person. This is one area in which Professor Walsh expressly disavows any attempt to critique policy or practice, presumably on the ground that it would stray too far from the subject matter of this text and also on the ground that the mammoth task of such a critique has also been admirably achieved by O’Malley’s *Sentencing Law and Practice*. The concluding chapter gives an account of the various rights of appeal in criminal proceedings, beginning with appeals from the District Court, the case stated procedure under the Summary Jurisdiction Act 1857, and the consultative case stated procedure. Appeals to the Court of Criminal Appeal are covered in great detail, including the requirement of leave to appeal, consequential orders available upon such leave being sought, and the miscellaneous matters arising, such as bail, notification of parties, presence of the appellant and other parties at the appeal, and documents which may be used in the proceedings. The jurisdiction of the court, the nature of the orders which can be made at the conclusion of the appeal, and the circumstances in which such orders will be made are also given a thorough consideration. The matter of appeals to the Supreme Court is broken down and considered on a court-by-court basis, beginning with appeals by way of case stated from the Circuit Court, appeals from the Central Criminal Court, and appeals from the Court of Criminal Appeal. The book concludes with an account of the miscarriages of justice procedure governed by the Criminal Procedure Act 1993, with extensive consideration of the principles established by the judgment in *Meleady and Grogan*.4 It is somewhat surprising, however, that the author omitted to mention the most recent and high-profile miscarriage of justice in this jurisdiction, in the decision of the Court of Criminal Appeal in *DPP v Shortt*.5 Nevertheless, it should be noted that this is an isolated instance and that the book consistently makes use of the most recent cases available at the date of publication. Professor Walsh has also indicated an intention to keep abreast of the rapid rate of change in this area by publishing subsequent editions in looseleaf form, which should also allow for further discussion of some of the areas curtailed by constraints of space in this edition.

As the author notes in his foreword, “[t]he rules of criminal procedure must … be sufficiently transparent and stable for the average person to make informed decisions at each stage of his or her criminal investigation, prosecution and trial, and generally to appreciate what is happening to him or her”. Whilst practitioners immediately recognised the immense value of this book and rapidly embraced it as an essential tool in their armour, it is equally the case that Professor Walsh’s treatment of the subject makes the rules of criminal procedure more accessible to students and the general public alike. This work


represents an immense achievement for the author, and it is to be welcomed by all as a tremendous addition to the pool of knowledge on the operation of the criminal justice system in Ireland.

PATRICIA BRAZIL
Trinity College, Dublin


"Trial by jury is open to much criticism ... the habit of submitting difficult problems of fact to twelve men of not more than average education and intelligence will in the near future be considered an absurdity as patent as ordeal by battle ..."1


Dicey's verdict on the jury, as elsewhere, was excessive. But, tied up with the belief in Anglo or Anglo-American exceptionalism, much nonsense has been spoken of English law throughout its history. The shibboleths of Saxon liberty have rarely been as excessive as in the case of the jury. By the eighteenth century, the jury trial was almost universally revered by Britons, its history questionably traced to the Magna Carta. The actual origins of the jury were with the Frankish monarchy, who began a form of presentment jury (the English "grand" jury) with the role of inquest, a procedure subsequently replaced on the continent with professional Romano-canonical procedures. Through Norman borrowing, however, the jury was to have a longer, more fruitful life in England. After the Norman conquest, Henry II regularised these nascent proceedings to establish greater control over the administration of justice, first in civil trials and then in criminal trials. Similarly, the "petit" jury was first essentially a body of witnesses, called for their knowledge of local customs or of the parties or facts in dispute. It was not until the reign of Henry VI that the jury became a trier of evidence.

Neither was the image of the jury as democratic, pedagogical, and uniquely suited to rendering justice immemorial, but it was an essential element of the English cult of the "ancient constitution" as developed in the seventeenth and eighteenth centuries. It would continue to remain vital to the English lawyer’s

self image, retaining an important role wherever the common law travelled or colonised. The most notable example is perhaps the jury's constitutional status in the Sixth and Seventh Amendments of the American Constitution. This is true, too, of Ireland. But while this favourable view of the jury has had its champions here, the complex Irish experience with English law has qualified this belief somewhat. As has recently been argued:

"Jury intimidation and prejudice, distrust of the state, considerable community segregation, and the small and largely rural nature of the jurisdictions [North and South] have combined to ensure that jury trial is by no means as entrenched in Irish legal culture as in England and Wales." The awareness of Ireland's very different, equally ancient constitution may not be unimportant.

