitutes a strong reason in favour of trial by jury.

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[14] New Zealand Bill of Rights Act 1990, s.24€.

[15] Hedden points out this problem for use of the CJT (2017: 371-373). I consider the option of removing jury deliberation in section 2.

[16] Crucially, Hedden (2017) is unconvinced by these, and argues that jury deliberation should be abandoned.

Bornstein and Greene dispute this, drawing upon evidence that implies that laypeople are only slightly better than chance at distinguishing truth from deception (2017: 117).

Hedden's third epistemic benefit of jury deliberation is that it may help to alleviate legal confusions, e.g., about language used when evidence has been presented, or about the standard of proof. While this may constitute a benefit of juries deliberating in comparison to juries *not* deliberating, it is certainly not a benefit over a judge being responsible for delivering the verdict, as they will have the required legal expertise.

Another important function of juries is more procedural; it seems suited to certain social or communicative functions. Because a jury consists of a random selection of the population, including people from a variety of backgrounds, it is seen as democratic. It also ensures public participation in the criminal justice system, which otherwise may appear alien or elitist. The Scottish Courts and Tribunals Service emphasise this point, stating that "the number of decision-makers is seen as conferring legitimacy and public acceptance of verdicts in most cases" (2021: §5.8).

The legitimacy-conferring element comes in part from the range of voices heard. It may also benefit from the number of people sitting on a jury. As it is a random sample of the population delivering the verdict, it can be seen as being delivered *by the people*. Like we may see a government's authority (in democratic countries) as originating in the approval of the people via elections, a trial verdict may receive authority through the jury's deliberative procedure. The jurors "are meant to speak and act on behalf of the whole political community" (Duff 2001: 190). Lord Devlin echoes this in describing each jury as "a little parliament" (1956: 164).

That the verdict is arrived at by a jury may also fit better with certain views of punishment. For instance, on Duff's communicative theory of punishment:

> "The criminal law of a liberal polity, and the criminal process of trial and conviction to which offenders are subjected, are communicative enterprises that address the citizens, as rational moral agents, in the normative language of the community's values" (2001: 80)

It is plausible that this communication is better able to address the offender on behalf of the community if a sample of the community (i.e., a jury) is responsible for reaching this verdict. Of course, it is possible for some individual members of the community (like a judge) to embody its values, but a representative jury does seem particularly well-suited for this function. If the jury is disposed of, it may appear that it is not *the people* responsible for a verdict, but the establishment, or those in power.

There are thus several related social functions of the jury. They make a trial more democratic, which in turn grants legitimacy to the proceedings. They increase public participation and may lead to increased public acceptance of verdicts. In addition, they fill a communicative role, publicising the community's values and that they have (or have not) been violated in a given instance.

Finally, the jury provides a final protection against injustice, either in terms of unjust laws or tyrannical judiciary. The US Supreme Court has emphasised the importance of this role, describing it as providing "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge".[17]

Lord Devlin saw this feature as hugely important, and highlighted the dual protection against both tyranny and unjust laws.

> "[The jury trial] is [a protection against tyranny]: but it is also an insurance that the criminal law will conform to the ordinary man's idea of what is fair and just" (1956: 160).

Each of these protections are rightly highly valued. The possibility of trumped-up charges being used to discredit or imprisoner an opponent of powerful politicians or their allies is a real and serious concern. The Scottish Courts and Tribunals Service voiced the same concern, observing that trial "by jury can be seen as a protection of the individual against oppression by the state" (SCTS 2021: §5.11). Some safeguard against this threat seems essential. This underpins one of the most persuasive normative justifications of the jury.

As well as protecting against maligned sources, the jury offers a final safeguard against unjust laws. An unjust law may have been developed with good intentions. It is also possible, because laws must generalise over various token acts, that a law could be good for arriving at a just outcome in almost all cases, but fail in some others. In such cases, it is possible for a jury to ignore what the law states. This power is also observed by Devlin:

> "[Juries] have in the past used their power of acquittal to defeat the full operation of laws which they thought to be too hard. I daresay that the cases in which a jury defies the law are very rare" (1956:160).

This practice, jury nullification, is controversial, but has been defended on grounds that it protects against bad laws made by fallible people either out of ignorance, prejudice or some other irrationality.[18] In April 2021, a case in the UK attracted attention for a jury verdict that appeared of this sort. This case involved several climate activists who had sprayed graffiti and smashed windows at the headquarters of Shell as part of a protest against the ecological damage caused by Shell's operation.[19] Despite the judge informing the jury that the defendants did not "have any defence in law for the charges the face", the jury acquitted the activists. One interpretation of the verdict is that the jury thought it would be unjust to punish the activists, perhaps because their cause is a good one, even if they clearly violated the law.

