Chapter 4 Common Law and Common Sense: Juries, Justice and the Challenge of Ethnic Plurality

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In Common Law systems, juries fulfil a crucial role as assessors of the evidence presented by the contending parties to legal proceedings, and consequently act as finders of fact. In the first place the jury is the source of that vital yardstick 'the reasonable man': the instrument through which a relevantly contextualised assessment of things done or said can be confidently and, at least in principle, reliably implemented. Secondly and just as importantly, the jury is and always has been a bastion against overweening authority (including, where necessary, that of judges), and ultimately the over-mighty power of Kings. That is precisely why the right to trial by a jury of one's peers is a key component of the *Magna Carta.*

From a thirteenth century perspective, the socio-political structure of contemporary England would be wholly unrecognisable. Not only has a parliament of commoners comprehensively superseded the powers of the Crown, but all aspects of the administration of justice are now handled within the context of a centralised bureaucracy. At the same time the role of the jury has been substantially constrained. Whilst still central to the trial process in the most serious criminal cases, it has long since been abandoned in the civil courts. Even in those cases where the presence of a jury is retained as a finder of fact, its powers have been significantly clipped in favour of a professional judiciary, whilst both its role and its mode of recruitment have been comprehensively transformed. As a leading member of the English bar put it in a contribution to the *Harvard Law Review* a century ago:

> The function of the jury continued for a long time to be very different from that of the jury of the present day. The jurymen were still mere recognitors, giving their verdict solely on their own knowledge of the

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> facts, or from tradition, and not upon evidence produced before them; and this was the reason why they were always chosen from the hundred or vicinage in which the question arose. On the other hand, jurymen in the present day are triers of the issue; they base their decision upon the evidence, whether oral or written, brought before them. But the ancient jurymen were not impanelled to examine into the credibility of evidence; the question was not discussed before them; they, the jurymen, were the witnesses themselves, and the verdict was, in reality, the examination of these witnesses, who of their own knowledge gave their evidence concerning the facts in dispute to the best of their belief (Stephens 1896: 157-58).

The transformation could hardly have been more dramatic. Where personal knowledge of the litigants and of the context within which they operated was once a positive recommendation for recruitment to a jury, it is now a ground for disbarment from that role; and where once it was taken for granted that jury members would be recruited from within the community to which the litigants belonged (and specifically from amongst their peers if the Crown was directly involved in the proceedings), contemporary practice has moved in the opposite direction. Contemporary juries are drawn at random from the population at large.

4.1 Common Sense in Medieval England

A vision of 'common sense' has always been an integral feature of the English tradition of Common Law. Over and above the commonplace observation that a central feature of this mode of legal practice is that judicial decisions are primarily based on considerations of tradition, custom, and precedent, rather than being spelled out with reference to an explicit statutory code, a central feature of the whole edifice is the role allocated to the jury as finders of fact. The basis on which they are expected to do so is quite explicit. When a judge concludes his summing up to the jury - having thus far simply fulfilled the role of referee in an adversarial contest between the prosecution and the defence - he invariably goes on to distinguish between his own role as an advisor to members of the jury on matters of law, and their role as finders of fact. Having done so he then goes on to urge them to assess the details of the evidence laid before them in the light of their own *common sense* understandings as they go about the process of reaching a verdict.

As with *Magna Carta* reiterated, a central role of the jury was to provide what we would currently identify as a democratic bastion against the overweening power of the state; a further contemporary function is to restrain the wiles of expensive lawyers employed by wealthy litigants to deploy casuistic tricks in an effort to extricate their clients from awkward

circumstances. But, if the jury are to fulfil their role effectively, one crucial prerequisite must of necessity be in place. The jury's resources of common sense - no less at an individual than at a collective level - must be sufficiently wide and deep to enable its members to place and understand the 'evidence with which it has been presented to them within an appropriate context. Only then will they be in a position to make informed and sensible judgements about its significance. It was precisely in an effort to ensure that such findings of fact would be made using an appropriate yardstick, rather than one which had been carefully constructed to the Crown's convenience, that the *Magna Carta* gave the King's subjects a right to be tried not just by a jury, but by a jury of their peers.

In medieval England the normative procedure followed in the vast majority of low-profilecases was to recruit jurors from within the local. liundred; from that perspective the provisions of the *Magna Carta* simply reaffirmed that when great magnates found themselves arraigned before the King's Justices, they would likewise be entitled to trial before a jury of their peers, rather than by royal/judicial fiat. Whilst this further reinforced the view that triers of fact were both expected and entitled to utilise 'common sense' as the basis on which they reached their verdict, it simultaneously accepted that this common sense was *not* common to the entire gamut of the King's SUbjects.

In medieval times our contemporary concept of national homogeneity was unknown. Whilst it went without saying that all the inhabitants of King's realm were his subjects, and consequently stood in a common condition of fealty to their ruler, it was equally self evident that they were far from being a homogeneous mass. Not only was fealty articulated through a feudal hierarchy, such that the population was divided into a series of clearly differentiated ranks, but the broad mass of the population lived within innumerable local communities, whose members were in turn skilled in a wide variety of occupations - all with their own distinctive customs and 'mysteries'. In the midst of such a social order, common sense was manifestly *plural* rather than singular in character, and hence specific to a multitude of differing bodies of people. The conventions of jury recruitment took direct cognisance of this condition of differentiation, and so produced juries congruent with the plural character of the social order. This had a further consequence - at least with respect to developments which were yet to come: there was no need for expert witnesses. Juries were recruited in such a. way that their members' common sense was grounded in extensive prior knowledge of the litigants and their daily *modus operandi.* Hence they were *ipso facto* expert to the issues at stake in the proceedings, as well as to the precise circumstances in which the events in question occurred. In this respect the system of justice-delivery was well suited to cope with the plural character of medieval England's socio-cultural order.

4.2 Common Sense and Ethnic Plurality in Contemporary Britain

During the course of the past eight centuries the English tradition of common law has undergone all manner of transformations, as has the character of the society whose members' doings it seeks to order and regulate. Firstly all the various components of the British social order are - or are at least envisioned as being - far more socially and ideologically interconnected than was the case in medieval England. Likewise their doings are subject to muchmore comprehensive and centralised forms of organisation and control than anyone could have imagined way back in the thirteenth century. In our current circumstances, the notion that British society is ordered around a single set of socio-cultural understandings, such that its members can safely be regarded as forming a more or less homogeneous whole, seems far from unreasonable. Hence the proposition that there is a single nationally applicable vision of 'common sense' to which everyone would in broad terms be prepared to subscribe appears, at least on the face of it, to be as sensible as it is realistic.

Indeed it is precisely on the basis of such a set of assumptions that the concept of 'the man on the Clapham omnibus' came to the fore in legal usage. Initially constructed as a descriptive representation of a reasonably educated, intelligent and thoroughly ordinary average citizen, it followed that the notion of such a person could be deployed as the model of a 'reasonable man' against whose opinions a defendant's conduct might be equitably adjudged *(McQuire v Western Morning News* [1903] 2 KB 100). To be sure the phrase deployed to identify such a person - 'the man on the Clapham omnibus' - sounds distinctly anachronistic in the context of twenty-first century discourse. Nevertheless the notion that certain matters do indeed fall within the realm of common knowledge, and that there is indeed a set of common behavioural yardsticks on which all sensible members of the population at large can be expected to agree, remains a largely unquestioned feature of contemporary legal discourse.

This view was explicitly confirmed in a series of cases heard during the course of the 1970s and 1980s, in which counsel for Afro-Caribbean defendants sought to use their right of peremptory challenge in effort to ensure that juries trying their clients' cases had some degree of racial and ethnic balance. As it happened Lord Denning had recently heard an appeal launched by two policemen facing criminal charges, and had sought to have the jury vetted to ensure that it did not include anyone who had beensuccessfully prosecuted by the police, and might consequently wish to get their own back. Denning rejected their argument with his customary clarity:

> Our philosophy is that the jury should be selected at random, from a panel of persons who are nominated at random, We believe that 12 persons selected at random are likely to be a cross-section of the people as a Whole and thus represent the view of the common man. *(R v. Crown Court at Sheffield, ex parte Brownlow* (1980) Q.B. 530)

Shortly afterwards Lord Lane LCJ also found himself addressing the issue of jury selection, but this time with respect to arguments as to whether in cases involving minority defendants, the jury should consist partly or wholly of members of that same ethnic group. Framing his analysis in terms of potential bias rather than the potential availability of special knowledge or awareness, he quoted his colleague's argument with approval before saying that English law:

> had never been held to include discretion to discharge a competent juror or jurors in an attempt to secure a jury drawn from a particular section of the community or otherwise to influence the overall composition of the jury. For this latter purpose the law provides that' fairness' is achieved by the principle of random selection. *(R v Royston James Fan!* (\989) 89 Cr App280)

Two points are worth noting here. By focussing on potential bias, rather than potential knowledge, and hence on the legitimacy of selectively discharging otherwise competent jurors, the Lord Chief Justice was able to overlook English law's long history of selecting expert juries; however in defending that position he also found it expedient to quote the Master of the Rolls' judgement - expressed in a very different context - highlighting the intrinsic fairness of random selection. However the core premises which underpin these arguments are not hard to discern. Firstly the population at large can safely be regarded as being 'unstructured' in a statistical sense - or in other words patterns of differentiation within it are individual rather than structural in character; secondly that by selecting a jury at random, its members can reasonably be expected to provide a fair approximation of the (broadly homogenous) views, knowledge and experience of the population at large.

