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## The Dock On Trial: Courtroom Design And The Presumption Of Innocence

MEREDITH ROSSNER\*, DAVID TAIT\*\*, BLAKE MCKIMMIE\*\*\*, AND RICK SARRE\*\*\*\*

*This paper examines the place of the criminal dock in courtroom design. Challenges to the use of the dock have been based upon the inability of the defendant to hear effectively, to communicate with counsel, to maintain his or her dignity, and to benefit from the presumption of innocence. Increasingly courts are incorporating secure docks, where defendants are partially or completely surrounded by glass (or in some countries, metal bars). To what extent do these changes and modifications undermine the right to the presumption of innocence? In this paper we present the results of an experimental mock jury study that was designed to test whether the placement of the accused influences jurors' perceptions. We find that jurors are more likely to convict defendants when they are located in a traditional dock or a secure dock, compared to having them sit next to their counsel at the bar table. We conclude by discussing the implications of these findings for trial procedures, counsel communications and courtroom design.*

Key words: criminal justice, courtroom design, courtroom architecture, presumption of innocence

Courtrooms may appear to embody immemorial tradition, an impression reinforced by the use of arcane rituals and archaic costumes. On closer inspection, however, courtroom designs can be seen to respond to contemporary influences – pressures of time and budgets, changing attitudes to human rights, security fears and the interests of professional groups. Where different participants sit in the criminal courtroom has changed considerably over the last two hundred years, and varies by jurisdiction and curial context. This modern diversity is perhaps most evident in the physical location of the accused in a criminal trial, which will vary depending upon a range of factors including the seriousness of the charge and the security risk assessment, but, most importantly, the jurisdiction in

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which the trial is proceeding. A person charged with involvement in organized crime, for example, is likely to be presented to the court in an open dock in Sydney or Wellington, a glass cage in Montreal or London, a metal cage in Moscow, or a glass cage *inside* a metal cage in Cairo. But in Chicago they will sit at the bar table looking almost indistinguishable from their lawyers. There is little evidence that Chicago gangsters are more benign than their counterparts elsewhere. The difference lies not in the personalities of gangsters, but the legal histories and design practices of the respective courts.

The use of docks has been contested almost since their inception. Early challenges were from individual defendants, and mainly concerned difficulty with hearing and access to counsel. In the 20<sup>th</sup> century, groups like the Howard League for Penal Reform and UK Law Society mounted campaigns against the dock, making more fundamental arguments about due process and the presumption of innocence.<sup>1</sup> In recent times, an opposite trend has emerged, as courtrooms around the world have seen the proliferation of ‘secure docks,’ where the accused will be fully enclosed in a glass dock or metal cage. This significant change to the design and architecture of the court has not been challenged by the judiciary, the legislature, nor by the general public.

In England and Wales, a significant reform of the court estate is underway. Courts and tribunals are closing, digitization of court processes is being embraced, and the very function of a court room is being challenged.<sup>2</sup> Starting in 2016, £700 million will be invested in modernising courts to improve efficiency and access to justice.<sup>3</sup> Given this rethinking of court buildings and courtrooms, it now seems a fitting time to question the use of docks in criminal proceedings.

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<sup>1</sup> L. Mulcahy, ‘Putting the Defendant in Their Place: Why Do We Still Use the Dock in Criminal Proceedings?’ (2013) 53 *Brit. J. Criminology*. 1139.

<sup>2</sup> See Her Majesty’s Court and Tribunal Service, *Response to the proposal on the provision of court and tribunal estate in England and Wales* (2016), <<https://www.gov.uk/government/consultations/proposal-on-the-provision-of-court-and-tribunal-estate-in-england-and-wales>>; Ministry of Justice, Lord Chief Justice of England and Wales, and the Senior President of the Tribunals, *Transforming Our Justice System* (2016), <<https://www.gov.uk/government/publications/transforming-our-justice-system-joint-statement>>; JUSTICE, *What is a Court?* (2016) <<https://justice.org.uk/what-is-a-court/>>.

<sup>3</sup> Her Majesty’s Court and Tribunal Service, id.

This paper is designed to revive the debate around the use of the dock. We briefly trace the history of the dock and review contemporary debates around its use. We then present the results of an experimental mock-jury study testing whether the dock is prejudicial to the accused in the eyes of jurors. We conclude by calling for an evidence-based consideration of court design.

## I. THE HISTORY OF THE DOCK

It is worth briefly examining the history of the enclosure known as the ‘dock’ or ‘prisoner’s dock.’ The word ‘dock’ may refer either to a holding pen or a place for the accused to be placed during the trial, and comes from a Flemish or Middle Dutch word, *dok*, meaning pen or rabbit hutch.<sup>4</sup> Courts in many jurisdictions have (or had) a holding area (originally referred to as a ‘bail-dock’ or ‘bale-dock’) where accused persons would wait before coming forward to the ‘bar’ to present their case. One of the earliest reported examples was an English forestry court, the Verderer’s Court, built in 1388, although some of the features including this form of enclosure may only date from 1634.<sup>5</sup> In the 1673 Old Bailey building in London, the bail-dock was an open area outside the courtroom. Eighteenth century courts in England tended to build the bail dock into the back of the courtroom.<sup>6</sup> They typically had spikes surrounding them (Old Bailey, 1716). Civil law countries meanwhile placed the defendant’s bench immediately behind the defence table, allowing them to testify (or be interrogated) without moving to the witness box. International criminal tribunals similarly place the accused in a bench behind the bar table.

The bar table, or ‘bar’ in medieval justice processes, had been a portable wooden barrier (French: *barreau*) that marked out the area within which justice was delivered; this might be under a tree, church or guild hall.<sup>7</sup> The ‘bar’ would subsequently refer both to the place from which litigants,

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<sup>4</sup> T.F. Hoad (ed.), *The Concise Oxford Dictionary of English Etymology* (1993).

<sup>5</sup> C.A. Brebbia, *The New Forest* (2014), at 34.

<sup>6</sup> L.E. Doerksen, ‘Out of the Dock and Into the Bar: An Examination of the History and Use of the Prisoner’s Dock’ (1989) 32 *Criminal Law Q.* 478, at 482.

<sup>7</sup> R. Jacob, *Images de la justice: essai sur l’iconographie judiciaire du Moyen âge à l’âge classique* (1994) 93; A. Garapon, *Bien Juger* (1997) 95.

defendants or witnesses might address the court ('standing at the bar') and the lawyers who worked within the bar area (the 'bar table'). But the original meaning (a physical demarcation between the core players and the areas outside that consecrated space) would continue to be represented often by a wooden or brass railing. It was this meaning of 'bar', an area reserved for selected officials, that English judges would use in their decisions to exclude defendants from the 'inner sanctum' of the courtroom.

Defence lawyers were not generally accepted in English criminal proceedings until about 1730 and were not allowed to address the jury directly until 1836.<sup>8</sup> So, in the absence of lawyers, the 'bar' or 'dock' in the Old Bailey (the words appear to have been used interchangeably in this period) was directly opposite the witness box. Only with the increasing use of defence counsel (and the development of the two-tiered system of barrister and instructing solicitor) did lawyers begin to take up space at 'the bar.'<sup>9</sup> Once this began to happen, the dock was moved out of the action space of the court towards the margins of the room, often at the back (the standard position in jury courts in England and Wales, and the Australian state of Victoria).<sup>10</sup> The dock thus became, in a sense, a holding pen (again) from which accused persons would venture to the witness box once they were allowed to give evidence.