There has, of course, been a decline in the use of the jury in the last century, especially the civil jury, throughout the common law world. This is true in the number of lesser offences tried in summary proceedings before a single judge, the size of "petit" juries, and the relaxation of unanimity requirements. Ireland is no exception. In addition, unlike his American counterpart, the English and Irish judge is also long accustomed to exerting an influence through the summarisation of evidence for jury deliberation. This is but one of a number of differences within the common law. Ironically, as the common law has moved closer to civil law models of judicial management in "civil" cases, in criminal law the civil law world may appear to be converging in their increasing use of juries, though these continental juries are far from simple transplants. Much of the most interesting American work on jury reform has come from studies of continental procedures and criminal "mixed" courts of professional and lay judges or elected lay assessors.

Given its history, Ireland has greater experience than other common law jurisdictions with non-jury criminal courts. Whether or not it is accurate to conclude that "the future of the jury system in Ireland is bleak", it may be time


to look beyond the neighbouring island for potential sources of jury reform. Indeed, in the Irish context, as R.J. O’Hanlon noted a decade ago:

“The many weaknesses inherent in the present system of jury trial have led to its gradual abandonment as a means of dealing with civil claims. There is a strong case for saying that its retention in the criminal courts is in [sic] anachronism in the modern constitutional democracy.”

Unlike the proponents of the English “ancient constitution”, the contributors of *The Dearest Birthright of the People of England* take the history of the jury seriously. Published by the increasingly important Hart Publishing, the essays that make up the book were collected from the Fourteenth British Legal History Conference on “Parliaments, Juries, and the Law” in Edinburgh (July 1999). The book is edited by John W. Cairns and Grant MacLeod, professor of legal history and lecturer in law, respectively, at the University of Edinburgh. As is noted in its preface, *The Dearest Birthright of the People of England*:

“[s]hows the way (or ways) forward for further research. It demonstrates how the jury should be studied comparatively, ignoring questions of whether jurisdiction is criminal or civil. It shows how there should always be sensitivity to the relationship between rules relating to proof and the jury and an awareness of how received traditions may be challenged. Moreover, the ideological justifications of the jury are shown to have a significant impact on legal practice. Finally, the volume opens up the topic of the jury in the nineteenth century for further research.” (ix)

While there is unfortunately no Irish contribution, understandable given the focus of the British Legal History Society, the book’s contents are diverse.

Roger D. Groot (Washington and Lee University, Lexington—“Petit Larceny, Jury Lenity and Parliament”) discusses the early distinction between minor and capital larcenies. This was not, he argues, the result of the Statute of Westminster I (1275), as is commonly assumed, but had effectively developed as a rule in court practice. In determining whether a larceny was minor or capital, juries were effectively making judgments of value, *i.e.* of price, as well as value judgments. The cases of the time are thus very useful to historians, within law and without, in providing economic values for the period. The price paid for larceny could also be quite high as a common penalty appears to have been the loss of an ear! Often jurors were deciding even more and “in effect, … deciding who should live and who should die … [as well as] whether they were willing to have the defendant amongst them.” (pp.58–59).

Dafydd Jenkins (University of Wales, Aberystwyth—"Towards the Jury in Medieval Wales") explores the period before the assimilation of Welsh law with the common law in 1536. Discussing medieval rules of procedure, he notes the movement of the "designated compurgators (gwyr nod)" of Wales towards something closer to the contemporary English jury. This was the result, in part, of borrowing. Indeed, a major theme of his piece is that "[f]rom one source or another the Welsh medieval lawyers were continually finding ideas which could be applied to their own legal problems, and so grafting them onto the native stock that they would bear fruit." (p.46).