Yet, just how sound are these 'commonsense' premises? An examination of the character of twenty-first century passengers on the Clapham omnibus would provide an effective answer to that question. Any such inspection would of course immediately highlight a salient feature of contemporary Britain: that its urban population, and most especially the urban population of the capital, is now markedly ethnically diverse. Hence the outcome of such an inspection would almost certainly reveal that only a small minority of the passengers were of indigenous ancestry; everyone else would turn out either to be recent immigrants, or failing that the offspring of such parents. British society is now significantly ethnically plural

, - and growing more so by the day. This chapter seeks to explore the conse-
. quences of our contemporary condition of plurality.

4.3 Expert Witnesses and their Role

In view of all this, can Lord Lane's *dictum* be left standing with any safety? Some fundamental issues of principle are at stake here. If justice is to be done in a society which is *de facto* ethnically diverse, should legal proceedings take cognisance of that condition of plurality? If so, how can that best .be achieved? In medieval England plurality was not a significant problem. Besides playing a much more salient role in the fact-finding process, juries were selected in such a way that their members were able - and indeed ./, expected - to draw on their own context-specific expertise: But as the social . order became ever more diverse, the role of the jury was steadily reduced. ~. The power of judges to order and control legal proceedings grew steadily greater, with the result - amongst other things - that juries lost their inves- r .tigative powers, and their role was restricted to the assessment of the evidence laid before them during the course of the proceedings. Moreover as the social order became more complex there was an ever-increasing prospect that a regularly assembled jury would lack the specialist knowledge required to make an equitable assessment of the evidence laid before them. One obvious solution to this was to make a deliberate effort to recruit an expert jury. As the inestimable Learned Hand (190 I: 41-42) noted:

> The custom was not only known but exceedingly common in the city of London throughout the fourteenth century in trade disputes .... The mayor then summoned a jury of men of that trade, and their verdict decided whether the defendant had offended the trade regulations, and upon it the mayor gave sentence ... The special jury continued as an institution of England. So we find in 1645 that the court summoned a jury of merchants to try merchants' affairs "because it was conceived they might have better Knowledge of the Matters in Difference which were to be tried, than others could, who were not of that Profession."

.However as time passed the practice of recruiting 'expert juries' in this sense gradually slipped into abeyance, to be replaced by the introduction .of a new form of evidence into the proceedings: that provided by witnesses who had not necessarily observed the events in question at first hand, but rather those whose expert knowledge and experience was such that they .were in a position to advise the court on technical matters which it was reasonable to suppose would otherwise lie beyond the knowledge and experience of lay jurymen; The key case in this respect was a dispute over the cause of the silting up of the harbour at Wells-next-the-Sea heard in 1782,

in which Lord Justice Mansfield allowed an expert witness to be called to give evidence with respect to technical issues, having ruled that:

> The general opinion of scientific men upon proven facts may be given in evidence by men of science within their own science. *(Folkes v Chard* (1782) 3 Doug KB 157)

Whilst current practice with respect to the introduction of expert evidence in English law can be traced back to that landmark decision, case law has led to the precise role and status of experts within legal proceedings being steadily more tightly specified. In doing so two issues have been of perennial concern. Firstly as to whether the experts called before the court really were experts, especially when they turned out to disagree with one another; .•. and secondly a fear that experts were beginning to play such a salient role in the proceedings that they became finders of fact in their own right, thereby potentially sidelining the whole judicial process (Jones 1994; Redmayne 2001).

Nevertheless the courts have found it quite impossible to do without experts, or even to limit the subjects which experts called before them might be invited to address. Only two restrictions have been imposed: firstly that their evidence must focus on issues germane to the proceedings, and which also lie outside the knowledge and experience of ordinary people. Lord Justice Lawton summed up this position when he ruled that:

> Expert evidence is only admissible if the evidence of the particular expert is significantly probative of issues which the triers of fact would, left with the established facts and their own knowledge, be unable to determine because they are outside ordinary human experience. *(R v Turner* [l97 5] 2QB 834)

Nevertheless his objective in staking out this position was not to extend the issues which experts might address, but rather to limit them. Considering the admissibility of psychiatric evidence in a case where the issue at stake was provocation, Lawton LJ ruled that in this particular context the issues which the psychiatrist sought to address lay "well within human experience", and hence was inadmissible. As he went on to elaborate,

> An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive

scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does (ibid.: 841~.

4.4 My own Initiation into the Provision of Expert Evidence

Many years ago I was asked to ,come to court to give evidence in a case in which a Sikh father had killed his daughter in a fit of rage having discovered that she was having an affair, and had entered a plea of guilty to manslaughter. As I recall, I received no written instructions, and so had not prepared a written report in advance; and when counsel asked that I be called to give expert evidence, the Judge promptly ruled that such evidence was inadmissible. Much has changed since then. As the years passed I began to receive a steadily mounting stream of requests from solicitors to provide expert reports about one aspect or another of the distinctive lifestyles of South Asian settlers in Britain, for use in all manner of legal proceedings in which their clients had found themselves involved. By fits and starts I began to learn how best to respond to their requests, and to ensure that I was properly instructed.

As this occurred I found that I had been led into fulfilling a more or less unprecedented role: the provision of expert anthropological evidence illuminating one aspect or another of the everyday lifestyles of South Asian settlers in Britain and their UK-based offspring. As information about my availability spread by word of mouth, the frequency with which I received instructions began to grow exponentially. I have by now prepared around 400 reports in cases spread across all manner of proceedings in the civil, criminal, family and asylum and immigration courts. Although a number of other anthropologists have also begun to dip their toes into this pool, there are nevertheless good grounds for believing that at present there is no one more experienced than myself when it comes to the preparation of expert anthropological evidence for use in mainline English legal processes, as opposed to the narrow world of asylum and immigration tribunals. However my entry into this career path was in no sense pre-planned: I have arrived at my current position simply as a result of receiving a steadily rising flow of instructions. My central objective in this chapter is consequently to step back and take stock of the position in which I have found myself, and in doing so to take the opportunity to reflect critically on my experience of fulfilling what appears to be a largely unprecedented role.

4.5 On Becoming an Expert Anthropologist

When I was first blundered my way into this field I was profoundly inexpert in legal terms. Besides having no legal qualifications, I soon found that there were no obvious precedents around which to build my practice.

Moreover at that stage I was unaware that anthropological evidence differs significantly in character from that provided to the courts by fellow professionals in the human sciences such as psychologists and psychiatrists, and even more so from that offered to the courts by the usual run of forensic scientists. I consequently found myself embarking on a fairly steep learning curve with respect to the limitations and expectations of English Law, together with the arcane mysteries of court proceedings. As a result I now have a great deal of experience of acting as an expert - as opposed to an academic - anthropologist. Whether I can claim as much competence in the former role as I can in the latter will be for the readers of this chapter to decide.

As I settled into my role, I soon realised that whilst lawyers had gone to great lengths to establish the parameters within which experts in general were expected to operate, the role is nevertheless surrounded by all manner of contradictions. Hence, for example, the current rules make it quite clear that the expert's duty is to provide an objective professional analysis to the court, and most emphatically not to seek to advance the interests of the party by whom one has been instructed. However I soon began to realise that as soon as one appears in court to give evidence in person - as opposed to preparing a written report - this ideal is promptly undermined by the adversarial structure of proceedings. Having stepped into the witness box one is examined, cross-examined and re-examined just like any other witness. In no way is one's opinion treated as objective: cross-examiners routinely assume that the expert's position is partial to the interests of those instructing him - as is indeed bound to be the case. His evidence would not have been disclosed, nor would he have been called to give evidence in person, unless his conclusions did indeed serve the purposes of those instructing him. Like it or not, experts find themselves caught up in the tactical battles waged between the contending parties.

In the midst of such battles any suggestion that one is fulfilling the role of an objective servant of the court begins to feel entirely fictitious: rather one becomes a bagatelle in a complex tactical game, which becomes yet more surreal when the judge himself gets drawn into the fray. To make sense of the arcane debates which developed about the admissibility of my expertise (but from which I was excluded except in one case where the judge decided to hold a *voire dire),* I decided that I had no alternative but to do some serious legal homework.