If we see interventions of this sort – which may veer away from following the letter of the law, to instead aim at what they judge to be just – as desirable, some element in a trial that is able to defy the law

[17] Duncan v Louisiana, 391 U.S. 145 (1968), 156.
[18] E.g., Brooks (2004), Huemer (2018).
[19] Case described here: https://www.bbc.co.uk/news/uk-england-london-56853979

is required. A judge could not be allowed to disregard whatever laws they think are unjust, but a jury does have this ability.

So far, in this section I have discussed three categories of benefits from jury trials: 1) epistemic, 2) procedural, and 3) safeguarding. These should not be understated. Because of the normative justifications offered by these considerations, if the right to a jury is to be withdrawn in some instances, the reasons must be sufficiently weighty. My argument for abolishing jury trials is targeted at situations when these advantages are significantly undermined.

If juries were successful in arriving at good verdicts with regards to a certain type of case (or at least *perceived* as being successful), there would be no call to replace them. Those who have suggested there would be some benefit to move away from jury trials in rape cases have done so because they believe the conviction rate is much lower than it ought to be. For instance, Wendy Larcombe argues for judge-only trials citing the low conviction rate for rapes, and claiming that juries are "the 'weakest link' in the criminal prosecution of sexual offences" (2017: 148). This is also noted as an explicit motivation of the Scottish Courts and Tribunal Service in their consideration of judge-only trials (2021: §5.4). At this point, the epistemic benefits of jury trials are threatened (or nullified).

Due to the other advantages of jury trials, we may be tolerant of some errors. If we start from a position of genuinely valuing the benefits afforded by juries, to be persuaded to abandon jury trials, we will need convincing evidence that for type of case in question, jurors are failing to deliver verdicts justified by the evidence presented at the trial and the legal advice they are given. This requires more than simply guilty people escaping conviction. The evidence in a given trial may not be sufficient to prove guilt beyond reasonable doubt even if the defendant is, in reality, guilty. This would, in a sense, be an unjust verdict, but not in a way that implies any deficiency on the part of jurors. A jury failure in an individual case occurs when a jury does not properly apply the law. For my purposes, jury failure regarding a domain of offences can be understood as a regular delivery of verdicts not called for by the evidence.[20] Call this *Criterion 1: Jury Failure*.

In addition, to motivate us to renounce juries, the failure must be deemed to come at some significant social cost.[21] There are several ways that some such failing could meet this criterion. If jury trials failed to convict murderers, and consequently large numbers of murderers escaped prosecution, then went on to repeat offend, this might be one such case. The serious harm caused to the community due to this failure would motivate a change in approach. Even if risks of recidivism are low, there are other potential worries, such as effects on public confidence. If failures to convict in certain offences gives victims the impression that they have been abandoned by the law, it might be appropriate to explore alternative legal methods. Widespread jury failure may also weaken the incentives that the average citizen has to abide the

[20] I thank Jeremy Davis for pressing me to clarify this point.
[21] In the case of a bad law, we might think there are no social costs to jury failure. If we accept good cases of jury nullification, we might be pleased that *Jury Failure* obtains. This is why the second criterion is required.

law, and may enable or embolden perpetrators of those crimes. These social costs are subject to degrees of gradation, and whether a social cost is sufficiently weighty to take radical legal measures is a matter for dispute. When assessing this, it is worth bearing in mind the social benefits of jury trials. While jury trials may prima facie confer some legitimacy on proceedings, and increase public participation in the criminal justice system, if it is widely-accepted that trials are failing with regard to some types of case, these benefits may not obtain (or may be undermined). If these social reasons in favour of jury trials no longer manifest (or do so to a much lesser degree), we have less reason to abide by the status quo. Call this *Criterion 2: Social Costs*.

Even if these first two criteria applied very clearly in a certain type of case, there may be obvious solutions that could be adopted without such drastic legal reform. Perhaps additional jury instructions could be given, changes could be made to the law, or restrictions could be placed on what prosecutors may ask. If there were methods like this which promised to resolve issues of jury failure (and did not have other independently objectionable features), these methods should be attempted first. Call this *Criterion 3: No Easy Fixes*.

Finally, we might accept that juries do a bad job in some cases. That in itself, does not indicate that judges would do any better. There would be little point in engaging in the radical change of moving away from jury trials for a certain type of case if the alternatives would be no better off. That would amount to sacrificing the advantageous features of jury trials for nothing. So, just as we need evidence that juries get verdicts significantly wrong, we also need reason to believe that judges would provide better judgments. Call this *Criterion 4: Judges Better*.

I have now described four criteria:

1. Jury Failure
2. Social Costs
3. No Easy Fixes
4. Judges Better

Where these four criteria are met (to a sufficient degree) with regard to a class of crimes, I argue that judge-only trials are a superior option. Weighing up whether these are sufficiently met is, of course, an onerous and difficult task. Moving away from jury trials, in the sense of removing the right to a jury trial,[22] should not be taken lightly.