Meanwhile in American colonial courts, such as the 1713 Boston court, the dock was more likely to be in the centre of the courtroom just behind the bar table and in front of the public.<sup>11</sup> This seems to have been the case in Virginia as well: an 1829 design for a Virginian courtroom had a 'criminal box with turned balusters' at the back of what was referred to as 'the lawyer's bar.' The box was not necessarily a mark of criminality because most courts also had a 'sheriff's box'.<sup>12</sup> Older

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<sup>8</sup> J. H. Langbein, *The Origins of Adversary Criminal Trial*. (2003) 307; J. Beattie, 'Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries' (1991) 9 *Law and History Rev.* 221.

<sup>9</sup> Beattie, *id.*

<sup>10</sup> L. Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (2011).

<sup>11</sup> A. Rogers, 'In the Cage: The Prisoner's Dock and the Presumption of Innocence in Massachusetts Criminal Trials' (1997) *Massachusetts Legal History*. 89, at 91.

<sup>12</sup> C. Lounsbury, *The Courthouses of Early Virginia: An Architectural History* (2005) 151, at 164.

magistrates courts in England and Wales tended to adopt this placement of the dock because it allowed the prisoner to be brought up from cells below. This central position of the dock is the contemporary Queensland position for jury courts. Other Australian states moved the dock around to the side to be adjacent to the bar table.

Security docks made their first appearance, at least symbolically, in selected English courts. These displayed spikes above the railing – reconstructed in the contemporary Royal Courts of Justice in London. Such railings were recorded in a 1795 trial in Dublin.<sup>13</sup> They also appeared in the US, where, in 1907, ten Chinese men were put into a metal cage in the courtroom after a gangland slaying in Boston's Chinatown, while in 1934 notorious bank robbers Sacco and Vanzetti were put into a dock surrounded by steel mesh, notwithstanding that they were also shackled.<sup>14</sup> With the fall of the Soviet Union, docks in the form of raised platforms (to display the prisoner) were replaced in former Soviet states by metal cages (to confine the prisoner). By the early twenty-first century in England and Wales, France, and several Australian states, glass cages became standard practice. They were retro-fitted to older courts, or built into new courtrooms, such as the one used in the study under discussion in this paper (below).

While jury trials in most Australian states do not use glass docks, the use of some form of security dock in lower courts is widespread for persons in custody, most commonly because the courtrooms have only one (secure) dock. However, in most Australian states the majority of defendants who are not in custody sit at the bar table or just behind it. The situation in England and Wales is more restrictive, with glass-fronted or glass-encased docks used routinely at all levels of criminal hearings.<sup>15</sup>

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<sup>13</sup> S. Deane, 'The Great Nation and the Evil Empire' in S. Deane, B. Mac Suibhne and C. Deane (eds.) *Field Day Review* (2009) 207.

<sup>14</sup> Rogers, *op. cit.*, n. 11, p. 94.

<sup>15</sup> JUSTICE, *In the Dock: Reassessing the use of the dock in criminal trials* (2015) < <https://justice.org.uk/in-the-dock/>>. The Court Standards Design Guideline for England and Wales, published by the Ministry of Justice, makes a distinction between standard and secure docks. Standard docks have Perspex walls on either side of the dock with clear glazing partway up at the front. Secure docks enclose the accused from floor to ceiling.

## II. CHALLENGES TO THE DOCK

Defendants and their lawyers have been objecting to the use of the dock for centuries.

Drawing on both common law and human rights principles, challenges to the dock have been made on a number of different grounds, including their effect on courtroom acoustics, access to counsel, the dignity to be accorded to the accused, and the presumption of innocence. We will review some of the key challenges made over the past three hundred years, with a particular focus on arguments about the presumption of innocence.

Early challenges to the dock in England sought the exercise of judicial discretion to facilitate hearing and communication with counsel by co-locating them with their clients.<sup>16</sup> These requests foreshadowed arguments put forward to the European Court of Human Rights in the 1990s, where it was argued that confinement in a secure dock interfered with the accused's ability to hear at trial.<sup>17</sup> Similar challenges were made in American colonial courts, many of which adopted English architecture. It was not until 1914, in Pennsylvania, that an American court decided that, as a general principle, sitting at the bar table was necessary for a client to instruct legal counsel properly.<sup>18</sup> Another reason for the transition to a dock-free courtroom may be the peculiar history of the legal profession in that jurisdiction. Unlike England and other common law countries, the United States never developed the two-tiered system of trained lawyers, divided into barristers and solicitors. Instead, the trial lawyer would meet with the defendant in person to take instructions directly. The physical dock, separating the defendant from counsel then became something of a nuisance.<sup>19</sup>

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<sup>16</sup> J. H. Blanchard, *The Proceedings at Large on the Trial of John Horne Tooke for High Treason in the Sessions Court of the Old Bailey, 17-22 November 1794* (Sessions House in the Old Bailey, Volume 1, 17-22 November 1794); Mulcahy n 2 above; Doerksen n 7 above.

<sup>17</sup> *Stanford v. U.K.* (No. 16757/90), Eur. Ct. of H.R. (1994). See also D. Tait, 'Glass Cages in the Dock? Presenting the Defendant to the Jury' (2011) 86 *Chicago-Kent Law Rev.*, 467, J. Miller, J. "A Rights-Based Argument against the Dock." *Criminal Law Rev.* (2011): 216. S. Shepard, "Should the criminal defendant be assigned a seat in court?" *Yale Law J.* 115 (2005): 2203 and Mulcahy, op. cit., n. 1..

<sup>18</sup> *Commonwealth v Boyd*, 246 Pa. 529, 92 A. 705 (Pa. 1914). Note that currently, only courts in Massachusetts continue to use docks in select criminal cases.

<sup>19</sup> Tait, op. cit., n. 17.

In the second half of the twentieth century there were a number of challenges in England to the location of the accused in the courtroom, mainly centring on the issue of dignity and the presumption of innocence.<sup>20</sup> Mulcahy has detailed the efforts of the Law Society and the Howard League for Penal Reform to abolish the dock in the 1960s and 1970s, drawing on arguments about dignity, fairness, and due process.<sup>21</sup> While these challenges seemed to enjoy support from senior officials at the Home Office, they failed to excite legislative change, in part because of the increasing emphasis on security. However, in Ireland, the 1966 Committee on Court Practice and Procedure concluded that the dock could be done away with, noting that it is ‘out of date and incompatible with the presumption that the accused is innocent until he is proved guilty’.<sup>22</sup>

There was also a strand of American opposition to the dock largely grounded in the English common law principle that no accused person should be fettered or bound in making his or her defence. It was argued that the use of both shackles and a dock violated the common law principle that the accused ‘was entitled to appear free from all manner of shackles and bonds.’<sup>23</sup> When the accused is placed under such conditions, ‘the jury must necessarily conceive a prejudice against the accused.’<sup>24</sup>

In 1979, a Massachusetts lawyer requested of the judge that his client sit beside him, noting that the client had hearing difficulties, and furthermore: ‘...and I know there is no basis that I know of in law for this, but there has always been something that has bothered me about that prisoner’s dock, the effect that it has on the jury psychologically seeing a man in that enclosure.’ The judge agreed to improve the acoustics but, in relation to the dock, asserted that, ‘the Sheriff has, of course, the responsibility of security, so I will make some inquiry with reference to your request to have him

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<sup>20</sup> L. Rosen, ‘The Dock: Should it be Abolished?’ (1966) 29 *Modern Law Rev.* 289. Mulcahy, *op. cit.*, n. 1.