4.6 The Status and Admissibility of Expert Evidence

Although an expert who appears in court has the status of a witness, one is nevertheless a witness of an unusual kind. Unlike a witness of fact, the expert will not normally have witnessed the things said or done with his own eyes. Rather the expert's role is to produce an expertly informed com-

mentary on the evidence which has been set before the court by other first-hand witnesses. In other circumstances, evidence of this kind would be excluded as hearsay. However in the expert's case this rule is of necessity set to one side. Without such an exception the expert would not be in a position to express an opinion on the facts of the case, for to do so would be to trespass on the role of the jury. Nevertheless in doing so experts in general,and anthropological experts in particular, come perilously close to superseding the role of the jury as finders of fact. Hence whilst there are in principle no limits to the matters outside "ordinary human experience" counsel may invite an expert to address, clear limits have been set as to how far one can go in addressing them. As Lord President Cooper put it:

> Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the function of the jury or Judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgment of the court. Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the application of their criteria to the facts proved in evidence. The scientific opinion, if intelligible, convincing and tested becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the Judge and jury. *(Davie* v *Magistrates of Edinburgh* [1953]SC 34)

Yet, despite confidence with which such formulations may be expressed from the bench, all sorts of complications and contradictions begin to emerge when efforts are made to put them into practice. Indeed, as Learned Hand noted in an incisive commentary penned over a century ago, there are several senses in which theadversarial system renders the role of the expert witness thoroughly anomalous - and sometimes impossibly so. With this in mind it is worth summarising the core of his arguments:

> The real question that arises is how to put at the disposal of the jury the knowledge of experts in the decision of the issue.... it is not as a witness of facts at all that his position is peculiar; it is because as an expert witness he is allowed to testify to his conclusion from the facts, which he has either himself observed or which are in evidence from the testimony of others. His position is only peculiar in that a common witness is forbidden to testify to conclusions .... the history of ... expert witnesses ... [is] simply the history of the exception in his favor to the rule that witnesses shall testify only to facts and not to inferences (Hand 1901: 43-44).

But as he promptly goes on to note, this precipitates contradictions between the role of the jury and that of the expert. Hence although "it is the jury that should form the opinion, make the conclusion and say truly - *vere dicere* - as to the facts, whilst the witness merely says what he knows" (p. 44), this careful distinction collapses as soon as one goes on to subject the interpretative role of the expert to detailed examination. Noting that the expert does not comprehensively usurp the role of the jury, for its members retain the capacity to reject the expert's testimony if they so choose, Hand nevertheless firmly reminds his readers that even though the jury may have the last word, "the important thing and the only important thing to notice is that the expert has taken the jury's place if they believe him" (p. 52).

Likewise Hand goes on to put his finger on precisely the dilemma which I myself experienced as soon as I stepped into the witness box:

> When an expert is on the stand what are the methods resorted to? Quite the same as when it is a witness. He is first examined in chief by the side which calls him. Assuming he has no direct evidence of facts to give, he must be plied with hypothetical questions, at as great length and in as great detail as seems necessary ... Assume that the expert has testified to a certain number of propositions expressing such general truths; he is then handed over to the opposite side for cross-examination.
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> There are two and only two possible efforts which the cross-examiner will make. First, he may seek to bring out other general propositions favorable to his contention; second, he may seek to shake the validity of those already testified to. Similarly when it comes the turn of the opposite side to submit evidence, it has the same two possible objects, to introduce evidence showing the invalidity of what the opposite experts have said, or to bring out other general truths favorable to them.
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> The trouble with all this is that it is setting the jury to decide, where doctors disagree. The whole object of the expert is to tell the jury, not facts, as we have seen, but general truths derived from his specialized experience. But how can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own'? It is just because they are incompetent for such atask that the expert is necessary at all (pp. 53-54).

Although Learned Hand went on to argue that if justice is adequately to be done in circumstances of this kind, it would make good sense to refer the matters in dispute to a board of experts acting as an advisory tribunal, whose conclusions would in due course be forwarded to the trial jury as expert evidence, that is not a soiution which judges or lawyers have found in any way attractive, not least because it would lead to the establishment of tribunals that would be beyond their immediate control, such that they would be capable - at least in their view - of causing all manner of chaos. **In** these circumstances some judges have sought refuge in the proposition

that far from being the objective experts they claim to be, such persons are merely hired guns, only too willing to advance the interests of whoever is providing them with their fees. This was precisely the position taken by Sir George Jessel MR in a case heard towards the end of the nineteenth century. On the grounds that dissention amongst self-professed men of science could only be caused by financially-driven partisanship, he adopted a stance of extreme scepticism:

> _.Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves witnesses, rather considering themselves as the paid agents of the person who employs them. *(Abinger* v *Ashton* (1873) L.R. 17 Eq. 374)

4.7 The Status **of Anthropological** Expertise

Much has changed since Learned Hand grappled so illuminatingly with these issues a century ago. The scope of scientific understanding has increased by leaps and bounds, and along with this there has been a growing public awareness of the necessarily tentative nature of scientific hypotheses. Hence however much the courts might wish to be provided with an incontestable, scientifically justified account of the truth of the matter, experts invariably offer an *interpretation* of the evidence laid before them. In these circumstances differences of opinion between experts do not invalidate the exercise, but are an integral part of it - and best resolved by means of informed debate amongst those who know what they are talking about. If, however, the courts turn their back on allowing such debates to take place on expert rather than on legal terms, inexpert juries will find themselves placed in the invidious position of being required to choose between doctors who disagree. How, then, are they to resolve the issues? Much of the chaos precipitated by the way paediatric expertise was handled in recent cases where infant deaths were alleged to have been caused by 'shaken baby syndrome' and/or by 'Munchausen's Syndrome by Proxy' appears to have been precipitated by the courts' poor handling of the expert evidence laid before the jury.

The presence of plurality raises a yet more complex set of issues, not least because it raises a further set of questions as to how far, and in what sense, it is legitimate to identify social anthropologists as 'men of science' in the sense understood by lawyers. We must of course be careful of anachronisms here. As Jones (1994) shows in great detail, the rapid development of the role of the expert witness that followed Lord Mansfield's decision in *Folkes v Chard* took place on the back of a wave of nineteenth century enthusiasm for the wonders of science and technology. Not only do all the

early legal sources consequently reflect nineteenth century understandings of the term 'science', but contemporary scientists' definitions of what their science is about frequently differs radically from those advanced by their forbears. That is certainly true of anthropology. To this also must be added the fact that few if any of the lawyers who become engaged in courtroom debates about the role and status of expert witnesses have had any training in the sciences, let alone the social sciences. This causes particularly acute problems with respect to the issues which concern us here. Even if most (but not all) lawyers and judges are now aware that anthropology is a discipline whose exponents are involved in a much wider range of activities than 'measuring heads', few can go much further than identifying the discipline of Social Anthropology as having something to do with the study of cultural practices. But whose cultural practices? And in any event, what sort of phenomenon do the courts, let alone contemporary anthropologists, have in mind when they use the term culture?

In my experience the vast majority of lawyers rely on popular understandings of what culture and ethnicity are all about, and use them to identify the kind of issues which it is reasonable to expect an anthropological expert to address. My experience suggests that anthropologists are routinely assumed to be primarily concerned with cultural alterity, and hence with the cultural practices of non-European people. A central consequence of this vision - which, to tell the truth, the anthropological profession has as yet done remarkably little to mount a public challenge - is that 'our' behaviour (in other words, the behaviour of members of the indigenous majority) is regularly assumed to be normal and hence a-cultural, with the result that it is only behaviour of non-assimilated members of Britain's non-European minorities which is significantly conditioned by 'culture'.

Secondly, and equally erroneously, it is routinely assumed that culture is a static and determinate set of rules which govern the behaviour of such persons, and that the mindless application of these rules can consequently precipitate all manner of pathological outcomes. Examples of such outcomes include forced marriages, exorcisms and honour killings, which are in turn held to arise when young people who have been exposed to more advanced notions of personal freedom as a result of their British upbringing seek to liberate themselves from the oppressive and authoritarian cultural restrictions imposed on them by their parents.

Whilst there is undoubtedly a grain of truth in such stereotypic understandings, the real world invariably turns out to be a great deal more complex. Hence the contents of my reports invariably come as an eye-opener to those instructing me, not least because they include detailed analyses of inter-personal relations within the extended families within which a disaster of one kind or another has occurred, and show that whilst cultural factors invariably condition behaviour, they rarely *determine* it. More-

oyer my reports regularly highlight the complex and sophisticated ways in which members of the younger generation navigate their way into and out of a range of differently ordered socio-cultural arenas, including those dominated by the native English; and as I sketch out these manoeuvres, it soon becomes apparent that those with the requisite navigational skills constantly re-order their behaviour .as they move through a varied range of cultural contexts, further illuminating my point that culture *conditions* behaviour. .

It goes without saying that all sorts of thoroughly familiar inter-personal contradictions can arise in the midst of all this, some of which sometimes get entirely out of hand. Domestic violence - up to and including homicide - is a universal phenomenon. Nevertheless the precise dynamics of the processes which lead to such outcomes is invariably far distant from the naive visions of 'adjustment problems' and 'culture conflict' from which most external observers - including those instructing me - all too readily assume will lie at the heart of such 'ethnic cases'. For those seeking meaningful explanations of otherwise bizarre behaviour, such an analysis can be a godsend, although one that immediately poses a challenge as to how to present such matters to the jury. By contrast those with a preformed opinion about the significance of the events in question, and who have consequently commissioned an expert report to confirm a hypothesis to which they are already committed - as has often been the case when I have been instructed by the prosecution - invariably find such a response most disconcerting.

4.8 Issues of Admissibility

However, the preparation of a report in response to a solicitor's instruction is one thing; ensuring that it is accepted as admissible as expert evidence and put before the court is quite another. There are several potential hitches along the way. In the first place counsel may well come to the conclusion that it would not be advisable to place the report before the court, either because he takes the view that doing so would not be tactically advantageous, or because he fears that the judge may regard it as inadmissible; secondly, even if the report crosses that hurdle, the judge may indeed rule that its contents are such that it cannot be accepted as admissible. As I have gradually come to realize, in the eyes of many lawyers anthropological evidence often sails very close to the wind in terms of admissibility. We need to consider why.