I also acknowledge that such a move may not be politically possible. Temkin and Krahé do not endorse the move, in part because they see is as unobtainable, that "…such is the commitment to this form of trial in the common law world that a step of this kind [abolishing juries for rape trials] is highly unlikely

[22] It is already common for jurisdictions to *allow* defendants to opt for a judge-only trial if they would prefer. For instance, in New Zealand, those charged with sexual violence offences have a right to elect a try by jury, which was taken up in 76% of cases in 2014/15 (Law Commission of New Zealand: 2015: 51).

in the foreseeable future" (2008: 177). My discussion here concerns only the desirability of such a change, not our ability to make it reality, but recent events may indicate that such changes are gaining popularity in legal circles, e.g., the recommendation in Scotland to consider a pilot scheme of judge-only rape trials (SCTS 2021: 118).

2. Judging Juries

In the previous section, I described four criteria. I argued that, if these criteria are satisfied to a sufficient degree for a certain type of case, it will be preferable to move from jury trials to judge-only trials for that type of case. In this section, I attempt to demonstrate that the first three criteria are in fact satisfied with regard to sexual assault offences.

Criterion 1: Jury Failure has been extensively discussed with regards to rape cases. The "attrition" in sexual offences – the process whereby cases drop out of the justice system – can happen at various points (Lea, Lanvers and Shaw 2003). It includes "victims' failure to report the rape, complainants' withdrawal of the allegation, police unwilling to proceed, prosecutors not taking the case to court and juries not returning a guilty verdict" (Brown, Hamilton and O'Neill 2006: 355). For my purposes, only the final of these stages is directly relevant (though, as I will mention shortly, the early points of attrition seem to be affected by perceptions of jury verdicts too).

The reasons why juries are unlikely to return guilty verdicts in rape trials have been the source of considerable debate. Some of these reasons have little to do with the jury. For example, there are issues relating to the legal definition of rape. For instance, Larcombe et al. (2016: 624) are critical of definitions that exonerate parties judged to "reasonably believe" that consent had been given.[23] Jurisdictions, like Scotland, which have a requirement for corroboration – at least two sources of evidence in order for any case to be brought to trial – may pose an additional obstacle to prosecution.[24]

I acknowledge that these (and others) may have the effect of reducing the likelihood of conviction, and also that some of these problems may not have a satisfactory resolution. If it is the case that changes to the law could overcome or significantly mitigate the justice gap, this may undermine the proposal for judge-only trials. This is an empirical question. In what follows, I assume that changes of these sorts – e.g., removing the corroboration requirement, or revising the understanding of "reasonable belief" – would still not result in a sufficiently high conviction rate (as to restore public confidence). If this assumption is incorrect, the additional changes (depending on how independently desirable they are) may be preferable to the proposal of judge-only trials.

[23] For a cautious defence of the "reasonable belief" standard, see Baron (2001).
[24] Susan Estrich (1987: 20) makes the point that rapes are less likely to be supported by other sources of corroboration than many other crimes.

We might also suppose that features of sexual assault crimes make it a very difficult to prove them beyond a reasonable doubt. Often in these cases, the only matter in dispute is whether or not the act was consented to, which is difficult to prove or disprove. This may be more likely to allow for reasonable doubt (for anyone who hears the case) that the crime was committed. This might be thought to explain the low conviction rates in comparison to other offences. I acknowledge that it is not clear what conviction rate we should expect – even if jurors were perfect – given the difficulties in proving guilt beyond reasonable doubt in sexual assault offences. For this reason, absent other evidence, the low conviction rates alone do not give us strong evidence of jury failure.

However, we do have evidence that features of juries themselves contribute the low conviction rate, i.e., that in some cases there is sufficient evidence to demonstrate a defendant's guilt beyond reasonable doubt, yet they are acquitted. Some of this evidence is anecdotal. For instance, one judge reported:

> "The cases in which it appears to me that, regardless of the quality and quantity of evidence juries do not convict with appropriate regularity, are cases where there is one complainer and a single charge of rape. In cases where there is evidence of a quality and quantity which for any other kind of crime would lead to a conviction, I see a number of acquittals each year in rape cases which, to my mind, are not explicable by rational application of the law to the evidence."[25]

Juries are seen as an issue because of various attitudes held about rape and rape victims. As well as anecdotal evidence, a wealth of empirical data is now available, particularly concerning the role of rape myths in acquittals. Fiona Leverick categorises these rape myths into the following categories (2020: 257):

- Beliefs that blame the victim/survivor
- Beliefs that cast doubt on allegations
- Beliefs that excuse the accused
- Beliefs about what 'real rape'[26] looks like

Leverick consulted a wide array of mock-juror studies, which demonstrate a strong relationship between acceptance of these myths and judgments about sexual assault cases:

> "All but three of the 28 studies identified found a significant relationship between RMA [Rape Myth Acceptance] scores and decisions about guilt. In other words, people presented with exactly the same information were significantly more or less likely to

[25] Quoted in SCTS (2021: §5.7). The additional verdict of 'not proven' is a particular complication in the case of Scottish law. This may have an impact on the conviction rates in Scotland, but conviction rates in Scotland are not dissimilar to other jurisdictions, so I do not consider this as having huge significance, and shall not consider it further here.