Maureen Mulholland (University of Manchester—"The Jury in English Manorial Courts") underscores the importance of manorial courts to English law. This was true both in terms of the courts' contact with ordinary individuals and in the cross-fertilisation of doctrine with the common law. In addition, the records of the manorial courts, long ignored by historians, are "an invaluable historical resource" (p.63). The different courts were part of the larger administrative and political unit. The seigniorial (or domanial) jurisdiction, intrinsic to feudal landholding, included the court baron and the court customary (the "halmote") for free and unfree tenants respectively. As Mulholland notes, this was an essentially "private" jurisdiction, while the franchise jurisdiction, that of royal grant, was of a more "public" nature. "It seems that the manorial courts 'borrowed' the jury from the king's courts" (p.68). The functions of manorial juries were essentially: "first, declaration of custom, secondly, presentment, and thirdly, deciding issues" (p.70). The decline of feudalism and the legal economy of the royal courts guaranteed the gradual eclipse of the manorial courts. 9

In his contribution, the always entertaining and erudite David J. Seipp (Boston University—"Jurors, Evidences and the Tempest of 1499") looks at run-away jurors, jury communication, and the requirements and necessary duress of jury participation. He discusses, also, the methods by which jury unanimity was secured, not least the prohibition on drinking and eating and jury confinement. "In a nutshell," he writes:

"these cases show that trial jurors in fourteenth- and fifteenth-century England, in civil and criminal suits, were virtual prisoners of the court once they were sworn. Before the trial, they were fair game for all sorts of communication of evidence and arguments by the parties and their counsel. Then, as soon as they were sworn, they were isolated and subjected to physical discomfort until they delivered their verdict" (p.75).

9. See also R. McMahon, "Manor Courts in the West of Ireland before the Famine" in D.S. Greer and N.M. Dawson (eds.), Mysteries and Solutions in Irish legal History: Irish Legal History Society Discourses and Other Papers, 1996-1999 (Four Courts Press, Dublin, 2001).
Other informative and interesting asides are sprinkled throughout the piece. Siepp notes, for example, that communication between jurors and the parties and counsel to a dispute were limited, but acceptable before trial. It was permissible, too, for the winning party to provide the jurors with a good dinner! His main focus is, however, the coercion crucial to getting the jurors to reach a verdict. In addition, this safety in numbers and uncertainty as to their reasoning helped to insulate the jurors from blame, giving them a “measure of plausible deniability” (p.91). Starved and secluded, this would not be difficult to maintain.

Richard D. Friedman (University of Michigan, Ann Arbor—“No Link: The Jury and the Origins of the Confrontation Right and the Hearsay Rule”) discusses the “rule against hearsay”. He argues that the common assumption that the rule is rooted in the demands of jury trial, recited by figures as august as Lord Mansfield, is inaccurate. Instead, the rule is rooted in “the fundamental right of a litigant, especially a criminal defendant, to confront the witness against him” (p.94). Friedman notes that this right to confrontation is not restricted to jury systems or the common law. The same idea is present, for example, in Roman law. He notes that:

“On the one hand, at the core of the hearsay rule is a noble principle that it is critical to preserve... [But the] modern hearsay rule is too poorly articulated, too broad, and too riddled with exceptions to protect that principle ideally well... On the other hand, to the extent that the hearsay rule excludes evidence where the confrontation norm is not at stake ... the justification for the rule seems dubious. Certainly the rule has significant costs, most notably in the loss of valuable information to the truth-determining process” (p.99).

More clearly than the book’s other contributors, Friedman’s purposes are not merely historical. Given recent Irish decisions on the ability of jurors to make decisions under the direction of the trial judge in cases involving a famous or notorious accused, this is a particularly fertile suggestion.10

The contribution of J.R. Pole (University of Oxford—“A Quest of Thoughts: Representation and Moral Agency in the Early Anglo-American Jury”) underscores the moral dimension of jury decisions. He argues that many changes in the jury “have not conflicted with but rather, have enabled the jury to maintain crucial attributes of this essential role of moral agency” (p.105). Representation of some pre-modern or modern variety was one of the jury’s roles, whether “petit” or “grand” jury. With the church, the judge’s “charge” to a grand jury, was a critical point of contact between centre and periphery.

state and society. Pole adds, however, that whatever the virtues of participation, community, or even consent, the pool of jurors was not egalitarian. Indeed, he notes, too, that the jury:

“is not synonymous with the word ‘justice’, and the habits of a community are not invariably derived from instincts of fairness, an ability to weigh evidence or a capacity to absorb scientific advances; a jury called together from the locality of the alleged crime could be fallible, prejudiced and ignorant” (p.129).