As we have seen, judges have taken great care to guard the boundary between the role of the expert as a commentator on, and potential illuminator of, the evidence placed before the court, and their own and the jury's role as finders of fact. As Lord President Cooper put it in his *dicta* quoted earlier. the expert may not usurp the function of the jury or of a judge

sitting as a jury. But whilst there are obvious strategic reasons why judges should be so keen to sustain this distinction, it is far less clear as to how far this can be sustained in practice without compromising the prospect of delivering justice on an equitable basis in the context of an increasingly plural society. A case study will serve to underline the point.

4.9 Regina v Jameel Akhtar

Jameel Akhtar found himself in court, charged with conspiring to import 20 kilograms of heroin into the UK. Ironically enough, the consignment of heroin in question had actually been imported into the UK by Customs and Excise in a 'process known as 'controlled delivery'. As such it was one of a whole series of operations designed, at least in principle, to enable Customs Officers to identify and prosecute major importers of Class A drugs into the UK. The case presented by Customs - who at that stage were still entitled to bring prosecutions themselves, rather than routing them through the Crown Prosecution Service - ran as 'follows: .

> A Drugs Liaison Officer attached to the British High Commission in Islamabad reported that a Participating Informer with the code-name 'Mark' reported that he had been asked to act as a 'mule' by transporting a consignment of heroin to the UK. In return for a substantial reward, 'Mark' agreed to allow the DLO to tape-record a series of telephone conversations between himself and the supplier in Pakistan, and to notify the DLO as to when and where he would take delivery of the consignment, so enabling the DLO to surreptiously observe the hand-over.
>
> Some days later Mark handed over the consignment to the DLO at the High Commission in Islamabad, where the consignment was weighed and sampled before being flown to the UK, as was Mark. On arrival in the UK 'Mark' was set up in a ready-prepared Customs safe house in Birmingham, along with the consignment of heroin. From there 'Mark' made a number of telephone calls to the defendant (which were again recorded by Customs and Excise), as a result of which Jameel eventually agreed to meet 'Mark' in the car-park in Birmingham New Street station.
>
> When they met in the station car-park, 'Mark' opened theboot of his car, and handed a hold-all to the defendant. At this point a party of Customs Officers who had concealed themselves behind neighbouring vehicles stepped forward and arrested the recipient, accusing him of importing the consignment of 20kg which was found in the holdall. On being questioned Jameel vigorously denied having anything to do with the importation of drugs, and insisted that 'Mark' was merely a friend. of a friend who had phoned him up to seek his assistance in starting up a business in herbal medicines. He did not open the holdall after it had

sible. The proceedings went ahead. Jameel was duly found guilty, and sentenced to thirteen years imprisonment. Moreover, his defence team had no greater success when the matter was taken to the Court of Appeal, which roundly supported the trial judge's decision to exclude my report from the proceedings. The arguments put forward by Buxton **LJ** to justify his decision are worth quoting in full:

> It is difficult to summarise Dr Ballard's report and we will not seek to do so, save to say in very brief terms that first of all Dr Ballard sought to analyse the conversations between Mark and Mr Akhtar and to indicate how they fitted into the cultural background of those taking part, and how therefore that might reflect on the alleged credibility or content of those conversations; and also gave extensive evidence, or wished to do so, about cultural and social aspects of life and politics in Pakistan: the importance that would be attached to persons like the Khans, the dangers for a man like Mark of double crossing them as Mark, in effect, said he had done in this case, and the extent to which unfair practices took place in Pakistani politics, such as Mr Akhtar alleged had been his fate in this case.
>
> The judge was clear that none of it should be admitted .... The substance of the judge's ruling was that in so far as the evidence went to an issue in the case, it concerned issues that were for the jury to decide.
>
> Mr Enright [counsel for Akhtar] has stressed the different cultural background of the jurors in this case and those concerned in events in Pakistan. That is true, but juries in this country often find themselves trying cases of this sort, and with assistance from the judge, such as the jury certainly received in this case, they are able to do that perfectly fairly. None of the issues in this case are unusual.
>
> Again, as was pointed out in argument, it is not the prerogative of Pakistan or of any country for it to be the case that to cross an influential drugs dealer is something that is only done with caution and trepidation. Nor will it be surprising to people in any country that there may be political plots which lead to events such as Mr Akhtar alleged to have happened in this case. To that extent, therefore, the judge was quite right to think that the additional evidence of Dr Ballard would not add anything in substance; quite apart from the fact, and we emphasise the judge did not rely on this, that Dr Ballard's evidence, no doubt, would have been met by other evidence from other anthropologists or other universities, an accretion of evidence that would be wholly unjustified.
>
> We further say, however, for the avoidance of doubt, that insofar as Dr Ballard's evidence was going to be relied upon by the defence to seek to elucidate the truth or plausibility of what Mr Akhtar gave as the explanation of his various conversations with Mark, we consider it was inadmissible in any event. *It was or would be evidence seeking to support the credibility or truth of another witness* [my italics]. This was nothing to do with the evidence of Mr Akhtar's psychology, state of mind or anything of that sort. It was evidence of cultural background which, in our judgement, would not be admissible in any event when the issue in the case was whether when they met on those occasions Mark and Akhtar had been discussing heroin or herbal remedies: a matter in our judgement not illuminated at all by any expert in any discipline whatsoever.
>
> It was for the trial judge to decide whether Dr Ballard should be allowed to give evidence. He was entirely right in not admitting his evidence. *(R v Akhtar* Case No. 970l082/Z2, Court of Appeal Criminal Division, lO March 1998)

In the light of the analysis set out earlier in this chapter, the grounds on which the Court of Appeal confirmed the trial judge's decision to exclude my evidence is quite clear. Whilst the learned judge was mistaken in suggesting that my report was primarily focussed on the behaviour of the defendant, for by far the greater part of its contents focussed on the activities of the PI Mark, he nevertheless concluded that in so far as my report provided an analytical commentary on the things said and done by another witness to the proceedings, I had strayed into territory in which the jury alone could legitimately operate. Hence my evidence was of necessity inadmissible.

However in so ruling, the learned judge also appears to have accorded the jury hearing this case - and other cases like it - with something close to superhuman powers. Hence even though counsel at the trial had sought to persuade the judge that the jurors might have difficulty in appreciating evidence which was set within a cultural and linguistic context with which it was most unlikely they would be in any way familiar (the case was in Worcester, a city with an insignificant South Asian population), Lord Justice Buxton strongly supported the trial judge's rejection of such arguments. Moreover he also took the opportunity to insert a further objection of his own, namely that if the appeal was to be allowed, there was a prospect that evidence of this kind "would have been met by other evidence from other anthropologists or other universities, an accretion of evidence that would be wholly unjustified."

But whilst his Lordship may have been echoing the fears of his predecessor Sir George Jessel, there can be no dispute that English juries do indeed regularly find themselves trying cases of this sort. Is it really the case, as the learned judge confidently went on to assert, that with assistance from the judge, such as the jury certainly received in this case, they are able to fulfil their task perfectly fairly?

4.10 The Issue Comes Back to the Court of Appeal

In the goodness of time this confidently-expressed opinion turned out to be erroneous. In 2005 this case, along with four other similar 'controlled delivery' cases came back to the Court of Appeal, where all the convictions were quashed *(R* v *Liaquat Ali and others* [2005] EWCA Crim 1783). Lengthy investigations conducted by the West Midlands Police and the Criminal Cases Review Commission (CCRC) generated a great deal of new evidence, which placed that evidence heard at Jameel's trial in an entirely new light. In the first place it emerged that 'Mark' was no mere bystander drawn into a conspiracy between Jameel and Abdullah by happenstance: on the contrary he had fulfilled the role of Participating Informer many times before, and he had been paid £12,000 (a princely sum in a Pakistani context) for his time and trouble in 'exposing' Jameel. Nor was the supplier unknown to Customs and Excise. On the very day when Jameel was arrested in Birmingham, there was a meeting between Abdullah Khan and two DLOs at the High Commission in Islamabad to discuss the implementation of two more Controlled Deliveries to the UK. What is more, in four Controlled Deliveries conducted during the previous year in which Abdullah had been the supplier and Mark the courier, the consignments had been seized by Customs Officers. There were also strong indications that the 'samples' extracted from the consignments by Customs Officers had in fact been in the kilogram range, and had subsequently 'disappeared'. As a result of all this (and much more besides) the Court of Appeal not only took the view that severe doubt consequently had to be cast on any evidence provided by Mark, but also roundly castigated Customs and Excise for its failure to make adequate disclosure of evidence in its possession during the course of the trial. Hence Lord Justice Hooper concluded that:

> Having reviewed the evidence in this case, the nature of the material that was not disclosed and the conduct of HM Customs and Excise, we are satisfied that Akhtar did not receive a fair trial. The undisclosed material could well have resulted in an acquittal. *(R v A* [2005] EWCA Crim 1788)