[26] This term comes from Estrich's *Real Rape*. She draws upon a Kalven and Zeisel's study (1966), which categorised rapes into two types; "aggravated rape" and "simple rape". Estrich makes the case that, because they lack the features of aggravated rapes, the "simple rapes" – cases where the rapist was previously known by the victim and where no force was used – are not perceived as "real" (1987: 4 et passim).

> find an accused person guilty of rape or sexual assault depending on their score on an RMA scale" (Leverick 2020: 263).[27]

Leverick's meta-survey provides very strong evidence for a mechanism leading juries to judge certain irrelevant information to be pertinent, and fail to find defendants guilty as a result. Further evidence, particularly pertinent to the Scottish context, for this mechanism was revealed in a large-scale 2019 mock-jury study.[28] In this study, in which transcripts were taken of 32 mock rape trial deliberations, evidence of rape myth acceptance was found to be prevalent, and often not challenged (SCTS 2021: §5.34). Concluding her meta-survey of studies into rape myth acceptance, Leverick stated:

> "To summarise, there is overwhelming evidence that jurors take into the deliberation room false and prejudicial beliefs about what rape looks like and what genuine rape victims would do and that these beliefs affect attitudes and verdict choices in concrete cases. This evidence is both quantitative and qualitative" (2020: 273).

This indicates that juror bias plays a role in preventing guilty verdicts in rape trials. This is only strengthened by facts about the conviction rates for sexual offences. It has long been noted that the conviction rates are "well below that of other violent crimes" (Temkin and Krahé 2008: 23). It was recently reported that the conviction rate for rape after reaching the High Court in Scotland is lower than for any other crime (SCTS 2021: §5.70). The figure reported was 47% for rape and attempted rape (compared with 87% for all crime). The 47% figure may also be misleadingly high, because this only includes cases that have been reported and deemed to meet the threshold for prosecution. Due to attrition that takes place before the trial, this means only a tiny fraction of rapes actually result in conviction. Rape myth acceptance thus seems to have an effect on the conviction rates that would constitute the sort of failing that undermines the case for jury trials.

Leverick's findings have been criticised recently by Cheryl Thomas, who has conducted surveys of actual jurors. Thomas' findings indicated that the belief in rape myths was actually very low (2020). Thomas explains differences between the two findings by noting that real jurors do not volunteer, and claiming that "most real jurors would never have volunteered to do jury service" (2021: 772). Because the meta-survey used by Leverick and the large 2019 study used mock jurors, who volunteered, there could be a selection bias at play.

I cannot respond fully to Thomas' claims here, but there are three reasons I find her position unconvincing.[29] First, without further explanation for why this would be the case, the explanation Thomas offers seems implausible. The volunteers for the 2019 large mock-juror study were all eligible for jury duty. Thomas offers no explanation for why rape myth acceptance would be more prevalent among juror-eligible volunteers than actual jurors. Second, Chalmers et al (2021) criticise Thomas' methodology. One notable feature of Thomas' methodology is that her surveys used a three-option, which offered "agree", "disagree"

[27] Leverick also identified methodological flaws in each of the three studies that did not report a statistically significant relationship (2020: 273).
[28] Reported in Ormson et al. (2019).
[29] Chalmers, Leverick and Munro offer a much more substantial rebuttal to Thomas (2021).

and "not sure" options (2020). Chalmers et al. suggest that it would have been better to use a five- or seven-point "Linkert scale", allowing participants to give more fine-grained evidence. It is suggested that these "may have resulted in a more honest answer" from participants unwilling to provide a socially unacceptable answer (2021: 766). Third, and most importantly, rape myth acceptance may have a role in jurors' reasoning and deliberations even if they do not explicitly accept the myths. One of the key observations from analyses of mock jury studies is a "marked tendency for participants who purported to reject problematic attitudes about rape in the abstract nonetheless to proceed to rely upon such views as part of the deliberative process" (Chalmers et al. 2021: 767).

To sum up: the low conviction rate does not in itself entail significant jury failing. The specific features of the crime might suggest that even with perfect juries (ones with no misconceptions or pernicious attitudes about rape), conviction rates would be lower than other offences. But alongside the rape myth acceptance studies, the evidence is overwhelming. Due to methodological issues, Thomas' jury studies do not demonstrate low rape myth acceptance, and even if they did, they would not indicate that rape myths do not affect juries' deliberations. Consequently, I argue that *Criterion 1: Jury Failure* is satisfied in the case of rape.

