

were not fatal to the re-election of the governments that introduced them. There are, undoubtedly, lessons to be learned from these experiences.

What, finally, should we make of the machiavellian policy advice that can be taken from Pierson's book? It would no doubt be unrealistic to expect politicians who hope to gain or continue in office to be entirely open about their intentions for welfare state programs and their financing. Readers of *Dismantling the Welfare State* will not be surprised to learn that the part of the US Republicans' 'contract with America' that has achieved greatest acceptance in US federal government circles is the idea that the onerous task of reforming income-support programs for the poor ('welfare') should be passed to the States. Nevertheless, to build an understanding of the need for change, societies need to be reminded of the longer-term costs of the policies that they have adopted. Since politicians will not do this (or not often enough), others must. I think Australian economists have done a good job at pointing, for example, to the eventual consequences of the ageing of the population for social expenditure. In so doing, they have attracted all the unpopularity that comes to those who spoil a good party. They will need to continue to court such unpopularity.

James Cox is a member of the Independent Pricing and Regulatory Tribunal of New South Wales.

Juries and Justice

Jeffrey Abramson, We, The Jury: The Jury System and the Ideal of Democracy, Basic Books/Harper Collins, New York, 1994

Reviewed by Mike Ross

JURY service is proclaimed to be a civic duty. The zeal of prosecuting authorities acting on behalf of the state is tempered by the moderating influence of twelve jurors picked at random. But this benign view of the jury is shattered by Abramson's study of the jury system as it operates in America. Juries are blinded by prejudice, confused by procedure, distracted by lawyers and often just plain fed up. The position is probably no different in Australia and New Zealand, but we have no way of knowing. The Antipodes follow the English model: the jury is as anonymous as the hangman. Jurors' identities may not be published, their deliberations are secret, their conclusions are delivered in a curt guilty/not guilty response. The process is protected by a veil of silence.

Abramson, in contrast, has a wealth of data and anecdote to work with. American jurisprudence puts jurors into the public arena. Potential jurors' personal views go on the court record as they are cross-questioned by lawyers prior to selection of the jury pool. Concealed listening devices have secretly recorded jury room discus-

sions in academic studies on the dynamics of jury deliberations. Jurors are permitted to talk to the media about the trial, after their deliberations are completed. Removing the veil of secrecy reveals some ugly warts. Yet Abramson remains optimistic. He argues that the jury system empowers ordinary citizens to do justice. The jury marries justice to democracy, for better or for worse.

Abramson sees the jury as a bulwark against state oppression; it protects individual political, religious and racial freedoms. Freedom of speech provides an obvious example. Abramson describes as the most famous jury of all, the 1670 London jury which refused to convict William Penn of unlawful assembly by preaching Quaker doctrines on the street, despite a clear direction from the judges that the charge was proved and a guilty verdict was to be returned. The jury, split on its verdict, attempted to reach a compromise by convicting Penn and his fellow defendant on some charges but not others. The court refused to accept the verdict, and threatened to imprison the jury without food until it came to its senses. The jury returned with verdicts of not guilty on all counts. The verdicts stood, but the jurors were promptly fined for reaching a verdict described as contrary to both the facts and the law.

The phrase 'jury nullification' is used to describe juries who ignore the law and/or the facts to reach a decision according to their consciences. In such cases, juries become party to acts of civil disobedience. Early American examples include juries acquitting those rebelling against the dictates of England as a colonial power, and those who assisted fugitive slaves. More recently, jury nullification has gained notoriety as a political statement against perceived state injustices. Oliver North was acquitted of lying to Congress over illegal funding of covert operations because the jury saw him as a subordinate player, following orders from above. Marion Barry, mayor of Washington DC, was acquitted of drug charges despite overwhelming evidence against him, probably because the local jury bridled against a white political power structure that treated Washington residents as a black colony. The O. J. Simpson murder trial came too late for inclusion in Abramson's book, but this was probably another case of jury nullification: an acquittal in protest against police attitudes towards black suspects in general.

But, as Abramson admits, jury nullification has a darker side. The conscience of the community is not always pure. It permits unelected people to spurn laws passed by a democratically elected legislature. Juries decide cases according to emotion, prejudice, and sympathy more than according to law and evidence. Trials are turned into circuses; juries are arbitrary and idiosyncratic.

Abramson does not argue that juries always get their verdicts right. There are risks to democracy. But to get at the good, we must risk the bad. To get the jury that resists the tyranny of the state, we must risk our freedom on the jury that practices its own petty tyranny.

Abramson takes it as given that the jury system (warts and all) is an essential part of the liberal democratic tradition. He sees no need to explore the civil-law tradition whereby lay assessors sit with judges to try cases. Judges and lawyers trained in civil-law jurisdictions look on with amazement at the excesses of the common-law

jury trial. Those countries in continental Europe that toyed with the use of juries have, in the main, abandoned the process. There is indeed little evidence that the common-law tradition is superior to the civil law in mediating between citizens and the state. England, for example, does not have an exemplary record of fair trials for politically-motivated crimes. Since 1989, appellate courts have overturned the convictions of some 18 people previously imprisoned for alleged IRA bombing attacks. It took applications by government, through the office of the Home Secretary, to achieve these reversals. By contrast, in Italy (a civil-law country) it was investigating prosecutors who from 1992 exposed state corruption in their 'clean hands' campaign. Juries in England failed to check misuses of state power in prosecutions over terrorist bombings, while the absence of a jury tradition in Italy did not prevent exposure and prosecutions for state corruption. In fairness, it should be noted that before the 'clean hands' campaign Italy adopted a new code of criminal procedure, placing more emphasis on common-law-style accusatory hearings and less on civil-law-style pre-trial investigations.

Both the civil-law and common-law systems seek primarily to discover the truth, but they use different processes to do so. The civil-law system is an inquisitorial process, with judges, lawyers and witnesses pitching in with questions. The presiding judge controls the procedure. By contrast, the common-law system is dominated by lawyers. They control the questioning, with the judge operating as a neutral umpire, asking questions infrequently, and the jurors standing by as mute observers. The trial becomes a game of skill between duelling lawyers. Abramson explores the relationship between lawyers and the jury, commenting that the trial is a dramatic performance that will flop if the audience (the jury) is not receptive.

Lawyers as an organised lobby have achieved substantial control over the outcome of litigation in the United States. While calling for impartiality, trial lawyers move to exclude from the case any sentient person, such as those who read daily newspapers or watch news reports on television. The goal is a jury that is impartial by virtue of its ignorance. Jury consultants offer expertise in assessing the appropriate profile for an acquittal jury. Potential jurors not fitting the profile are challenged, or excluded after admitting some passing knowledge of the case or its circumstances. Moot trials are staged in advance to test presentation styles and stratagem against a mock jury chosen to mirror the attributes of the trial jury. Little wonder that American trial lawyers crow that the trial is over after the jury is selected. The English tradition is that the trial begins when the jury is selected.

Abramson picks clean the bones of the jury system as it operates in the United States. His book provides a fascinating, if not disturbing, insight into the operation of the common law jury system. It is hard to share Abramson's optimism about the jury as a democratic tool. He implies there is no better alternative to protect citizens from the power of the state; but that claim is surely open to challenge.

Mike Ross is Senior Lecturer in the Department of Commercial Law at The University of Auckland Business School.