To put all this in context, it is worth noting that the Court reached similar conclusions with respect to all the 'controlled delivery' appeals which it was considering - although not before all those involved had served lengthy terms of imprisonment. Moreover, it did so primarily on the grounds that the Customs and Excise officials dealing with the appeal process, no less than those responsible for implementing the deliveries and following the cases through to trial, had systematically abused due process. This had further consequences. In an additional judgement delivered in 2005, the court set out a comprehensive critique of the obstructive manner in which Customs and Excise had responded to those involved in the appeal process, leading to the conclusion that:

> In our view the respondent should have taken a proactive role with the Criminal Cases Review Commission. That overworked body should not have been expected to undertake over a period of 3 - 4 years the laborious and difficult task of untangling the evidence about Controlled Deliveries. The respondent should have done that and finished the task by about early 2001, thus saving the CCRC from spending so much time on these cases. It was the respondent's task, on the unusual facts of this case, to assess the safety of the convictions, not to allow another body to carry out the task for it.
>
> We have no doubt that the respondent has not conducted these appeals properly within the meaning of the Regulation. That has had two consequences. A huge amount of the time of this Court has been wasted - it has taken more than 20 hearings to dispose of these appeals. For that there is no remedy. The second consequence is that the legal aid fund has been significantly depleted when it ought not to have been. *(R v A* [2005] EWCA Crim 2598)

With this in mind, the court ordered Customs and Excise to pay 70 per cent of the appellants' costs, noting that this was merely a rough 'ball park' figure, and that if the figure was wrong, then it was too low rather than too high. It also specified the High Court Judge by whom the expected flood of claims from those who had been wrongly convicted should be heard. Nor was that all: on 7 April 2006 three of the Customs Officers involved in the Controlled Delivery programs were found guilty of a series of serious criminal offences, including collaborating with a drug smuggler on the run from justice, allowing at least 1.7kg of heroin to be sold in Leeds and Bradford, permitting heroin suppliers in Pakistan to receive a share of customs reward money funded by taxpayers as well as cash from street sales in Britain, and planning how to break rules covering informant handling and undercover smuggling operations.

Even so, it is not so much the seriousness of the system-failure to which these cases gave rise on which I want to focus here, but rather the reasons why the failure happened in the first place. With that in mind, two specific questions go to the heart of the original cases which were brought to trial. Firstly, how was it that what the Court of Appeal subsequently described as "a gentlemen's club of Drugs Suppliers and Participating Informers acting together and to the benefit of each other in Pakistan" managed so successfully to run rings round the Islamabad DLOs? Secondly, since it was subsequently discovered that those DLOs succumbed to the temptation to reach into the honey-pot themselves, how was it that during the course of

repeated trials in criminal courts in the UK, counsel, judges, and juries failed to smell a rat, and to realise that the cases presented to them were merely put-up jobs based on severely flawed evidence? Could this happen again? With this in mind it is also worth noting that although the Court of Appeal has found that the reservations about 'Mark's' role which I set out in my report were in fact entirely sound;' Lord Justice Buxton's strictures about the inadmissibility of anthropological evidence remain untouched, at least in principle. It is hard to resist the view that if my evidence had not been excluded from the proceedings by the trial judge, there is an excellent prospect that Jameel Akhtar, as well as the victims of numerous parallel sting operations, would have avoided many years of wrongful imprisonment.

4.11 Wider Issues: The Implementation of Justice in Contexts of Ethnic Plurality

Although ethnic plurality is in no sense a novel phenomenon in either English or British contexts, its current salience may well be unprecedented. What cannot be denied is that given the scale of immigration during the past half-century, the social, cultural, linguistic and spatial distance of their countries of origin, together with the settlers' capacity to keep in touch with and to reproduce their own distinctive lifestyles in the aftermath of settlement, the courts now find themselves facing challenges of this kind with unprecedented frequency (Ballard 2006). As a result finders of fact- be they judges or juries - frequently find themselves expected to adjudicate in the proceedings where those involved routinely utilise a language other than English as a vehicle of communication. Moreover even when they have gained fluency in English, as is increasingly the case, settlers and their offspring frequently continue to order their inter-personal relationships in terms of premises and conventions which differ sharply from those routinely deployed by members of the indigenous majority. With such considerations in mind I would be the first to agree with Lord Justice Buxton that none of the issues raised in *Jameel Akhtar* were intrinsically unusual. But how far is the corollary which he so confidently goes on to assert - namely that with assistance from the judge, which they certainly received in this

3 Whilst my report was included in the documents considered by the Court of Appeal and the Criminal Cases Review Commission, there appear to have been two reasons why it was overlooked. On the one hand the CCRC appear to have deliberately avoided the problems associated with making a direct challenge to Lord Justice Buxton's ruling, given the complexity of the issues which were already on its plate; and secondly because the Court of Appeal decided for strategic reasons to focus primarily on the issue of due process.

case, juries are able to deal with the underlying cultural issues perfectly fairly - actually justified in practice?

In addressing such issues, it is self-evident that the capacity of lay juries to fulfil their role adequately will always be strongly conditioned by the effectiveness of the trial judge's instructions as to the basis on which they should set about their task; but no matter how clear those instructions may be, the jury's capacity to implement those instructions will be even more critically dependent on the quality of the evidence laid before them in the course of the proceedings, as well as the quality and character of the experiences and understandings on which the twelve jurors are in a position to draw in the course of reaching their verdict. However given the crucial role of *evidence* in this process, this raises a much wider range of issues than questions about whether - and in what format - anthropological insights should be made available to the jury. Similar questions also need to be asked with respect to all the other officers of the court - from the police officers who conducted the investigations which generated the evidence in the first place, through the solicitors and barristers (both for the prosecution or the defence) who considered the evidence and worked up a case, and finally the judges themselves. As things stand at present, how far are all these contributors to the judicial process adequately equipped to get to the bottom of actions and events conceived and implemented in linguistic and cultural contexts with which they themselves are unfamiliar?

With that in mind the core issue with which this chapter is concerned can be starkly formulated: was the sorry tale of the ease with which the courts were hoodwinked in the course of Customs' controlled delivery operations simply an exceptional one-off? Or were the underlying issues exposed in this particular case symptomatic of a much wider set of problems, and in that sense merely the tip of an iceberg? My experience is driving me inexorably towards the latter conclusion. But even though - or perhaps it would be better to say precisely because - members of the jury are the only non-professional participants in the whole process, they nevertheless have a crucial role to playas whistle-blowers. From a historical perspective speaking up on behalf of the common man in the face of the overweening power of the state has always been a central feature of the role of the jury. It is a role which is no less important today than it ever was, but can only be implemented if the jury is given adequate tools with which to work.

4.12 The Challenge of Plurality

Yet although the jury's role as purveyors of 'common sense' remains as central to the Common Law as it was when the Norman Conquest led to the consolidation of the English state under the purview of the Crown a full millennium ago, the organizational context within which juries now operate has changed almost beyond recognition. Firstly the powers of the

Crown have been transformed. Duke William and most of his immediate successors would doubtless have been astonished had they been informed of the success with which an initially merely advisory Parliament has by now managed to encroach on the personal powers of the monarchy, so much so that occupants of his throne have by now been reduced to little more than figureheads; nevertheless I have little doubt that the compilers of the Doomsday Book would have been astounded by the thoroughness with which officials based in the Palace of Whitehall have by now managed to extend their administrative tentacles into so many nooks and crannies of a far more populous and affluent United Kingdom. To be sure the state may now be democratically rather than autocratically constituted: but as Lord Bingham (2006) has recently reminded us, in the absence of the most careful scrutiny of the powers at its command, even the most nominally democratic governments can all too easily convince themselves of the righteousness of iniquitous policies and practices. That is why the constraints formally imposed by its subjects on the autocratic powers of the Crown in the *Magna Carta* remain as significant today as they were in the thirteenth century.

Moreover the dramatic changes in the character of the population over which the Crown now exercises its powers yet further reinforces the significance of those constraints. When Duke William successfully imposed his rule, it was taken for granted that juries would and should be drawn from members of the immediate community to which those in dispute with one another belonged, and that the more they knew about the litigants beforehand, the better. The jury's 'common sense' in this context did much more than underline its members' unanimity in reaching their verdict; it was also grounded in its members collective awareness of the customs and conventions of the locality, as well as of the background and personal characteristics of the litigants themselves. In such circumstances it followed that other than in terms of a common appreciation of the broad principles of English justice, there was nothing uniform or standardised about the grounds on which juries arrived at their verdicts. Rather each jury delivered a common-sense verdict on a contextually-grounded basis specific to the case in hand. The plural character of the wider social order within which those verdicts were articulated were simply taken for granted, and as such merely part of the scenery.

Since then much has changed. In the first place the delivery of justice has been brought under steadily greater central control: besides having been required to cede a substantial degree of autonomy to a professional judiciary, the twelve jurors' collective common sense is no longer held to be _ nor expected or even allowed to be - rooted in a personal appreciation of the details of the specific context from which the litigants in the proceedings before them are drawn. Quite the contrary. In addition to being expected to disqualify themselves if they are personally acquainted with any of the litigants, jurors are recruited at random from amongst the population at large, such that they are 'likely to be a cross-section of the people as a whole and thus represent the view of the common man.'