Juries acquitting at trial is one major point of attrition for rape cases; another is the low levels of reporting. In 2020, the Office of National Statistics found that fewer than one in six who had been sexually assaulted in England and Wales reported the assault to the police (ONS, 2020). A recent report from Australia put the figure at under one in five (Larcombe 2017: 145). Temkin and Krahé, in a summary of global reporting trends describe several similar levels in various other countries, include a reporting rate of 8 per cent in Germany in 2003 (2008: 13). This low level of reporting can be explained in several ways. The investigation process can be daunting and intrusive. Pertinent to my purposes here, it has been noted that a lack of confidence that a conviction would obtain reduces the likelihood that a victim will report an assault to the police.

> "The low conviction rate for rape cases will obviously impact on victim decision-making. A cyclical process is liable to occur as a consequence, with the high attrition at court discouraging victim reporting and participation, which in turn impacts further on the attrition rate" (Brown, Hamilton and O'Neill 2003: 368).

The (accurate) perception of the low conviction rate therefore dissuades victims from engaging with the criminal justice system entirely, exacerbating the issue, because fewer cases even have a chance of prosecution.

The low likelihood of juries convicting may also have an impact on prosecutors and police. Prosecutors are aware that, if taken to trial, many cases will not return a guilty verdict even if the case appears strong (e.g., Larcombe et al. 2016). This may make them reluctant to bring charges in cases. The awareness of this apprehension on behalf of the prosecutors may be perceived by police:

> "[T]he difficulty posed by juries in rape cases is an important factor in the attrition problem throughout the system since police and prosecutors will inevitably second-guess juries in the decisions they make as to whether prosecutions should be pursued" (Temkin and Krahé 2008: 178).

Due to the high levels of attrition, estimates of the real conviction rate – i.e., the percentage of rapes that actually result in a conviction – is extremely low. For instance, "the overall conviction rate for sexual assaults in Australia is less than 5 per cent and, in some jurisdictions, less than 1 per cent." (Larcombe 2017: 145). In England and Wales, this was estimated in 2019 at 3% (Baird 2020: 16).

The fact that the low conviction rate is a well-known phenomenon has had an effect on public confidence. As Brown, Hamilton and O'Neill (2003) point out, this lack of faith in the system has an effect on whether a victim will report. Dame Vera Baird, Crime Commissioner for England and Wales, has described the low conviction rates as, in effect, "the de-criminalisation of rape" (2020: 16). This has been a regular news item,[30] which surely has an effect on public confidence. The lack of public confidence in the criminal justice system has also been reported in the news,[31] and even admitted by the Crown Prosecution Service of England and Wales.[32][33] Larcombe also cites the low community and professional confidence – "undermined currently by the expectation that criminal prosecutions will be determined by jury members' beliefs and attitudes (2017: 149) – as a key motivation for judge-only trials.

These reports highlight the lack of public confidence. Given the importance of prosecutions for preventing further sexual assaults, and the distress of victims who have negligible chances of any legal outcome they would welcome, I take it that *Criterion 2: Social Costs* is satisfied.

As I have noted previously, as well as judge-only trials, many alternative measures have been proposed to improve the current system. It is difficult to tell whether some of the changes that have been proposed would have significant effects on conviction rates, so *Criterion 3: No Easy Fixes* may be the most difficult to establish. There have been many suggestions to curb the existing trend.

Some of the proposals are aimed at jury education. Given that rape myth acceptance is suggested to have a significant role in leading to unwarranted acquittals, efforts to inform jurors seem sensible. One recommendation is to have jurors educated about rape myths and cautioned against accepting them (SCTS 2021: §5.70[a]). Patricia Tetreault goes further, suggesting that expert testimony should be given to "compensate for the bias against the complainant or victim in rape trials" (1989: 254). Following comments from former Director of Public Prosecution, Alison Saunders, Katharine Jenkins proposes that juries be given warnings not to give credence to rape myths at the *beginning* of a trial (2016: 201). While judges had

[30] E.g., BBC (2021) https://www.bbc.co.uk/news/uk-48095118,

[31] E.g., Channel 4 (2021): https://www.channel4.com/news/cps-admits-long-way-to-go-to-restore-public-confidence-amid-record-low-rape-convictions

[32] https://www.cps.gov.uk/cps/news/cps-statement-judgment-judicial-review-prosecution-rape-and-serious-sexual-offences

[33] A similar lack of confidence has been noted regarding sexual offence cases in Scotland (SCTS 2021: §5.2)

often warned against rape myths, this has often occurred at the end of a trial, by which time jurors may already have formed strong opinions. Jenkins suggests that early warnings will be more effective.

Larcombe is dubious about the prospects for additional guidance for jurors having the desired effect. Regarding Tetreault's suggestion of utilising expert witnesses at every rape trial, she states:

> "If an expert has to be sworn in for every sexual offence trial in the county or district courts, experts will be spending most of their time in court speaking to juries about sexual offending" (2017: 149).