<sup>21</sup> Mulcahy, *id.*

<sup>22</sup> M. Coen, *Presumed Competent? An Analysis of the Irish Criminal Jury* (unpublished doctoral thesis, Trinity College Dublin, 2012), 253. Currently in Ireland most criminal courts demarcate a place for the accused – either a simple bench next to the bar table or a more elaborate open box similar to a witness box.

<sup>23</sup> Rogers, *op. cit.*, n. 11, at 95.

<sup>24</sup> Rogers, *id.* There is a similar English jurisprudence against shackling but does not include the dock in this discussion. See Miller, *op. cit.*, n 17.



sit next to you. That depends on security.<sup>25</sup> There are several features from this exchange that are worth noting. First, the assertion by the defence lawyer that there was no legal basis preventing co-location of the accused and counsel is interesting. Second, the effect on jury perception was a key concern for the defence. Third, the judge recognised, correctly, that he could exercise his discretion as to where the accused should sit, but he effectively delegated the decision to security staff. Not surprisingly, the Sheriff concluded the dock was preferable from a security perspective.

A further principle, regularly asserted by defence counsel, but firmly established by the US Supreme Court in 1976 on constitutional grounds, was that any form of constraint – prison clothing was the immediate issue in this case – could be seen as a ‘brand of incarceration’ and could undermine the presumption of innocence.<sup>26</sup> This was interpreted in a subsequent Massachusetts case to apply where the defendant posed no security problems; what would happen if the accused *were* seen to be a security risk was left unresolved.<sup>27</sup> But in *Deck v Missouri* in 2005, the US Supreme Court ruled that the jury should not see the accused with any form of restraint, even in the penalty phase of a trial.<sup>28</sup> The focus was thus on appearances before a jury, with the court required to eliminate avoidable prejudice. This led some States to introduce stun belts invisible to the jury but which could immobilize unruly defendants, although this was also ruled unconstitutional in other States in subsequent years.<sup>29</sup>

The concern for defence counsel is the undue attention that the dock draws to their clients. The eyes of the jury are on the accused in a dock in a way that is not the case if they were sitting with counsel. As was noted in an American case in 1983:

The practice of isolating the accused in a four foot high box very well may affect a juror's objectivity. Confinement in a prisoner dock focuses attention on the accused and may create the impression that he is somehow different or dangerous. By treating the accused in this distinctive manner, a juror may be influenced throughout the trial. The impression created may well erode

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<sup>25</sup> *Commonwealth v Albert Francis Moore*, 379 Mass. 106, 393 N.E.2d 904 (Mass. 1979).

<sup>26</sup> See *Estelle v Williams*, 425 U.S. 501, 504-05, (1976).

<sup>27</sup> *Young v Callahan*, 700 F.2d 32 (1<sup>st</sup> Cir. 1983).

<sup>28</sup> *Deck v Missouri*, 544 U.S. 622, 628–29 (2005).

<sup>29</sup> P. Russev, ‘Restraining US Violations of International Law: An Attempt to Curtail Stun Belt Use and Manufacture under the United Nations Convention Against Torture’ (2002-3) 19 *Georgia State University Law Rev.* 603.

the presumption of innocence that every person is to enjoy.<sup>30</sup>

Two of the judges in *Young v Callahan* thought that the right to a fair trial was ‘too delicate and valuable to be impeded by an anachronistic practice’ so ‘as a general matter’ the dock should not be used.<sup>31</sup>

If being placed in a dock causes prejudice, putting an accused person in a glass-framed dock may, a New South Wales judge ruled, add another ‘layer of prejudice.’<sup>32</sup> The European Court of Human Rights has been developing a similar jurisprudence, mostly dealing with how security docks violate Article 3 (a prohibition on degrading treatment) and Article 6 (the right to a fair trial). The court has ruled that an inability to talk to one’s lawyer ‘without being separated by a glass partition’ constitutes a violation of the ‘right to defence;’<sup>33</sup> a defendant in a ‘glass fronted dock’ is denied a fair trial if he cannot hear all the evidence against him,<sup>34</sup> and placing an accused person in a ‘cage’ in the courtroom breaches Article 3 of the European Charter of Human Rights.<sup>35</sup>

This position was strengthened in 2014 in the case of *Svinarenko and Slyadnev v Russia*.<sup>36</sup> The defendants claimed that their containment in a dock was akin to being ‘a monkey in a zoo.’ The Grand Chamber of the European Court of Human Rights ruled that the ‘objectively degrading nature’ of caged docks are ‘incompatible with the standards of civilised behaviour that are the hallmark of a democratic society.’<sup>37</sup> They ruled that caged docks, independent of specific circumstances of the defendant or trial, were a violation of the Article 3 prohibition against degrading treatment.

While the court in *Svinarenko and Slyadnev* ruled on Article 3 and metal cages, two of the judges commented, *obiter*, on the increasing use of glass cages, noting that ‘countries that have used

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<sup>30</sup> *Walker v Butterworth*, 599 F.2d 1074, 1080 (1st Cir.1979), cited in *Young v Callahan*, 1983, at 13.

<sup>31</sup> *Ibid* at 15.

<sup>32</sup> Whealy J. in *R v Baladjam et al.*, [2008] NSWSC 1462, 22. The dock in this decision referred to the one in the courthouse used for the current study.

<sup>33</sup> *Castravet v Moldova* (No. 23393/05), Eur. Ct. of H.R. 6 (2007).

<sup>34</sup> *Stanford v UK* (No. 16757/90), Eur. Ct. of H.R. (1994).

<sup>35</sup> *Sarban v Moldova* (No. 3456/05), Eur. Ct. of H.R. (2005).

<sup>36</sup> *Svinarenko and Slyadnev v Russia* (Nos. 32541/08 and 43441/08); Eur. Ct. of H.R. (2014)

<sup>37</sup> *Svinarenko and Slyadnev v Russia*, *Id.* at 138.

metal cages in courtrooms are developing a tendency to replace them with glass enclosures or “organic glass screens” and opined that ‘such “cages” might raise issues under the requirement of procedural fairness in Art.6 §1 and the presumption of innocence in Art.6 §2 of the Convention.’<sup>38</sup>

Two Supreme Court judges in Victoria (*R v Benbrika*) and in New South Wales (*R v Baladjam*) had come to similar conclusions in 2008.<sup>39</sup> In both cases the glass around the dock was ordered to be removed before trial. Seeing defendants behind glass screens, the judges determined, could lead the jury to conclude the men were ‘dangerous,’ undermining the presumption of innocence. They also limited their access to counsel. This was particularly important, Whealy J ruled in *Baladjam*, where there could already be prejudice against them – it was the court’s responsibility to do everything in its power to remove avoidable prejudice. Nevertheless, in both cases the exemplary conduct of the accused was a factor in the decision. The defendants were well-behaved, and so were accorded a more dignified environment. But this criterion may cut both ways. The case of *R v Farr*, tried in the Queensland Supreme Court in 1994 is a case in point. Because one of the accused had been violent during his last appearance, *all* of the accused were placed in a glass dock, and shackled so as not to isolate (and thereby prejudice) the one accused person who was perceived to pose a danger to the court.<sup>40</sup>

The judgments discussed above in the American, Australian and European cases did not depend, however, on the dock having a provable impact on the verdict for every type of case. Rather, they relied on the principle that visible signs of confinement in the courtroom *could* influence decision-makers, and, since justice being seen to be done was required for a trial to be fair, the appearance of the accused in a prejudicial situation was something to be avoided.