In a world where sample surveys are regularly used as a dipstick to establish public opinion, the use of a random sample as a means of establishing the views of the common man may well appear to be a matter of common sense. Nevertheless there are good grounds for suggesting that where the object of the exercise is to select twelve persons to fulfil the role of finders of fact in a criminal trial, such a procedure must be regarded as intrinsically problematic, for reasons with which any statistician will be immediately familiar. The more the population from which the sample is drawn departs from a condition of homogeneity, the more difficult it becomes to claim that the one drawn is *representative* of the population as a whole. Moreover the smaller the size of the sample (and from a stochastic perspective 12 is an extremely small number), and the more salient and complex the diversities within the population in question are known to be, the larger those difficulties will loom.

Moreover even if statistically representative juries could be constructed, it certainly does not follow that this would be sufficient to deal with the specific issues at hand. The problem is best exposed by asking a simple question: of what are such juries expected to be representative? Of 'the common man' in the sense of the collective mean of the perceptions and understandings of the population at large? Or as a mode of jury selection which generates a reasonable (although in most circumstances only a remote) chance that at least one jury member will be familiar with the relevant cultural context? Moreover even if either of these outcomes was achieved, would that be a sufficient means of addressing the issues at hand? Does it make sense to expect the jury to use some kind of 'average' yardstick to assess the reasonableness or otherwise of behaviour articulated within the context of a plural society? I think not. And even if by some fortunate happenstance one member of the jury was familiar - or at least claimed to be familiar - with the cultural context within which the events in question were set, is it either reasonable, or even appropriate, to expect that the remainder of the jury will turn to, or that they will rely on that person's 'expert' understanding in reaching their verdict? Or is it more likely - given the sharpness of the contradictions surrounding ethnic plurality in contemporary Britain - that a sole dissenting voice of the minority juror would simply be overridden by the settled views of the dominant majority?

The dilemma is clear. Although experts now make ever more frequent appearances in the courts to testify on all manner of scientific, technical, professional, medical and psychiatric matters in cases where some of the issues at stake in the proceedings are deemed to be 'outside ordinary human

experience', great uncertainty still surrounds the extent to which any of the issues associated with Britain's current condition of ethnic plurality can legitimately be so described. As a result the admissibility of expert evidence with respect to the specific character of the social, cultural, religious, familial and linguistic practices within minority communities, and on their likely impact on litigants' behaviour currently rests under a cloud of uncertainty. Hence the central paradox with which this chapter is concerned: whilst the social order which English Law seeks to regulate has grown steadily more plural, the ancient institutional means of providing a remedy against injustice in plural contexts has fallen into what appears to be irremediable abeyance.

4.13 Expert Anthropologists to the Rescue?

Now that expert juries have been comprehensively replaced by expert witnesses, it would seem reasonable - at least in principle - that those able to spell out the specific features of the relevant social, cultural, religious, familial and linguistic context would be routinely regarded as the most appropriate source of expert assistance to finders of fact (be they juries in criminal cases or judges in civil and family contexts) as and when that might seem appropriate. But as we have seen judges are often - although by no means always - reluctant to accept such evidence as admissible. The central reason for this, as I have gradually come to discern, is that the perspective on the available evidence which an anthropologist offers differs significantly from that offered by most other purveyors of expert opinion. As a result I have sailed straight into hitherto largely unexplored territory, no less in professional and intellectual than in ethical terms. Hence before closing this essay I would like to take the opportunity to reflect on some of the many dilemmas with which I have found myself confronting as a pioneer - at least in UK contexts - in this field.

As English Law stands at present, there is a strong presumption that expert evidence will normally be called with respect to scientific, technical and professional matters: hence accountants, architects, doctors and engineers of all kinds are routinely instructed to prepare expert reports, and there is rarely if ever any dispute about the prospective admissibility of such evidence. But although there are in principle no limits to the issues with respect to which litigants may seek to introduce expert evidence into the proceedings, if and when other parties challenge its admissibility judges often find themselves in something of a quandary. In the company of the doctors, engineers, and professional specialists in technical activities of one kind or another, the suggestion that an anthropologist is in a position to place the evidence in their appropriate *conceptual* context can all too easily appear to be wholly out of order: neither fish nor flesh nor good red herring. Lord Justice Buxton is by no means the only member of the bench who has been deeply sceptical as to whether expert evidence is in any way admissible. Hence even though I may be critical of the learned judge's conclusions, I would readily accept that the grounds on which, as well as the terms on which expert anthropological evidence might legitimately be set before the court does indeed require careful scrutiny.

4.14 Contradictions Inherent in the Role of the Expert Witness

It goes without saying that experts may not offer their opinions out of thin air: their role is to scrutinize, analyse and offer further comment on relevant components of the evidence set before the court, and to offer an objective opinion on its potential significance in the light of their expertise. Whilst experts appear in court as witnesses, they are nevertheless witnesses of a distinctive sort. They have rarely, if ever, witnessed any of the incidents in question at first hand: rather they are most usually invited to examine, and to offer their expert opinion on evidence which first hand witnesses have already provided. Experts are consequently exempted from the rule which excludes the introduction of hearsay evidence.

Nevertheless the commentary on the evidence which anthropologists find themselves offering is of a different character from that provided by the majority of other experts. Hence in sharp contrast to those who are called in to offer their opinion on physical and technical issues such as the silting up of harbours, the overloading of ships, finger-print matches, shaken babies or the precipitating cause of a fire, anthropologists find themselves addressing much more intangible issues. Hence my normal approach is set about locating the available evidence about things said and done in their appropriate social, cultural, familial and linguistic context, as a prelude to setting out a commentary on the likely significance of these events in the light of such considerations. From this perspective my central role is not just to contextualize the evidence, but in doing so warn the finders of fact of the pitfalls of ethnocentrism.

But in doing so I have become acutely aware that I am walking on a knife-edge. In putting the evidence through an ethnographic sieve, it follows that the operation I undertake in so doing runs closely parallel to aspects of the task which the finders of fact are expected to undertake. To be sure there are some significant differences. Whilst the filter through which members of the jury are expected to sift the evidence is their collective 'common sense', the sieve which I deploy as an anthropologist is my specialist knowledge of the relevant context-specific social, cultural, familial and linguistic conventions. Nevertheless the dangers here are precisely those identified by Lord Justice Buxton. If an expert anthropologist is permitted to perform a parallel exercise to the formal finders of fact, is there not a significant sense in which he or she will be usurping the role of the jury?

One way of answering that conundrum is to take shelter under Learned Hand's careful arguments. Having considered the role of the expert at great length, and having also noted that the credibility of any witness must also remain a question for the jury alone, he goes on to conclude that:

> Now the important thing to notice, and the only important thing to notice is that the expert has taken the jury's place if they believe him. It is of course not necessary for the jury to accept the expert's opinion, but were it not really of possible weight with them, it would not be relevant, and if of possible weight, it is only because it furnishes to them general propositions which it is ordinarily their function and theirs only to furnish to the conclusion which constitutes the verdict (Hand 1901: 52).

But although it consequently follows that any qualms an anthropologist may have on this score are not so much a function of his disciplinary perspective, but run in parallel with the contradictions which any other expert, regardless of discipline, is likely to encounter, this in no way attenuates the burden of responsibility that consequently falls on one's shoulders. Nor is this conundrum significantly lightened by Hand's important caveat: even if the judge rules that the evidence I proffer is admissible, my own credibility as a witness still rests with the jury. Like it or not I regularly find myself sorely tempted to act as an advocate of my own position; the further one progresses down this road the more the knife-edge of objectivity on which the expert must of necessity seek to balance sharpens, so much so that the satisfactory fulfilment of the role becomes much more of an art than a science. I find that the only way I can console myself when required to perform in this way is that justice and equity - which are likewise much more of an art than a science - would probably be the worse off if one did not attempt to implement this balancing act to the best of one's ability.

4.15 Contradictions Encountered before one even Reaches the Doors of Court

Nor is it just the role of the jury which anthropologists can find themselves usurping - or at least challenging. In considering the witness statements laid before me - whether they have been prepared by the police and defence in criminal cases, or by the solicitors for each party in civil cases - I regularly find that all sorts of pieces of information which I regard as crucial to a proper understanding of the issues in dispute are absent from the bundle of documents with which I have been presented. The most characteristic deficiency in South Asian cases is the absence of the material required to construct a detailed family tree, without which it is virtually impossible to begin to grasp the internal dynamics of the extended families of the litigants - and which in my experience are almost invariably a crucial factor

in the underlying dispute, no matter whether the case is being heard in the criminal, civil, family or immigration court.

That such questions should remain unasked is hardly surprising. Corporate extended families and their associated kinship networks have never been a feature of the English cultural tradition. In the absence of suitably attuned investigative antennae, it is hardly surprising that solicitors and detectives have little notion of how best to layout a family tree in a graphical format, let alone as to how to use such a diagram to explore potential and actual patterns of conflict and alliance between kinsfolk, and on that basis to explore the likely dynamics of interpersonal relationships within such an arena. Such an exercise is simply not a part of their standard investigative toolkit. In these circumstances I frequently find myself going back to those instructing me, and asking them to fill in potentially crucial details which did not appear in the witness statements presented to me. Hence in fulfilling my role as an expert I regularly find myself insisting that those instructing me should go back to their clients to pose a whole series of hitherto unasked questions and unexplored issues.