This may simply not be feasible. It would also have the effect of prolonging trials further, which is undesirable in particular because of the distress this imposes on complainants. While some ways of instructing jurors may be more successful than others – e.g., instructions at the beginning rather than end of a trial – we currently do not have evidence to suggest that this would reduce the efficacy of these myths in jury deliberations. As discussed earlier, analysis of mock-juror deliberations indicates that even when jurors explicitly reject rape myths when asked about them in the abstract, many still "rely upon such views as part of the deliberative process" (Chalmers et al. 2021: 767). If jurors underwent a course to alleviate the pernicious effects of rape myth acceptance,[34] this might be successful, but this would make proceedings considerably more expensive and have the undesirable effect of significantly prolonging trials.

Other kinds of measures concern the law. For instance, in Scotland, the removal of the corroboration requirement may improve conviction rates.[35] Similarly, the reduction of the jury size in Scotland (which currently has some of the highest jury sizes, at 15) may have an effect.[36] Jurisdictions which hold that a reasonable belief in consent means that the mens rea criteria are not fulfilled may add further restrictions on what beliefs count as reasonable (Larcombe et al. 2016).[37] While these sorts of changes may make *some* difference, it seems unlikely that they will make an enormous difference. As Larcombe notes, there have already been very significant rape law reforms, and yet this has been accompanied by no significant improvements in conviction rates. In fact, despite very significant reforms over the last 40 years in Australia, the problem seems to be getting worse, perhaps because "(widely-known) low conviction rate now contributes to low reporting" (Larcombe 2017: 145).

One of the more drastic changes comes from Brian Hedden (2017), who suggests that jury deliberation should be abolished. He proposes this as a general solution, i.e., not just for sexual assault trials. Drawing upon evidence from social psychology, he suggests that deliberation – rather than achieving some of the epistemic benefits we might hope for from bringing different perspectives together – can lead to worse decision-making.

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[34] I discuss training judges this way – and evidence that this may be successful – in section 3.

[35] This has been cited as a stumbling block for convictions by Rape Crisis Scotland (https://www.bbc.co.uk/news/uk-scotland-25639645).

[36] BBC (2021): https://www.bbc.co.uk/news/uk-scotland-scotland-politics-57910065

[37] More drastically, rape could be reconceived as a strict liability crime. This kind of change would be extremely drastic (perhaps even more controversial than the proposal under consideration). Many of the mechanisms that lead to not guilty verdicts would also still apply even under such a change. I say no more on this point here, but my view is that this would be more controversial and less successful than switching to judge-only trials.

> "Groups can suffer from groupthink and polarization. Social and informational pressures can bias the deliberation in non-truth-conducive ways by making it sensitive to evidentially irrelevant factors like which members speak up early and often, and also which convey the most confidence" (Hedden 2017: 380).

Hedden suggests that juries are retained, but their decision-making is done without deliberation, via some suitable method. Jurors might all provide their verdicts of guilty or not guilty, with a threshold of the jurors needed to ensure conviction. Alternatively, we could use a more sophisticated method where voters each report how confident they are of a defendant's guilt (e.g., 75% or 95% sure), which could be averaged together, and a conviction would be reached only if the average was above a certain threshold.

While Hedden's proposal is an interesting one, it does not seem to address the concern of juror bias. There are potential benefits. In some cases, a juror who has internalised certain rape myths may have persuaded other jurors of their view. This could be avoided by abolishing deliberation. However, this persuasion may also operate the other way, and removing deliberation would eliminate that benefit. Unless we have some reason to think that those who have accepted rape myths are more convincing in group deliberations than those who do not, this proposal does nothing to suggest it may lead to an increase in convictions. Even if jury deliberation is bad for getting warranted verdicts, this gives us no reason to think it is *especially* bad in sexual offences.

Another proposal is to increase the numbers of female judges. Bertha Wilson discusses "overwhelming evidence that gender-based myths, biases, and stereotypes are deeply embedded in the attitudes of many male judges" (1990: 512). As the majority of judges are men in many jurisdictions, we might anticipate that this would influence trials in ways that benefit defendants. However, the evidence for this claim is mixed, with many studies finding no significant differences between male and female judges.[38] It is thus dubious that this measure could constitute a fix of any sort. Temkin and Krahé note that women can also be susceptible to rape myth acceptance, and found no gender differences in rape attitudes in their survey of prospective lawyers (2008: 196).

I have only mentioned a few potential fixes. There are many more,[39] and I cannot address them all here. I also do not suggest that we dismiss these proposals out of hand. They may have positive effects on conviction rates, but lacking evidence to the contrary, I share Larcombe's suspicion that the effects would be minimal. Furthermore, tinkering with procedure is unlikely to have any effect on public confidence in the near future. A more radical change, like moving away from jury trials, could send a signal that rape is being taken seriously. If evidence does come to light that some of these changes are particularly effective, this would count against *Criterion 3: No Easy Fixes*, as well as being welcome news. However, as things stand, I find it plausible that this criterion also obtains.