Thus, challenges to the dock have encompassed arguments about participation in the trial, dignity, and the presumption of innocence. The research presented here focuses on the last-named.

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<sup>38</sup> At [2] of Judges Nicolaou’s and Keller’s joint concurring opinion, cited in R. Easton, ‘Caged Injustice’ (2014) 178 *Criminal Law and Justice Weekly*. 36 <<http://www.criminallawandjustice.co.uk/issue/178-Nos3536>>.

<sup>39</sup> *R v Benbrika*, 182 A. Crim. R 205, 226 (2008); In New South Wales, *R v Baladjam et al.*, [2008] NSWSC 1462, 22.

<sup>40</sup> *R v Farr* [1994] QCA 266, 2.

If the presumption of innocence is indeed undermined by the enclosure of the accused in a dock, a fundamental principle of both common law and European Convention on Human Rights jurisprudence is violated. The presumption of innocence has long been viewed as the ‘golden thread’ holding a trial together, preventing wrongful convictions and upholding the legitimacy of the rule of law.<sup>41</sup> Only in the most narrow of circumstances should this right be compromised. Indeed, it has been argued that the presumption should only be limited in cases where such limitation would not risk a wrongful conviction.<sup>42</sup> Normative debates about the presumption of innocence have experienced somewhat of a resurgence in the literature, focusing mostly on the prosecutorial burden of proof and the ‘beyond reasonable doubt’ standard.<sup>43</sup> However, there is also a broader conception of the presumption of innocence as a general principle which asserts that the treatment of the defendant, at all stages of the criminal process, should be consistent with their innocence.<sup>44</sup> This is the meaning of the presumption of innocence that has been the basis of arguments against the dock in US and EU courts, and the focus of the analysis presented below. If jurors are more likely to convict someone who is sitting in a dock, independent of their particular characteristics, their lawyer’s abilities, or the evidence presented, then the dock undermines this presumption.

### III. RESEARCH INTO TRIAL PREJUDICE

This research is the first to examine empirical links between juror decision-making and the placement of the accused in the dock. However, we can draw on a range of other social-

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<sup>41</sup> *Woolmington v D.P.P.* [1935] AC 462; [1936] 25 Cr App R 72, at 95. See A. Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (2010); P. Roberts, ‘Loss of Innocence in Common Law Presumptions’ (2013) 8 *Criminal Law and Philosophy*. 317; P. Tomlin, ‘Could the presumption of innocence protect the guilty?’ (2014) 8 *Criminal Law and Philosophy*. 431.

<sup>42</sup> See Stumer and Roberts, *id.* for a discussion of how the burden and standard of proof are normatively justified within the presumption of innocence, as well as a discussion of the differences between common law and European Human Rights conception of the presumption.

<sup>43</sup> Stumer, *op. cit.* n. 41. See also F. Picinali, ‘Innocence and burdens of proof in English criminal law.’ (2014) 13 *Law, Probability and Risk*. 243. P. Tomlin ‘Extending the Golden Thread: Criminalisation and the Presumption of Innocence’ (2013) 21 *Journal of Political Philosophy* 44. V. Tadros. ‘The Ideal of the Presumption of Innocence’ (2014) 8 *Criminal Law and Philosophy* 449.

<sup>44</sup> Stumer, *op. cit.* n. 41, at xxxviii.

psychological research on both juries and the built environment that suggest there might be a link between the two. For instance, evidence suggests that jurors tend to show more sympathy for defendants who are similar to themselves; such studies have focused on the defendant's race, gender, age and clothing.<sup>45</sup> The most consistent finding is that those who belong to an 'out-group' are more likely to be convicted than those who belong to an 'in-group.'<sup>46</sup> Other research suggests that, despite jurors' best efforts to attend to the evidence and arguments presented at trial, their decisions can be influenced by stereotypes,<sup>47</sup> which may be cued or accentuated by features of the courtroom design. Anything that makes the accused look different from other people in the room could potentially lead to prejudice. A defendant in a dock, one might assume, is potentially more likely to be seen as an 'outsider.'

Jurors are frequently not conscious of cues they use to assess credibility or their own impartiality.<sup>48</sup> Social psychologists have shown that observers make judgments about the personality of a person, for example, based on the space they occupy or other salient stimuli in the room.<sup>49</sup> The quality of the spaces and furniture also provide 'status cues.'<sup>50</sup> For example, a dock furnished similarly to the jury box may suggest equality of legal status between the occupants of those positions. Meanwhile more 'dangerous' looking environments or 'threat cues' can lead to more hostile responses; in this case (potentially) a greater likelihood of conviction.<sup>51</sup>

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<sup>45</sup> N. Kerr, et al., 'Defendant-Juror Similarity and Mock Juror Judgments' (2005) 19 *Law and Human Behavior* 567; R. Mazzella and A. Feingold. 'The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis.' (1994) 24 *Journal of Applied Social Psychology*. 1315. D. Devine et al., 'Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups' (2001) 7 *Psychology Public Policy and Law*. 622; D. Devine, *Jury Decision Making: The State of the Science* (2012).

<sup>46</sup> L. Gruel, *Pardons et châtements: Essais et recherches* (1991); Devine, id., p.113.

<sup>47</sup> R.A. Schuller, B.M. McKimmie, B.M. Masser, and M.A. Klippenstine, 'Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanour, Gender and Victim Stereotypes' (2010) 13 *New Criminal Law Rev.* 759.

<sup>48</sup> G. Matoesian, 'Language, Law and Society; Policy Implications of the Kennedy Smith Rape Trial' (1995) 29 *Law and Society Rev.* 669; M, Rose and S Seidman Diamond. 'Judging bias: Juror confidence and judicial rulings on challenges for cause,' (2008) 42 *Law and Society Rev.* 513.

<sup>49</sup> S. Gosling et al., 'Room With A Cue: Judgments Of Personality Based On Offices And Bedrooms' (2002) 2 *Journal of Personality and Social Psychology*. 379; D. Lassiter and G. Daniel. 'Illusory causation in the courtroom.' (2002) 11 *Current Directions in Psychological Science*. 204.

<sup>50</sup> T. Davis, 'The Influence of the Physical Environment in Offices' (1984) 9 *Academy of Manage Rev.* 271.

<sup>51</sup> J. Correll et al., 'Dangerous Enough: Moderating Racial Bias with Contextual Threat Cues' (2010) 47 *Journal of*

Building materials – such as glass – may provide additional cues to the jury.<sup>52</sup> Glass may draw attention to the potential dangerousness of the item exhibited inside – like Adolf Eichmann in a bullet-proof cubicle in his 1963 trial in Jerusalem.<sup>53</sup> By the same token, glass may provide a barrier protecting observers from contamination, such as in the isolation cubicles of late nineteenth century hospitals, where patients could be monitored in safety.<sup>54</sup> Alternatively, glass may protect the defendant from dangerous members of the public such as during the french trial of 87-year-old Maurice Papon for crimes against humanity.<sup>55</sup> Meanwhile removing glass barriers has a measurable effect, such as the improved communication between patients and staff in nursing stations at psychiatric hospitals.<sup>56</sup>

For the person being restrained, confinement may increase fear or stress; when people feel entrapped or concealed they tend to feel less safe.<sup>57</sup> So, being in a fully enclosed dock could enhance fear and stress for the accused. Anxiety in others can be detected by observers such as jurors.<sup>58</sup>

Earlier studies have suggested links between design and crime.<sup>59</sup> Similarly, there is a growing body of social science research suggesting that courtroom design and ritual do influence proceedings.<sup>60</sup> Most research and debate surrounding the dock is based on reviews of judicial

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*Experimental Psychology*. 184.