In doing so, I have gradually begun to realise that the responses I receive in so doing display some very significant variations, most particularly when the line of analysis I begin to pursue diverges significantly from their own assumptions about the core issues in the case. In my experience solicitors rarely if ever have qualms about seeking further instructions from their clients in response to my queries. If - as is most usually the case - my report throws new light on the issues, and enables them to argue their client's case more effectively than had hitherto been possible, my contribution is invariably welcome. But if my analysis blows large holes in the case they had hoped to advance, as most certainly sometimes happens, they simply shelve my report, since they have no duty to disclose it to their adversaries.

However I have gradually begun to appreciate that the Police and the Crown Prosecution Service - by whom I have so far been instructed a great deal less frequently than by defence - frequently find themselves in a much trickier position in such circumstances, not least because they have a duty - in sharp contrast to the defendants - to disclose all unused evidence to their opponents. Secondly, I invariably find that I only receive my instruction very late in the day, by which time all the evidence which the prosecution considers relevant to the proceedings has been gathered, committal proceedings have been completed and a skeleton argument - or at least a prosecution case summary - has been handed to the defence. Hence even though the instructions which I receive may be similarly worded to those I would receive from defence solicitors, the context in which they have been delivered is quite different. The Crown has already decided on - and indeed committed itself to - a specific line of argument. Indeed it may well be that

the trial is only weeks away. In these circumstances what those instructing me are effectively looking for is expert confirmation of a line of analysis to which the prosecution is already committed.

Whilst I am sometimes able to fulfil those expectations, that is by no means always the case. Indeedjust as happens in other contexts, I often find myself opening up new lines of enquiry which those instructing me have not hitherto considered. Hence I not infrequently find myself suggesting that the evidence available might be better interpreted in a manner wholly at odds with the line of analysis to which the prosecution has already committed itself. This can cause particularly severe consternation when - as in one case in which I was recently involved where very serious charges had been brought against three co-defendants - my analysis suggested two of those defendants were most unlikely to have been involved in the events which had led to the charges being brought. Whilst it went without saying that my report would be disclosed to the solicitors for the three defendants, the prosecution took the view that it was by then too late to change course with respect to the arguments they planned to present to the up-coming trial. Such experiences may well serve to explain why it is that my name has not been included on the register of experts maintained by the National Criminal Intelligence Service.

4.16 Experience in Court

My experience in court has also been riddled with similar contradictions. Despite Lord Justice Buxton's caveats, I found myself receiving a steadily increasing stream of instructions to prepare reports for use in an ever wider range of proceedings in the criminal, civil, family and immigration courts - with a wide variety of outcomes. On relatively rare occasions the admissibility has been challenged, sometimes successfully and sometimes not. Rather more frequently my reports have been discarded by those instructing me on tactical grounds, with the result that they effectively fell into abeyance, except in those cases where I had been instructed by the prosecution. That said, the vast majority of my reports overcame these initial hurdles, and were set before the court. Even so, we still have to consider the precise basis on which their contents were made available to the finders of fact.

It is, of course, by no means always a twelve-person jury which fulfils that role. In Magistrates courts, Tribunals of various kinds and in most forms of civil proceedings it is the bench which fulfils the role. However in a striking paradox, the only circumstances in which finders of fact normally have direct access to the text of an expert report is in the latter circumstance, where that role is most usually fulfilled by a judge. Juries - whose members are surely at least as much in need of direct access to their contents as are the learned occupants of the judicial bench - are invariably precluded from reading my reports. Instead they have to rely on what the expert has to say in the witness box. In the process of getting there one encounters all manner of additional shoals.

Despite the fact that the expert's central duty is to inform the court, rather than to advance the interests of those instructing him, the closer one approaches the doors of the courtroom the more the adversarial character of the proceedings begins to kick in. Hence as soon as the nominally independent and objective expert steps into court, he swiftly finds that he has been reduced to the position of a bagatelle in the game of thrust and counter-thrust between the contending parties. In my experience few holds are barred in this process.

In fact the implications of the adversarial nature of the proceedings begin to appear well before one approaches the courtroom door. Whilst Counsel rarely, if ever, query any aspects of their expert's conclusions (note the possessive), they not infrequently suggest that for tactical reasons significant components of the report are excised. Of course an expert is wholly within his rights if he refuses to do so; but it is equally within the rights of Counsel not to disclose the report if the expert refuses to make the suggested excisions. But even if the report is indeed disclosed and accepted as admissible, that is by no means the end of the road. If the contents of the report are accepted by the other side, the expert will not normally be called to give evidence in person: instead counsel will read out to the jury those parts of its contents which he considers most significant. If, however, the instructing party's opponents do not accept the report, the adversarial process kicks in once again. The expert will be called to give evidence in chief, and then be cross-examined and re-examined in the usual adversarial manner. My experience of being put through this process has left me with two very salient conclusions.

Firstly the notion that the expert is a servant of the court - rather than a hired gun wheeled in to advance the interest of those instructing him - is blown to the winds by the adversarial character of the proceedings. From the jury's perspective I have little doubt that the expert will be seen as a witness 'for' whichever party has instructed him. Secondly, and perhaps even more significantly, in no circumstances do the members of the jury actually get to see, read, and contemplate the actual contents of my report - which may well be thirty or forty pages long. Hence what actually informs their deliberations is not the report itself, but at best an account of its contents filtered through counsel's efforts to represent its main themes to them by reading out selected parts of its contents. If, however, the report is contested by the other side the jury's access to the expert's arguments, analyses and conclusions is even more limited. Restricted by the tactical manoeuvres of agile counsel competing with one another in the adversarial process of examination, cross-examination and re-examination, the long-suffering

expert can only come to the conclusion that his efforts to provide the court with the benefits of his professional insights are entirely subordinated to demands of a strange ritual process which is alleged to be a highly effective means of getting to the truth of the matter.

4.17 Conclusion

By its very nature, plurality puts the skids under the commonplace assumption that our own taken for granted yardsticks can safely be regarded as being universally applicable. Those whose experience has hitherto been limited to life 'within the whale' may well take the view that they know their way around, and that the categories and concepts that they have encountered during the course of that experience are of universal applicability - little knowing that there are many other sea-creatures beyond the universe of their experience, each of which is structured in ways which often differ radically from the one which they themselves inhabit. This is not to suggest that each such universe is structured on an entirely different basis. Virtually all sea creatures have fins of one kind or another; most, but not all, have back-bones; others have external carapaces whilst yet others appear to be made entirely of jelly. Once one adopts an oceanic as opposed to a whale-based perspective, it becomes only too obvious that one size does not fit all.

Problems associated with the plural character of social and cultural universes which humans have constructed around themselves - or rather the problems with which one finds oneself confronted if and when one emerges from the belly of the whale - are by no means restricted to lawyers and the law. Those seeking to provide professional practice that brings them into contact with any kind of activity which is conditioned by our capacity to *create the conceptual foundations of our own existence,* as we humans routinely do as we go about our personal, domestic, familial, social, religious and linguistic business, can expect to encounter clients who put their lives together in terms of premises and practices which differ from their own. Sometimes those variations are relatively small, as for example those associated with differences of gender and social class within a single over-arching linguistic and socio-cultural order. However they are often far more substantial, either because the indigenous social order has long been deeply plural (as for example in the case of the Austro-Hungarian Empire) or because mass migration from the distant parts of the globe has sharply increased a pre-existing condition of mild plurality - as for example in the United Kingdom. From this perspective cultural plurality is in no sense 'outside ordinary human experience': indeed anthropological analysis suggests that in historical terms it is a core feature of human experience, albeit a phenomenon of which our awareness has steadily atrophied in the face of the unitarian perspective into which we have been socialised as a result of our contemporary commitment to modernity (Ballard 2007). In other words when it comes to their knowledge of the variety of conventions which humans use to order their lives, the scope of the 'ordinary human experience' with which both judges and juries are familiar is invariably far less universalistic in its reach than they routinely assume.

Whilst globalisation is shrinking the significance of distance, it is by no means undermining the plural character of the world in which we live. In historical terms successive inflows of immigrants from elsewhere in Western Europe have regularly introduced additional layers of plurality into Britain's established social order. In the past half-century, however, these processes have gone global. Not only have migrants been drawn in from much further afield, but linguistic, social, cultural and religious baggage which the settlers brought with them was far more distinctive than that imported by any of their predecessors. Moreover globalisation has also enabled settlers to keep far more closely in touch with their overseas roots than any of their predecessors. The ethnic colonies which settlers have formed have consequently remained strongly transnational in character - so yet further reinforcing the resilience of the additional vectors of plurality they have introduced into the pre-existent socio-cultural order. Whilst these new vectors are undoubtedly altering in character as adaptive processes kick in, they show little sign of diminishing significantly in strength. Plurality is here to stay.

