"Penn and Mead, Ponting, Randle and Pottle and now the "Colston Four".

Are such verdicts, as Lord Devlin praised, the right of a jury to act as a long-stop against oppression by the State or was Lord Auld correct in 2001 to describe the perverse verdict as "a blatant affront to the legal process" such as to call for the law to declare, by statute, if necessary, that juries have no right to acquit in defiance of the law or in disregard of the evidence.

Amidst the predictable outpouring of disbelief and indignation following their acquittals at Bristol Crown Court in January 2022, it is worth noting that the Colston Four did not lack valid defences in their trial for criminal damage. On the contrary, they ran several defences. Those left to the jury all had an entirely sound legal basis, and may be scrutinised in the detailed written directions provided to the jury by HHJ Blair QC, the Recorder of Bristol[1]. In fact, as The Secret Barrister has pointed out, other, even more ambitious arguments were made at trial by the defence, but were rejected by the judge and therefore not left to the jury's consideration, which puts paid to any notion that the defence advocates were somehow left unchallenged to beguile the jury with all manner of legal sophistry.[2]

The Crown had the daunting task of disproving to the criminal standard - as they almost always must - each and every defence that was left to the jury. That they failed to do so is perhaps unsurprising. The not guilty verdicts subsequently returned were therefore plainly neither 'perverse' nor 'in defiance of the law.' The case of the Colston Four sits awkwardly beside those more 'traditional' perverse verdicts, as returned in cases such as that of Clive Ponting and Randle & Pottle. Those defendants truly lacked legal defences - and their juries had been duly informed of this before acquitting them regardless.

So-called perverse verdicts are therefore rare, yet attract a degree of attention that is starkly disproportionate to the frequency with which they in fact occur. (One struggles to think of the last time, prior to the Colston Four, that 'perverse verdicts' hit the headlines). I will argue in this essay that 'perverse verdicts' in themselves pose no threat to the legal process. What *does* threaten the legal process, undermine trust in the system and sow confusion is the ambiguous

[1] These directions were later helpfully set out in full in a post by legal blogger Matthew Scott, which may be viewed here: https://barristerblogger.com/

[2] www.thesecretbarrister.com

and uncertain position that the perverse verdict presently occupies within our trial system - firmly established yet not clearly and definitively articulated (certainly not recently) either in statute or caselaw. Any law seeking to prevent jurors from returning verdicts in accordance with their consciences would be unjust, impractical, and unworkable. As I will explore below, to impose such draconian consequences would risk a chilling effect on *all* juries, even if such legislation was only seldom used.

Attempting to encode a prohibition on returning 'perverse verdicts' would also raise myriad practical and procedural problems. This may in part be why, over 20 years on from the publication of his report, Lord Auld's recommendations have not been implemented in any form - though they have undoubtedly found favour in certain quarters recently. There are numerous unanswered questions. Indeed, the proposal raises more questions than it answers. Would such conduct be treated as a contempt of court? A civil wrong? Who exactly would decide what constitutes a case involving such 'overwhelming evidence?' Would it be a judicial review-style exercise, quashing not guilty verdicts '*no reasonable juror* could have returned'? Or would it be a separate criminal offence?

If errant jurors were to be criminalised, would the offence be strict liability? How would the *actus reus* and *mens rea* be worded? Would the offence be summary only? Triable either way? Indictable only? It would seem proper for a defendant to enjoy a right of election given the seriousness of the allegation, namely that they have wilfully disregarded their oath. It seems doubtful whether any allegedly recalcitrant juror would opt to be tried by a lay bench as opposed to a jury. It would be a crowning irony, and truly make a mockery of the system, if, in a criminal prosecution of a juror, or jurors, for failing to abide by their oath, another jury hearing that case *themselves* acquitted on the grounds of a conscientious objection to the prosecution. Indeed, such an outcome would hardly be unexpected. Jurors dislike unjust prosecutions; they dislike unjust laws even more. It seems likely that, in any event, robust Crown Prosecution Service Guidelines would have to be issued, which presumably would narrowly circumscribe the circumstances in which the public interest would ever require the prosecution of jurors.

The civic duty borne by jurors is already a considerable one. They are being entrusted to make - as defence advocates often tell them - what might just be the most important decision of their lives. Their professional and personal lives are put on hold for weeks, sometimes even months,

as they bring all their analytical and experiential nous to bear on the most serious criminal cases. They hear every syllable of evidence called, and then weigh it with the utmost care and attention - there is a reason Court of Appeal court judges are so reluctant to interfere with jury verdicts. In light of these demands, those deliberations should not be compromised or inhibited by the threat of either prosecution or any other equally stressful legal action. It would be an entirely unwelcome and unnecessary distraction. Either we trust our juries or we do not.

Jurors' right to return verdicts in accordance with their conscience is long established, dating back to at least 1670, with the case of Penn and Mead. Yet we are strangely - and unhelpfully - coy about that right. As David Hewitt has observed, juries are never expressly *told* of their ability to return a perverse verdict (despite the occasional occurrence of such verdicts), which may in part explain their comparative rarity. This appears to be regarded as a satisfactory compromise, even if it runs counter to the principles of transparency and open justice, and those other much-trumpeted legal virtues of clarity, certainty, and consistency. Just as jurors are not required to provide reasons for their decision - which itself many consider to be problematic, as errors of reasoning or failures to follow mandatory legal directions are thereby made impossible to identify. (And in that sense *all* jury verdicts might in their own way be considered perverse).

Despite the bold recommendation he made in his 2001 Report to effectively ban 'perverse verdicts,' it would be wrong to characterise Lord Auld's position as one of simple, unqualified opposition to jury nullification. Further exploration of his ideas in fact reveal that he was more ambivalent - and pragmatic - than that ultimate conclusion might suggest. He also acknowledges that implementing such a ban may be:

'too great a shock to the system': 'Should the law - and the juror's oath - be more honest…? Should we provide juries with an express power of dispensation or nullification, instead of just letting them get away with it, and should jurors undertake to give a verdict according to the evidence or their conscience? […]' [jurors would need to be told] *'that they need not convict if they disagree with the law or with the decision to prosecute.*

[…]

Just articulating the direction brings home the enormity of such a possible clarification of the law, but as one distinguished academic has asked, "what other way is there for an honest system to behave?"

David Hewitt, again, articulates the real nub of the problem: 'Where a perverse verdict [is] rejected, we cannot know whether that was only because jurors believed they must obey the oath they had been required to make'.[3] And indeed: why should only some defendants enjoy the benefit of a conscientious jury who may be cognisant of the noble tradition of jury nullification, whilst other, less fortunate accused must make do with a jury that earnestly and dutifully follows its oath to the letter, to the exclusion of all other considerations? (Not that those juries are necessarily blameworthy). It would be a bold step indeed to put the *right* to return 'perverse verdicts' on a statutory footing, yet on the other hand this surely amounts to no more than the system putting its money where its mouth is - and extending jurors' rights, not curtailing them.

Matt Ward
187 Chambers

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Sources

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[3] Hewitt, 'Who Says It's Perverse?