<sup>52</sup> A. Fierro, *The Glass State: The Technology of the Spectacle, Paris 1981-1988* (2003).

<sup>53</sup> H. Arendt, *Eichmann in Jerusalem: a Report on the Banality of Evil* (1963).

<sup>54</sup> L. Prior. 'The Architecture of the Hospital: A Study of Spatial Organization and Medical Knowledge' (1988) 39 *Brit. Journal of Sociology*. 86.

<sup>55</sup> Liberation, 'Maurice Papon devant ses juges. Le procès reprend, sans garde dans le box' (October 14, 1997) at <http://www.liberation.fr/societe/0101228671>.

<sup>56</sup> B. Karlin and R. Zeiss, 'Environmental and Therapeutic Issues in Psychiatric Hospital Design: Towards Best Practice' (2006) 57 *Psych Service*. 1376.

<sup>57</sup> B. Fisher and J. Nasar, 'Fear of Crime in Relation to Three Exterior Site Features: Prospect, Refuge And Escape' (1998) 30 *Environment and Behavior*. 429; T. Herzog and L. Kropscott, 'Legibility, Mystery, and Visual Access as Predictors of Preference and Perceived Danger in Forest Settings without Pathways' (2004) 36 *Environment and Behavior*. 659.

<sup>58</sup> J.A. Harrigan et al., 'Detecting Anxiety and Defensiveness from Visual and Auditory Cues' (1996) 64 *J. Personality and Social Psychology*, 675. Note, however, that observers are more adept at detecting anxiety in members of their own group. See H. M. Gray, et al., 'An In-group Advantage in Detecting Intergroup Anxiety' (2008) 19 *Psychological Science*. 1233.

<sup>59</sup> R.V. Clarke, *Designing Out Crime*. (1980). R.V. Clarke, 'Situational Crime Prevention: Theoretical Background and Current Practice' in *Handbook on Crime and Deviance*, eds. M.D. Khron et al.(2009) 259.

<sup>60</sup> See, P. Carlen, 'The Staging of Magistrates Justice' (1976) 16 *Brit. J. Criminology*. 48; P. Rock, 'Witnesses and Space

opinion, supplemented by the impressions of judges and lawyers about how juries might respond to what they see. The study presented below employs a different methodology – a mock-jury field experiment designed to test the likely impacts of different dock placement configurations.

#### IV. THE CURRENT STUDY

The current study involved an experiment in real trial court with 404 participants.<sup>61</sup> A 45-minute trial (scripted by the researchers) was performed nine times by actors over a three day period in a trial court in Sydney. The jurors then gave their verdict. The outcome measures were: verdict (guilty or not guilty), perceived strength of evidence, and likelihood that the accused was guilty on all four key elements of the charge. The experimental conditions placed the position of the accused in three positions in the courtroom: at the bar table (134 jurors), in an open dock (135 jurors) and in a glass dock (135 jurors).

Due to the ethical and methodological challenges involved in researching actual jury decision-making, social scientists have tended to use simulated trials under experimental conditions with mock jurors assessing evidence and deciding on verdicts. The strength of this methodology is the elegance of the experimental method: if a difference is found between equivalent groups one can be reasonably certain that the difference is due to the experimental manipulation. However, mock-jury studies have been legitimately criticized for a range of reasons, including lack of external validity and verisimilitude, inadequate trial simulations, lack of deliberations, inadequate samples (usually made up of psychology undergraduates), and lack of corroborating research.<sup>62</sup> This study was designed to

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in a Crown Court' (1991) 31 *Brit. J. Criminology*. 266; D. Tait, 'Popular Sovereignty and the Justice Process: Towards a Comparative Methodology for Observing Courtroom Rituals' (2001) 4 *Contemporary Justice Rev.* 201; J. Wolfe, 'The Effect of Location in the Courtroom on Jury Perception of Law.' (2010) 21 *Pepperdine Law Rev.* 73.

<sup>61</sup> This was the first major empirical study designed to determine how the location of the accused in the criminal courtroom impacts on the presumption of innocence. The experiment took place in July 2014.

<sup>62</sup> For a recent summary see, E. Finch and V. Munro. 'Lifting the Veil: The Use of Focus Group and Trial Simulation in Legal Research' (2008) 35 *J. Law and Society*. 30. See also B.H Bornstein, 'The Ecological Validity of Jury Simulations: Is the Jury Still Out?' (1999) 23 *Law and Human Behavior*. 1.

address some of these critiques and criticisms: the mock-jurors were drawn from the general public and were jury-eligible citizens; a trial was simulated live in a court room with professional actors playing all the key roles; observations of a variety of criminal courts were undertaken to explore different dock configurations; and judges and lawyers advised on the trial script before it was put into action.

The trial scenario involved a terrorist conspiracy case. It was loosely modelled on a terrorist conspiracy trial that had taken place in the same court building six years previously, an associated trial in Melbourne, and a more recent trial in the German city of Düsseldorf. In particular, the evidence was circumstantial: it involved a terrorist plot, not a successful terrorist action.

The accused in the scenario was a cleaner who stored chemicals in his garage, including the ingredients required for several types of explosive, as well as a quantity of marijuana. He was part of a group of Muslims under surveillance by police; wiretaps revealed conversations about a proposed attack on a cinema, with the attack believed imminent when, for a screening of the film *Noah*, the group received an email from an Indonesian Islamist group telling them to ‘drown the unbelievers.’ The accused replied, ‘Let’s do it.’ At the trial, the accused was presented either at the bar table, in an open dock, or in a glass dock. There were four witnesses, three for the prosecution (who laid out the evidence of the planning, the chemical storage and the email trails), and one for the defence (a family doctor who raised doubts on the accused’s mental state). The jurors were told by the judge that to find him guilty of conspiracy it was necessary to establish several factual elements, including that he had personally taken steps to carry out the plan.

We hypothesized that jurors who saw the accused in either version of the dock would be more likely to find him guilty compared to those participants who saw him at the bar table. In addition, we hypothesized that jurors who saw the accused in the glass dock would be more likely to find him guilty than those who saw him in the open dock.

### *1. Participants and Design*



Participants were 404 community members (221 women, 183 men), with an average age of 39.7 years ( $SD = 13.5$ ).<sup>63</sup> Professionals were the largest occupational group; almost a third had a university qualification (Table 1). Demographic characteristics were reasonably similar to the jury-eligible population in Australia in terms of gender, age, and occupation. In the research population, 54.7 percent were women. This compares with 52 percent of the eligible jury population in Victoria.<sup>64</sup> In terms of age, 44 percent were between 25 and 44 years of age, compared to 47 percent of the eligible jury population in Victoria. Those with university degrees were over-represented in the study compared to the jury-eligible population: 31 percent had a university degree compared to only 17 percent of the jury-eligible Victorian population.<sup>65</sup> There may be small differences between jurisdictions in terms of jury representativeness, but in general the study population appears to be not too dissimilar to the jury-eligible population and the jury pool.<sup>66</sup>

**Table 1. Sample Characteristics**

	Number	Percent
<i>Gender</i>		
Men	183	45%
Women	221	55%
<i>Age</i>		
18-24	72	18%
25-34	86	21%
35-44	92	23%
45-54	82	20%
55-64	72	18%
<i>Occupation</i>		
Manager	74	18%
Professional	104	26%
Vocationally trained	55	14%

<sup>63</sup> The sample originally comprised 407 jurors, three were observed to have their eyes closed for some or all of the trial. While it is possible they were listening to the evidence, the experiment was focusing on the visual impression made by the position of the accused, so these three were eliminated from the analysis.