Nevertheless the emergence of these additional dimensions of plurality has been, and remains, exceedingly contentious. As hostility to these developments has become steadily more salient amongst members of the indigenous majority - not just in Britain but across the length and breadth of Western Europe - the view that all public manifestations of ethnic diversity are *ipsofacto* illegitimate has become increasingly widespread. In consequence this particular vector of plurality is currently strongly inegalitarian in character. In the face of all this I can see very little prospect of my new-found profession being significantly undermined in the immediately foreseeable future. Thus far, at least, accurate and sympathetic knowledge of the linguistic, social, cultural and religious baggage which non-European settlers brought with them to Britain - and into which they have done their best to socialise their offspring - have not spread far beyond the boundaries of the ethnic colonies which they have formed around themselves. Nor have there been any significant institutionally supported efforts to make analytical sense of the processes of culturally-creative readjustment which were going on within these thriving colonies, largely on the grounds that the significance of these necessarily ephemeral phenomena was strictly time limited. Hence little effort was made to bring the findings of those few scholars who have explored these developments to the attention of a wider audience. The consequences of this myopic stance are plain to see: the core

agenda of the British educational system - the principal contemporary purveyor of both knowledge and the analytical frameworks required to make sense of it - remains largely untouched by these developments. To be sure most primary schools now make an effort to celebrate diversity: rival festivals to Christmas and Easter are now noted, and often more or less elaborately celebrated. Moreover such celebrations are frequently accompanied by primary-Ievel- and hence inevitably stereotypical - accounts of what the underlying traditions stand for. But the further up the educational system one penetrates, the more such celebrations of multi-culturalism (for that is all they are) begin to evaporate, such that they are almost entirely absent from the agenda in higher educational contexts.

This has had several consequences, not leastin the light of the steadily increasing maturity of the new minority settlements. Now that the British-born offspring of the original generation of migrants have not only reached adulthood, but also passed through the higher educational system in substantial numbers, fully qualified minority professionals are becoming increasingly commonplace, not least in legal contexts. In the course of gaining the necessary qualifications such students will have extensive contacts with their more indigenous counterparts - and of course vice-versa. Hence at one level experience of the new plurality is much more part of the scenery for rising generations than it was for their parents. Yetjust how deep has mutual appreciation actually been?

Although most members of the rising generation of minority professionals have had far more contact with members of the indigenous majority that their parents ever did, their knowledge of, and insight into, the foundations of their own ancestral linguistic, social, cultural and religious heritage is often extremely limited. The reasons are plain to see. Although they have most usually been socialised into the popular dimensions of that heritage in domestic contexts, their awareness of that heritage, together with an insight into its conceptual foundations, is rarely if ever significantly reinforced during their passage through the educational system. Precisely because such matters are in no way represented in the academic syllabus, most minority students are at present exceedingly loath to raise their heads above the parapet with respect to all the issues associated with plurality. Their reasons for so doing vary enormously. Some do their best to put their ancestral heritage entirely behind them, and hence to assimilate in the way in which the majoritarian consensus requires. Others, perhaps the majority, sustain a positive appreciation of their heritage in personal and domestic circumstances, but nevertheless take the strategic decision to play down their alterity as much as possible whenever they find themselves in majoritarian company. Meanwhile those at the far end of the spectrum lead what can best be described as a split intellectual life: whilst making the best endeavours to gain the capacity to put on a skilled professional

performance in whichever discipline they have chosen to specialise, they simultaneously maintain a private commitment to an alternative ideology _ most usually grounded in a neo-fundamentalist reinterpretation of their ancestral religious heritage - from within which they condemn the ideological foundations of European intellectual traditions as being as hypocritical as they are misguided.

Unfortunately these developments remain largely subterranean. They do not appear on the conceptual radar of those who set the systematic agenda of the educational system with any greater salience than does the existence of plurality itself. One obvious consequence of this is that professional training courses of all kinds - including those offered in the vast majority of Departments of Law - are ill-equipped to provide their students with the basic ethnographic data, let alone the conceptual frameworks, with which to cope with the challenges of plurality highlighted in this volume. With such considerations in mind it is immediately apparent that the problems generated by our present methods of jury selection are not necessarily the most pressing of all the many issues we currently face. My own view is that until we regain the capacity to feel intellectually comfortable with the plural character of the world in which we live, and hence to *think plural,* we will make relatively little progress towards addressing the knotty issues in this sphere.

But just how might we best begin to move towards such an outcome? This chapter is a report from the coalface. As yet relatively few other UK-based anthropologists have followed me into the field of expert witnessing, and none have as yet become so deeply embroiled in it as I. But however much of a path-breaker I may be, I would hesitate before identifying myself as an expert expert. I am still in the midst of feeling my way through a novel sphere of activity, and the further I penetrate into the field, the more I have begun to realise that anyone who wishes to fulfil this role adequately needs to become as expert in law and legal procedures as in anthropology in order to do so. At this stage I readily acknowledge that I still have much to learn.

But by the same token that is not the only sphere where additional learning is urgently required. My experience also suggests that lawyers at all levels in the profession, whether drawn from majority or from minority backgrounds, still have much to learn about how all the knotty issues arising from our more salient condition of ethnic plurality can best be handled within the established procedural and conceptual frameworks of English law. However tempting it may be to evade the issues by brushing them under the carpet, the longer efforts to address these issues in a systematic way are postponed, the more seriously the English legal system's proud _ but already damaged - reputation for delivering justice on an equitable basis to all comers will be further compromised. Nor will proposed legis-

lative interventions with respect to ethnically specific phenomena such as 'Forced Marriage', 'Honour Killing', the Veil, People Smuggling, Hawala Value Transfers, Islamic fundamentalism and Terrorism necessarily make matters any easier for the courts, especially if the discussions and consultations associated with these developments, let alone the prosecution of such new-found offences, continues to sideline the potential contribution of anthropologically-informed insights and critiques.

In the midst of all this, I cannot avoid addressing one further set of criticisms with which any anthropological expert in this field will inevitably find himself confronted: namely that one is engaged in some form of special pleading. Such arguments take many forms, but two are particularly alarming. Firstly that one is seeking to place aspects of minority behaviour outside the scope of established legal rules and proceedings; and secondly that one is seeking to underpin and reinforce illiberal, authoritarian and generally patriarchal customs and practices still regretfully adhered to by many members of recently arrived and still largely unassimilated minority communities.

If either of those charges were sustainable, anthropological interventions in this field would be quite untenable. Precisely because this is so, anyone who does stray into this territory must pay careful attention if they are to avoid being waylaid - no less by accident than by design - into one or other of these pitfalls. **In** my view the firmest ground on which one can seek to stand is that of a servant of the court. From that perspective it follows that the core of one's role is to provide finders of fact with an insight into the conventions which are likely to have been deployed within the social and cultural context(s) within which the events in question took place, and their likely impact on the behaviour of those involved. This is most emphatically not a form of special pleading: rather it is to provide the court with an opportunity to consider which yardsticks it is most appropriate to deploy in making sense of the behaviour in question.

However fulfilling this role is not an easy task, especially in the adversarial context of an English courtroom. As Learned Hand rightly emphasises, however much the role of the expert may be formally defined as that of a servant of the court, that role is rendered entirely fictitious the moment one steps through the court-room door. Not only will instructing lawyers invariably have done their best to manoeuvre 'his' expert's evidence in such a way to maximise his strategic advantage before the trial has even begun, but counsel for the other side is equally likely to dismiss as special pleading all aspects of one's evidence that he regards as unhelpful to his cause.

In responding to such charges I must admit that I do very often have an agenda of my own - although I am rarely foolish enough to acknowledge it in the midst of adversarial cross-fire. Most usually I have two particularly salient objectives in mind. The first is to seek to do my best to ensure that no-one who has been drawn into the proceedings is found guilty of what **I** would describe as a 'cultural crime': namely of acting in ways which were entirely reasonable, appropriate and inoffensive in the particular context within which it occurs, but which can be represented as wholly unreasonable and inappropriate when viewed through the prism of external cultural yardsticks. At the same time one also needs to guard against falling into the pitfalls which lie at the opposite end of the spectrum. Hence whilst it is undoubtedly worth noting that homicidal revenge may in some traditions be regarded as an appropriate means of restoring one's seriously damaged honour, this certainly cannot be used to suggest that someone who has successfully done so should escape conviction for homicide. Set against this it is equally important to insist that by no means all homicides within South Asian families are necessarily honour killings in this sense, even if prosecutors all too often assume that this must inevitably have been the case. Such decisions can have quite disastrous consequences, some of which I hope to be at liberty to discuss at some point in the near future.

So just what is the role of the anthropological expert? At the end of the day I find myself coming down on Learned Hand's side of the fence: if one fulfils one's role as an expert judiciously, one does indeed at least supplant the role of the jury. That is precisely the burden of my comments in the paragraph above. But of course one does not - and indeed should not - wholly supplant the role of the jury; Learned Hand rightly adds the caveat *if they believe him* to his decisive comment. Nevertheless just what is an expert who fulfils his role judiciously up to? At the end of the day the lodestone which I have found myself following is that I should do my best to facilitate just and equitable outcomes, not least because I have also become ever more aware that in the absence of a capacity to 'think plural', the uncritical application of established European legal conventions can all too easily precipitate rank injustice. With this in mind it is worth remembering that *insaaf, justice,* is a value of no less significance in South Asian legal, religious and cultural traditions than it is in Common Law. **If** community cohesion is ever to mean anything less vacuous than it does at present, English law needs to return to its roots, and regain - and indeed to elaborate - the capacity to 'think plural' which it once enjoyed.