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[38] E.g., Westergren (2004); McCormick and Job (1993). For a summary of the data providing evidence either way, see Feenan (2009: 5).

[39] For instance, in addition to judge-only trials, Larcombe suggests alternative justice options outside criminal law (2017: 150). Temkin and Krahé consider various other improvements in their chapter on 'Improving Rape Trials' (2008: 177-197).

In this section, I have attempted to establish the first three criteria from the proposed framework. In the next section, I discuss jury-only trials in more depth, and attempt to establish Criterion 4 in rape cases.

3. Judge-Only Trials: Pros and Cons

In this section I discuss advantages and disadvantages of judge-only trials, with some particular attention paid to whether the disadvantages are applicable (and concerning) in sexual offence cases. I argue that we do have good cause to accept *Criterion 4: Judges Better*.

There are several advantages of judge-only trials, which I will quickly mention. First, judge-only trials are typically much cheaper and quicker than jury trials.[40] The verdict is given by a genuine expert in the law, rather than a layperson. Even Lord Devlin, despite his support of the jury, concedes that "a jury is not as good a separating machine as a judge would be" (Devlin 1956: 154). The judge already having the legal expertise eliminates the need for lengthy explanations of legal minutiae. Also, when the verdict is given, we receive a written explanation of the verdict, which is not the case with jury trials.[41] That this is the case can make an appeal process a simpler matter, as any errors in legal matters about the judgment can be identified and scrutinised.

There are several disadvantages to judge-only trials. Devlin suggested that juries are better at detecting lies from the truth. As I mentioned previously, there are reasons to be doubtful of this in the general case anyway. In rape cases, there are especially likely to be compromised, due to acceptance of rape myths.

A further potential worry with judge-only trials is the potential for what Alexander Guerrero calls "capture", i.e., the manipulation of a person for private interests (2014: 142). While Guerrero uses the notion with regards to politicians, if judges were given the additional power of determining verdicts, they could make attractive targets for nefarious and powerful individuals. If wealthy citizens think they can secure some desired outcome by bribery, or grooming someone for a position, this may increase the likelihood of corruption. I acknowledge that this is a concern. However, given the power judges wield as things stand, I suggest that this is *already* a concern. Judges are prime targets for capture, particularly given that civil cases in many jurisdictions (e.g., England and Wales; Scotland) decide important matters with large financial interests at stake. Additionally, if judge-only trials were introduced only for a specific type of offence (e.g., sexual offences), this would not make judges significantly more attractive long-term prospects for the sort of grooming Guerrero is concerned about (2014: 144). This highlights the need for safeguards

[40] This is widely accepted, e.g., Devlin (1956:147), Katzen (2003: 20), SCTS (2021: §5.12).
[41] If we accepted a communicative theory of punishment (e.g., Duff 2001), we might see this as facilitating the community understanding the verdict, and a potential advantage over the status quo.

to protect against capture for the judiciary. This is a real need, but not one that is seriously affected by moving to judge-only trials for sexual offences.

A third concern is the additional stress or pressure this could put on judges. Temkin and Krahé noted that some judges who had been consulted about an expansion of judge-only trials found this concerning (2008: 179). As things stand, juries are responsible for the verdicts. If this was changed, judges would the pressure of making the decision as well as the potential for serious media scrutiny. This would be an undesirable consequence of such a change. However, I would make two points in response. First, in many jurisdictions a defendant can opt for a judge-only trial anyway,[42] so this may not be such a serious change in those jurisdictions. For others, examples of those jurisdictions, where results have not been disastrous may be of some comfort to apprehensive judges. Second, so long as the desire to avoid judge-only trials wasn't hugely widespread, provisions could be made to permit some judges to avoid these cases.

Lord Devlin discusses another benefit of having jury trials over judge-only trials in general: it ensures the "quality of judges as well as of their independence" (1956: 159). He suggests that people in any profession have a tendency to "construct a mystique that cuts them off from the common man" (1956: 159). If we imagine that judges were responsible for delivering verdicts in every case, they may become detached or desensitised, which could perhaps distort their views. I will say two things in response to this. First, the many jury studies which have asked judges what they would have decided in the case do not indicate that judges do have significantly different views to juries in general.[43] Of course, currently judges do not decide every case, so we could imagine that they would become "cut off" from the "common man" when this happens significantly more. To this, I offer a second response, namely that the proposal under consideration is only for specific types of case to be tried by judge-only, so there need not be a significant wholesale change. This may be a worry for advocates of jury abolition, but I am not arguing for that position here.[44]

More troublesome for judge-only trials is the potential for a loss of perceived legitimacy. The public is largely confident in verdicts arrived at by juries, and sees them as in a sense democratic. This faith could be jeopardised in judge-only trials. However, as discussed in the previous section "general public confidence, however, would seem to be lower in respect of sexual offences" (SCTS 2021: §5.2) anyway. Given the state of affairs as things stand (at least in some jurisdictions), judge-only trials may in fact enhance the perceived legitimacy. It should also be noted that the additional safeguard of written verdicts, which can more easily facilitate appeal can protect against this worry.