<sup>64</sup> For this comparison, Victorian data are used here because they have been adjusted to take out those whose lack of English proficiency or hearing loss (or other disabilities) would make them either ineligible to serve or likely to seek to be excused on these grounds. J. Horan and D. Tait, 'Do Juries Adequately Represent the Community? A Case Study of Civil Juries in Victoria' (2007) 16 *J Judicial Administration*. 179.

<sup>65</sup> Horan and Tait, *id.*, p. 11.

<sup>66</sup> The data in our sample is also comparable to UK juries. See C. Thomas, 'Diversity and Fairness in the Jury System' (2007) Ministry of Justice Research Series 2/07. An earlier comprehensive study of jurors in the UK found similar results, see M. Zander and P. Henderson, 'Crown Court Study' (1993) Royal Commission on Criminal Justice, Research Study No. 19.

Office worker	86	21%
Manual worker	35	9%
No paid job	50	12%
<i>Highest qualification</i>		
University	125	31%
Other professional	43	11%
Vocational	24	6%
Other or not specified	212	53%
Total	404	100%

Testing was conducted over three days, with each condition being presented each day but in a different order. The performances were held at 10 am, 12 noon, and at 2 pm. The average number of jurors in each sitting was 45, varying between 40 and 48.

The large number of jurors per session meant that, with 12 accommodated in the jury box, the remaining 28 to 36 were accommodated in the public gallery. These were seated immediately behind the bar table. The sightlines from the public gallery to the bar table and open dock were clear and unimpeded, so the view of the accused was virtually as good from the body of the court as from the jury box for these two conditions. However, when the accused was in the glass dock, he was clearly visible from the jury box and the front right-hand row of the public gallery; for others he was partly or (in some cases) totally obscured. All of the jurors saw him when he was escorted into and out of the courtroom.

## 2. *Measures and Procedures*

Research participants were recruited through a market research company, selected to obtain a representative cross-section of the jury-eligible Australian population, and were paid AUD \$80 for their attendance. On the day of the experiment, they were met by court staff and ushered into a courtroom to their seats. They then observed the trial performed by actors. The script was written to contain a number of potentially incriminating and exculpatory pieces of evidence. It was designed to offer a credible defence to the accused person, so the decision of the jury could go either way.

The actors were attired in the appropriate costumes for their roles: the judge (a man) in a red

NSW Supreme Court robe and wig, the prosecutor and defence lawyer (both women) in black barristers' gowns and wigs. The actor who played the accused was of Arabic appearance and wore a *keffiyeh* around his head. He remained silent during the trial, to ensure that jurors responded to his appearance, not his style of speech or credibility. His physical appearance remained constant across the three conditions. The performances were overseen by a professional stage director.

The evidence was circumstantial and there was no specific target identified. In his instructions to the jury, the judge mentioned the prosecution's burden of proof and the 'beyond reasonable doubt' test, both before and after the evidence was presented. He also emphasized the circumstantial nature of the case and listed a number of facts that had to be established before the jury could convict, namely, there had to be evidence of a specific plan, the plan had to be of a terrorist nature, there had to have been evidence that the accused agreed to the plan, and that he had taken specific steps to carry out the plan.

#### (a) Dependent Measures

After the trial, participants were asked to complete a survey individually.<sup>67</sup> Multiple items were used to measure culpability of the accused, in addition to verdict (see Table 2). In the survey, respondents were asked to indicate how 'influential' each item was in reaching their verdict, from 1, *not at all*, to 5, *very much*. The strength of prosecution evidence was measured by adding the scores for the seven items and dividing by seven, to produce an average score. A measure of factual culpability was produced by asking jurors how likely it was each of the factual elements of the crime had been established. This was the list used by the judge in his summing up. As with the scale for strength of evidence, an average score was produced. A fifth item asked jurors for an overall assessment of guilt; this was not used in calculating the factual guilt measure.

#### **Table 2. Variables used to measure strength of evidence and culpability**

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<sup>67</sup> Jurors were randomly assigned to take part in a deliberation in roughly half of our sample. These deliberations were filmed and transcribed for future analysis. The current analysis uses pre-deliberation verdict as a dependent measure.

	N items	Mean	S.D.	Zero-order relationships with:			
				Verdict <sup>1</sup>		Factual elements proven <sup>2</sup>	
<i>Strength of evidence</i>							
Bomb-making chemicals in garage	1	4.1	1.0	0.49	***	0.54	***
Marked maps of specific cinemas on computer	1	4.2	1.0	0.50	***	0.57	***
Fingerprint evidence in the garage	1	3.4	1.4	0.42	***	0.42	***
Email response to invitation (Let's do it)	1	3.8	1.2	0.56	***	0.54	***
Bomb recipes, and videos on computer	1	4.1	1.0	0.53	***	0.56	***
Past role of defendant in terrorist attacks	1	3.1	1.4	0.42	***	0.46	***
The overall weight of the prosecution case	1	3.9	1.0	0.47	***	0.52	***
Average strength of prosecution items	7	3.8	0.9	0.64	***	0.69	***
<i>Lawyers credible and convincing</i>							
Prosecutor	2	7.7	1.7	0.47	***	0.48	***
Defence lawyer	2	7.1	1.8	-0.48	***	-0.49	***
Different in credibility	4	0.6	2.7	0.63	***	0.65	***
<i>How likely the following considered accused guilty</i>							
Judge	1	4.0	1.2	0.25	***	0.33	***
Prosecutor	1	6.2	1.2	0.25	***	0.29	***
Defence lawyer	1	2.7	1.6	0.23	***	0.33	***
Average of three items	3	4.3	0.9	0.37	***	0.50	***
<i>How likely that each element proven</i>							
Agreed to participate in actions	1	3.5	1.3	0.67	***	n/a	
Involved in planting bomb	1	3.4	1.2	0.65	***	n/a	
Took action to further plan	1	3.3	1.3	0.69	***	n/a	
Action had terrorist objective	1	3.6	1.3	0.64	***	n/a	
Overall- committed crimes alleged	1	3.2	1.3	0.72	***	n/a	
Average of four factual elements	4	3.5	1.1	0.74	***	n/a	

\*\*\* Significant at .001 level  
<sup>1</sup> Phi-coefficient  
<sup>2</sup> Pearson's correlation coefficient

## (b) Punitiveness

A punitive attitudes measure was obtained in an initial online survey participants undertook approximately two weeks before they attended the trial. Items making up a punitiveness scale were borrowed and modified from a variety of sources or developed by the team during the pre-testing process, and measured attitudes towards sentencing, the rights of the accused, and proportionality.<sup>68</sup>

<sup>68</sup> Items were modified from K. Gelb, *Predictors of punitiveness: Community views in Victoria*. Sentencing Advisory Council (2011); G. Mackenzie, et al. 'Sentencing and public confidence: Results from a national Australian survey on public opinions towards sentencing' (2012) 45 *Australian & New Zealand J. of Criminology*. 45; J.D Unnever and F.T. Cullen. 'Empathetic identification and punitiveness A middle-range theory of individual differences' (2009) 13 *Theoretical Criminology*. 283; R.C McCorkle, 'Research note: Punish and rehabilitate? Public attitudes toward six common crimes' (1993) 39 *Crime & Delinquency*. 240. Items Included: a) The death penalty should be the punishment for murder. b) Judges are too soft on offenders. c) The tougher the sentence, the less likely an offender is to commit more crime. d) Do the crime, and you should do the time. e) High crime rates show that punishments are not severe enough. f) Overseas-born people who commit crimes should be deported. g) Offenders are given more rights than their victims h) Prison is not a solution to crime, it teaches inmates to be better criminals. i) People who commit minor

### 3. Analysis

Logistic regression was used to analyse the measure of verdict – a dichotomous variable. Results from logit models are presented both in odds-ratio form and as percentage differences from the baseline condition. The percentage differences reported are those derived from the logit models, i.e., they take account of other variables in the model. Odds-ratios are the most commonly presented measures of effect size. Normal conventions for presenting odds-ratios,  $\chi^2$  and  $p$ -values information are used in the text, but, for the most part, the tables use percentage differences adopting the approach outlined.