This is far from a merely historical observation.

James Oldman (Georgetown University) is the author of The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century (University of North Carolina Press, Chapel Hill, 1992), one of the most important works in legal history in the past decade. His contribution here (“Jury Research in the English Reports in CD-Rom”) is somewhat more minor, but links the other essays of the collection. Oldman stresses the simplicity and value of CD-Rom access to the English Reports. In illustrating the possibilities of research, he discusses the specific writ, the jury of merchants, Chancery and the special jury, and the disqualification of parties. He notes, too, how this accessibility can challenge assumptions about past legal doctrine. For example, it makes questionable the substance of the right to jury trial famously mandated in the Seventh Amendment of the American Constitution (in suits at common law involving more than 20 dollars). At least where there were difficult questions that might be beyond the abilities of the average juror, the historical record makes this “right” quite questionable.

John Cairns (University of Edinburgh) is the author of numerous pieces on Scottish legal history, especially the eighteenth century. Appropriately, his title essay focuses not on the English jury but the civil jury in modern Scottish legal history. In the early nineteenth century, the “jury trial had come to be seen not only as a defining characteristic of the (English) common law, but also as having significant political impact as a mark of liberty and freedom” (p.1). The introduction of the civil jury to Scotland, with numerous other reforms, significantly altered the character of its mixed jurisdiction. It was hoped that the oral and consequently simplifying nature of appealing to a jury would assist in separating questions of law and fact and better focus the issues at dispute. Ironically, English rigidity was a virtue in comparison to the flexibility available in the Scottish adaptation of continental procedures. The pull of “whig” rhetoric, aided in no small way by the writers of the Scottish Enlightenment, was a powerful force in an era of general European legal reform. As a result:

“[i]nstead of Scots law being a traditional set of argumentative practices,
drawing on Roman law and its commentators, natural law, statutes, and decisions, negotiated through a complex procedural structure, it was to be conceived of as a system of dynamic precedent and statutes creating national rules that were to be applied in a rational court structure that separated law from fact. Introducing the civil jury was an important part of that major transformation” (pp.13–14).

Just after its introduction to Scotland, the civil jury came under increasing criticism in England. Cairns notes the “wonderful irony” that the new civil jury’s existence may have “encouraged ... the elaboration of rules of law to avoid jury decisions” (p.15).

Drawing on his unpublished Ph.D. thesis at the University of Cambridge (2002)—“Forgery and Criminal Law Reform in England, 1818-1830”—Philip Handler (University of Leicester—“The limits of Discretion: Forgery and the Jury at the Old Bailey, 1818-21”) looks at the “forgery acquittals” of the early nineteenth century. These are normally ascribed to widespread humanitarian disgust at the death penalty, with the jury seen as acting in its role as a constitutional safeguard against government tyranny. Handler suggests more complex motives. The trials brought the role of the jurors and judges “into sharp focus. The two traditions, of modest law finding in everyday criminal trials and radical law finding in political trials, came together clearly in the crisis” (pp.165–166). In the acquittals, the jurors were expressing dissatisfaction with the evidence in cases involving counterfeit bank notes, a particularly acute problem in the early century. But:

“their effect was to undermine [the juries’] older role of modestly mitigating the severity of the law. In the ensuing decades, reform of the law of sanctions, the coming of the police and the adversarial criminal trial reduced the jury to its modern, more passive and less overtly discretionary role” (p.172).

Handler’s piece thus fits nicely with those of Cairns, Michael Lobban, and perhaps especially, Joshua Getzer. Concluding the collection, Getzer (University of Oxford—“The Fate of the Civil Jury in Late Victorian England: Malicious Prosecution as a Test Case”) writes:

“The dominance of the jury in criminal trials remains, and indeed is enshrined as a foundation of the legal polity... because of a perception that findings of wicked conduct occasioning state punishment should be inflicted only through the operation of peer or lay justice. Elsewhere, pockets of strong jury control remain only in those tortuous areas with stronger moralistic resonance...” (pp.218–219).
Thus both Handler and Getzer, in different respects, signal a decline of the jury in the nineteenth century.