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[42] E.g., New Zealand, where 26% of defendants did accept a judge-only trial in 2014/15 (Law Commission of New Zealand 2015: 51).

[43] Bornstein and Greene survey these studies and offer the general evaluation that results are "strikingly similar" (2017: 280)

[44] It could also be a worry for jurisdictions where judge-only trials are standard, like Israel. On the other hand, if no such problems are identified in those jurisdictions, this might indicate that Devlin's worries of judicial detachment are overstated.

Another worry is the loss of the final protection against tyranny. A judge is not able to simply flout the law if they deem it unjust. And a judge with bad intentions could do serious harm. Against the latter concern, again the safeguard of written verdicts and explanations should provide some protection against arbitrary verdicts. This may also seem like less of a concern for sexual offences, which are "not conventionally political crimes which any faction of the state might seek to prosecute for improper reasons" (SCTS 2021: §5.11). Furthermore, while there are laws that we may not want to see enforced in some instances – as in the case of the activists taking on Shell – it is difficult to see this obtaining in a case of rape. Unlike a fossil fuel company, we do not think a victim of sexual assault deserves some come-uppance; we would not see a sexual assault as justified, regardless of the victim's actions.

Finally, it may be questioned whether judges are really likely to outperform juries. Judges are people too, so they may be subject to the same biases of the layperson (Temkin and Krahé 2008: 177). That being said, empirical evidence does give us reason to think we may able to protect against these influences. Fox and Cook (2011) studied the effects of college students taking a victimology course, and found that students were considerably less likely to engage in victim blaming behaviours at the end of the course than they were at the beginning. This is a limited study. It may be that the effects of such a course are short-lived, or that these findings would not have significant impact on criminal cases, but it does provide grounds for optimism. While such training may be possible for judges, it would likely not be feasible for all jurors. Additionally, specialist judges may be better able to guard themselves from the effects of pernicious attitudes. "Rape ticketed judges are far less likely to be led astray by defence counsel or, perhaps, by a victim's incongruent emotional expression" (Temkin and Krahé 2008: 178).

More optimism about the ability for judge-only trials yielding a higher conviction rate can be extracted from some of the studies comparing the verdicts of juries with the views of judges. Bornstein and Greene observe that there is significant agreement between judges and juries (2017: 271-287). An exception to this, historically, is found in sexual assault cases. Temkin and Krahé point to Kalven and Zeisel's study of the American jury:

> "Kalven and Zeisel (1966) showed that when both judges and juries were asked to make decisions about the same rape charges, judges were seven times more likely to convict than juries in those cases particularly susceptible to rape myths, ie acquaintance rapes without aggravating factors" (Temkin and Krahé 2008: 178).

Kalven and Zeisel recognised at the time that this result was "startling" (1966: 254). While it does give us some evidence, Temkin and Krahé acknowledge that there are limitations in this finding, particularly given that it was conducted in the 1950s. Unfortunately, we lack a more recent systemic judge-jury verdict comparisons. Despite the lack of replication, this is still striking. Combined with Fox and Cook's findings that victim-blaming behaviours can be combatted, we have strong reason to believe judges would outperform juries. This is bolstered further by some of the judge testimonials referenced by the SCTS.

Some complained explicitly that "evidence led justified conviction of rape and where it was difficult to understand the rationale for the acquittal verdict returned" (SCTS 2021: §5.7).

Given the evidence at hand, I argue that in rape cases *Criterion 4: Judges Better* is also satisfied. Consequently, all four of my criteria appear to be satisfied. Thus, I argue we should try cases of rape in judge-only trials.

4. Conclusion

I have argued that despite the virtues of jury trials, contextual features may render them inappropriate for criminal justice. I have suggested a set of criteria which are jointly sufficient for moving to judge-only trials in a given type of case. In sexual offences, I argue that these criteria are in fact satisfied. This may be disputed.

While I have spent most of this paper considering the merits of moving to judge-only trials in sexual offences, various other types of case may be suitable candidates. Most obviously are cases where entrenched prejudices that may affect a jury's verdict are commonplace. In jurisdictions where an ethnic minority group is mistreated or the target of stereotypes, cases where a complainant or defendant is a member of that minority might satisfy the criteria I have given. Similarly, in a population with discrimination against a (non-ethnic) class, people from that group may be unfairly convicted by a jury if accused of a crime. Whether this is true in a given jurisdiction is, of course, subject to host of empirical facts, but I hope my criteria provide a suitable way of evaluating the prospects of jury abolition.[45]

[45] I would like to thank Dario Mortini for extremely helpful comments on a previous draft of this paper, and Lizzy Ventham her cutting expertise. This was also significantly improved by comments from Jeremy Davis and Lewis Ross.

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