An additional form of presenting information is to use the relative contribution of each factor or covariate to the model. With regression analysis, this involves looking at the additional variance ( $R^2$ ) contributed by adding each additional element to the model in a specified order. With logistic regression, a pseudo-  $R^2$  approach, developed by Cox & Snell, is used to replicate this process, one that compares each iteration of the model to the baseline condition.

## V. RESULTS

### 1. Verdict

A logistic regression analysis, with punitiveness as a covariate, indicated that jurors who saw the defendant in the dock – either a glass or an open dock – were 1.8 times more likely to view him as guilty than jurors who saw the accused at the bar table ( $\chi^2(1) = 6.0, p = .014$ ). This effect size was virtually identical for the two dock types. Expressed in percentage terms, those who saw the accused in a dock had a guilt level 14 percentage points higher (47 per cent) than those who saw him at the bar

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crimes should be given a second chance. j) The most effective response to crime is to provide better treatment for offenders. Although cases were subject to random assignment, there was a difference in level of punitiveness between the three conditions, with 36 per cent of those who saw the accused at the bar table being classified as in the top half of the punitiveness scale compared to 35 per cent in the glass dock condition and 29 per cent in the open dock condition. While this difference was not statistically significant ( $\chi^2 = 3.4, df = 2, p = .18$ ), it could bias estimates of effect sizes, so most of the models reported here include punitiveness as a covariate.

table (33 per cent).

## 2. Predictors of verdict

### (a). Demographic factors

There were significant age and gender differences in how the presence of the dock increased conviction levels, but the impact was most evident for the glass dock (Table 3). The glass dock had a particular impact on women (a 2.4 times increase in odds of a guilty verdict for women versus 1.2 times for men ( $\chi^2 = 4.3$ ,  $df = 1$ ,  $p = .04$ )), on jurors aged 35 years or over (2.4 increase in odds of a guilty verdict versus 1.0 times for younger jurors ( $\chi^2 = 8.8$ ,  $df = 1$ ,  $p = .003$ )), and for those with professional employment (3.6 times versus 1.3 times for those without professional jobs ( $\chi^2 = 3.5$ ,  $df = 1$ ,  $p = .06$ )). Expressed in terms of percentage point increases – net of punitiveness – the effect of the glass dock compared to the bar table was 22 points increase in guilt level for women, 22 points for jurors over 35, and 27 points for those with professional employment. Combining age and gender, the effect of seeing the accused in the glass dock for women over 35 was 39 percentage points higher than seeing him at the bar table.<sup>69</sup>

**Table 3. Differences in guilt levels between conditions, by demographic characteristic**

<i>Demographic variables</i> <sup>1</sup>	<i>Per cent Guilty</i>	<i>Percentage difference from bar table</i>			<i>N</i>
		Bar table	Glass dock	Open dock	
<i>Gender</i>					
Men	31	4	14	8	183
Women	36	22*	15	18*	221
<i>Age</i>					
Under 35	32	0	20*	10	159
35 or over	34	22*	10	16*	245
<i>Occupation</i>					
Professional	20	27*	7	17	104
Other	40	6	13	10	300
Total <sup>1</sup>	33	13*	14*	14*	404

<sup>69</sup> We also analyzed these data using age as a continuous variable, and found similar results. For women it is estimated that there is a 1.03 change in the odds of conviction for every year of age, bearing in mind that all the participants were between 18 and 65. For a women of 25 years of age, the model estimates that she is 2.8 times more likely to find an accused person guilty if he or she is seated in a glass dock than at the bar table, whereas for a 55 year old woman the equivalent effect size is 6.1.

*Odds-ratios difference from bar table*

<i>Gender</i>	Bar table	Glass dock	Open dock	Dock, total	
Men	1.0	1.2	1.8	1.5	183
Women	1.0	2.4*	1.9	2.1*	221
<i>Age</i>					
Under 35	1.0	1.0	2.3*	1.5	159
35 or over	1.0	2.4*	1.5	1.9*	245
<i>Occupation</i>					
Professional	1.0	3.6*	1.5	2.3	104
Other	1.0	1.3	1.7	1.5	300
Total	1.0	1.7*	1.8*	1.8*	404

\*  $p < .05$ <sup>1</sup> Estimates from logit models. controlling for punitiveness

## (b). Punitiveness

While effect sizes for demographic groups were, for the most part, moderate or small, jurors' prior attitudes had a somewhat larger effect. However, unlike with gender and age, there was no difference in verdict between an open and secure dock conditions. Twenty-six percent of those with a punitiveness score below the median found the accused guilty when he was at the bar table (Table 4). For this low punitiveness group, the dock effect was modest – up nine points to 35 percent (in odds ratio terms, 1.5 times higher than the baseline condition). For the higher punitiveness group, by contrast, the bar table condition already had a high conviction rate of 44 percent, which rose by a further 16 points to 60 percent when the accused was in the dock (1.9 times higher than the baseline condition). The average increase in percentage points from this model (estimated marginal means specifying punitiveness as a binary) is 13 points attributed to the dock and 22 points associated with punitiveness. Using Cox & Snell's pseudo-  $R^2$ , the relative contribution of punitiveness is considerably greater. Together the two variables (dock condition and punitiveness, defined as a continuous variable), account for 9.7% of the total variance in verdict, of which 1.1% is explained by the dock condition (Wald  $\chi^2 = 6.0$ ,  $df = 1$ ,  $p = .014$ ), while 8.6% is explained by punitiveness (Wald  $\chi^2 = 31.7$ ,  $df = 1$ ,  $p < .001$ ).

**Table 4. Impact of position by punitiveness**

	<i>Verdict: per cent guilty</i>				
	bar table	open dock	glass dock	dock, total	Total
Low punitiveness (n=183)	26%	36%	34%	35%	32%
High punitiveness (n=221)	44%	61%	59%	60%	54%
Total (n=404)	36% <sup>1</sup>	47%	47%	47%	43%

<sup>1</sup> note that this estimate for verdict is slightly higher than the estimated marginal mean from the logit model with punitiveness as a co-variate (33%, presented on p 19). This is because, as noted previously, the three experimental groups are slightly different in terms of punitiveness. The estimated marginal means model is set at the average for punitiveness.

(c) Strength of evidence.