Author of *Common Law and English Jurisprudence, 1760-1850*, Michael Lobban (University of London—"The Strange Life of the English Civil Jury, 1837-1914") indicates that this decline was not a simple collapse. He notes, however, that "[t]he mid-nineteenth-century press abounded with stories of the absurdities of civil jury trials" (p.174). His example must be quoted in full:

"In 1875, The Times ran a leading article on the case of Mallam v. Attree, decided at the Gloucester assizes. The defendant was a lady who had been injured in a railway accident on the Great Western Railway, and who had been taken to a hotel in Oxford for treatment, for which the company promised to pay. The company failed to pay the bill, and the hotel duly sued the woman. The jury listened patiently to the evidence and the summing up, and after an hour found a verdict of £100—against the Great Western Railway. Grove J. sent the jury back, telling them that the company was not a party to the action; and they returned some time later finding a verdict for the defendant, for £100. They were sent away again. At their third attempt, they found a verdict of £17 for the plaintiff, a small proportion of the sum claimed. The jury clearly felt that it would be fair to give the hotel something for their trouble; but, in so doing, they forgot that the lady would be saddled with the cost of the suit" (p.174).  

Worries of jury corruption, bias, or susceptibility to trial trickery were constant in the debate on jury reform. But "the civil jury remained an important part of the legal landscape throughout the nineteenth century and into the twentieth" (p.176). Lobban backs his suggestions with a battery of empirical data. He notes, too, the clash of jury ideology and practice. While the jury was, in practice, far from democratic, the belief in the sanctity of the jury was repeatedly to frustrate reform. Indeed, "reformers were seen as iconoclasts, attacking a cherished institution" (p.207). As a consequence, changes would be postponed until the early twentieth century.

As *The Dearest Birthright of the People of England* makes clear, debates on the jury have a long and complex pedigree. These debates, at least in the area of criminal law, are not likely to end soon. But Ireland's unique experience with the jury and the hesitant convergence of European institutions may permit it to escape common law provincialism or the "[f]orensic forelock touching" of these islands.  

Indeed, most of the interesting and equitable jury reforms of recent decades are arguably those of the continent and its unique "mixed"

12. "Forensic forelock touching is as much a part of the cultural cringe that has beset our country as the mimicry of English accents and manners, but it may be more..."
juries. Comparativists have often noted that the baroque rules necessitated by jury trials—especially in the cynical, if cinematic, American variant—do not guarantee truth or justice. John Henry Merryman noted (of another unnamed scholar) that:

"[h]e said if he were innocent, he would prefer to be tried by a civil law court, but that if he were guilty, he would prefer to be tried by a common law court. This is, in effect, a judgment that criminal proceedings in the civil law world are more likely to distinguish accurately between the guilty and the innocent."\(^\text{13}\)

We would do well, at least, to make ourselves better aware of the options available to us.

Dr SEÁN PATRICK DONLAN
Junior Lecturer, University of Limerick

CIVIL PROCEDURE IN THE SUPERIOR COURTS
by Hilary Delany and Declan McGrath (Thomson Round Hall, Dublin, 2001) (ISBN 1-85800-241-9) (Hardback, €236)

The Rules of the Superior Courts, even in their consolidated version, can prove daunting to the legal practitioner and the academic in the absence of an understanding of the context within which individual rules are set. For example, reference to the text of a particular rule, together with any amendment, in the absence of comprehension of the decided case law on the point will invariably prove problematic. There have, of course, been significant forays into the procedural underworld of the Rules of the Superior Courts, notably by various contributors to the Practice & Procedure periodical and, in detail, by Ó’Floinn’s Practice and Procedure in the Superior Courts. However, Hilary Delany and Declan McGrath have produced, for the first time, a truly contextual analysis of those Rules and the practice and procedure derived therefrom.

The book is thorough, focusing on nearly all the areas of the courts’ jurisdiction. Understandably, given the backgrounds of the authors, each chapter expounds the relevant principles and recent case law on particular topics in a manner easily recognisable to the academic. However, this is achieved without damaging in its long term effects.” Mr Justice Niall McCarthy, Foreword to the First Edition of R. Byrne and J. P. McCutcheon, The Irish Legal System (4th ed., Butterworths, Dublin, 2001), v.