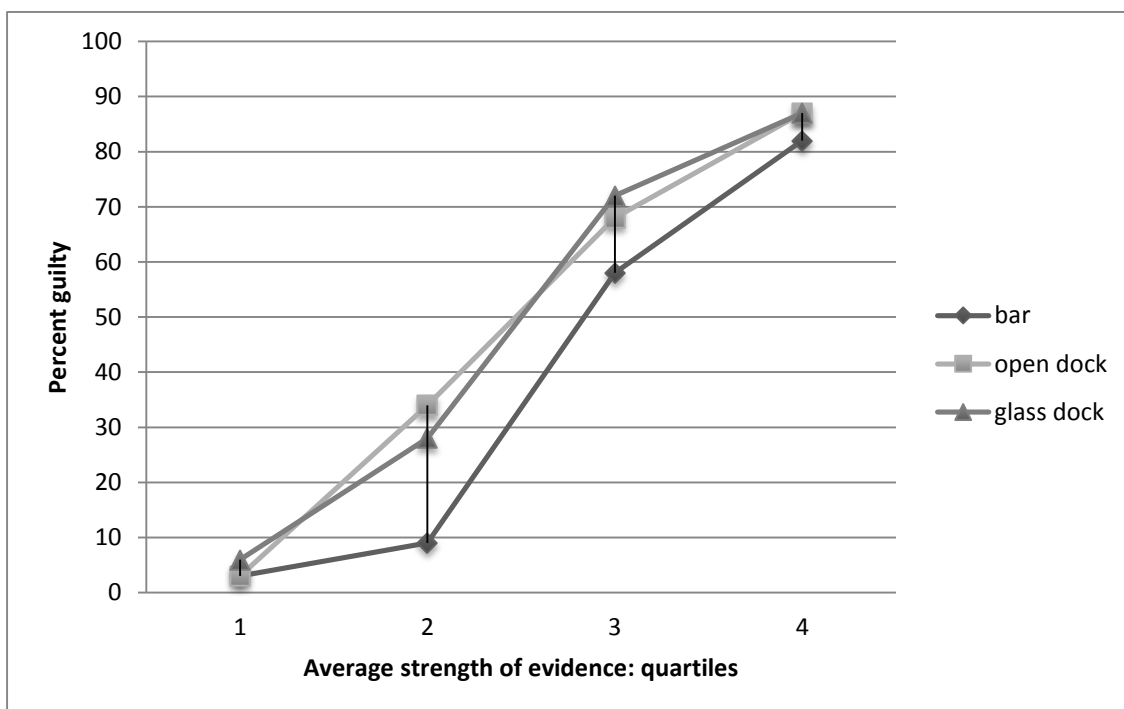
It was anticipated that there would be a strong relationship between the perceived strength of prosecution evidence and verdict: the better the evidence the greater likelihood of a conviction (see Table 2, zero-order phi-coefficient of .64). Strength of evidence scores range from 1 to 5, with the mean score being 3.8 ( $SD = 0.9$ ), and perceptions of evidence strength were not affected by the dock condition ( $F(2, 401) = 0.00, p = .99$ ). To examine the relationship between juror assessments of the strength of evidence and dock condition, we tested how the dock condition impacts verdict across the strength of evidence quartiles. The difference between bar table and dock conditions was not uniform across all assessments of evidence strength (Figure 1). In the bottom and the top quartile the two conditions closely track each other. But in interquartile range there is a marked difference between the bar table and dock conditions. This information is also summarized in Table 5, where the two dock conditions are presented together. Jurors who rated the strength of evidence in the lowest quartile were, not surprisingly, the least likely to convict the defendants- three per cent find him guilty. There was no statistically significant difference between those who saw him at the bar table (3 per cent guilty) to those who saw him in a dock (4 per cent guilty,  $\text{Exp}(B) = 1.3, \chi^2(1) = 0.05, p = .83$ ). Amongst those who found the evidence strong – those in the top quartile – there was also a non-significant difference in the verdicts for those who saw him at the bar table (82 per cent) and those who saw him in the dock (89 per cent),  $\text{Exp}(B) = 1.1, \chi^2(1) = 1.03, p = .31$ ). However, in the middle



fifty percent of jurors the difference was striking: 28% of jurors returned a guilty verdict in the in bar table condition and 50% voted guilty in the dock conditions,  $\text{Exp}(B)= 2.51, \chi^2=7.77, \text{df}= 1, p = .005$ .<sup>70</sup>

It is possible to put these findings simply as follows: for jurors who are strongly convinced or not convinced about the strength of the prosecution evidence, additional cues (such as where the accused is sitting) do not seem to play a role in their decision. On the other hand, for jurors whose assessments of the strength of evidence hover around the mean - suggesting that they perceive the evidence as neither particularly strong nor particularly weak - the position of the accused seems to become salient in helping them come to a decision.

**Figure 1. Percent of guilty verdicts by strength of evidence, accused at bar table or in dock**



<sup>70</sup> Because the distribution of the strength of evidence scale is not completely continuous, the number of respondents in each quartile was 107 jurors in Q1, 105 in Q2, 91 in Q3, and 101 in Q4. We also conducted an alternative analysis with equal numbers in each quartile using Principle Axis Factoring, which resulted in very similar findings to the ones reported in this paper. The jurors in the interquartile range returned a verdict of guilty 26% of the time in the bar table condition and 52% of the time in dock conditions,  $\text{Exp}(B)= 3.01, \chi^2=10.88, \text{df}= 1, p = .001$ .

**Table 5: Verdict by strength of evidence and position of the accused**

Average strength of evidence	<i>Position of accused</i>			<i>Effect of dock</i>				
	Bar table (n=134)	Dock, combined (n=270)	Total		Exp(B)	$\chi^2$	df	p
Quartile one (n=107)	3%	4%	3%	1%	1.3	0.05	1	0.83
Quartile two and three (n=196)	28%	50%	39%	22%	2.5	7.77	1	0.005
Quartile four (n=101)	82%	89%	86%	7%	1.1	1.03	1	0.31
Total (n=404)	33%	47%	43%	14%	1.8	6.0	1	0.014

Note: Estimates produce by logistic regression, net of punitiveness

While this interpretation is plausible, an alternative explanation cannot be ruled out.

Allocation to the dock or bar table conditions was carried out under experimental conditions, so the inferences drawn about the effect of the dock can be considered strong. Jurors were not, however, similarly assigned to strength of evidence. They made their own judgements about strength of evidence, potentially based in part on whether the accused was in the dock or at the bar table. To test whether the relationship between strength of evidence and guilt varied according to dock condition, it is useful to compare the variance attributed to strength of evidence for each dock condition (see Table 6). As with previous models, a measure of punitiveness is also included in the model to account for slight differences in punitiveness between experimental conditions.<sup>71</sup>

What appears to be happening is that prior attitudes, in this case measured by level of punitiveness, lie largely dormant in those who see the accused at the bar table. For this group, prior attitudes have relatively little impact on their decision. Only 5 percent of the variance in likelihood of guilt for those seeing the accused at the bar table is explained by punitiveness ( $B = -.02$ ,  $\chi^2 = .13$ ,  $df = 1$ ,  $p = .74$ ). For those who see the accused at the glass dock, by contrast, the proportion is

<sup>71</sup> For this purpose, likelihood of guilt, a continuous variable, is used because the partitioning of effect contributions from OLS regression models is more intuitive than those using logistic regression.

considerably higher, 13 percent of variance explained ( $B = 1.0, \chi^2 = 7.0, df = 1, p = .008$ ), with those seeing the accused in the open dock being about half way in between, at 8 percent ( $B = .08, \chi^2 = 4.7, df = 1, p = .03$ ). The dock, particularly the glass dock, seems to activate or trigger prior prejudice.

Having accounted for prior attitudes, what happens with strength of evidence? If jurors think that the evidence is very strong, they are naturally more likely to consider the accused guilty. Those who saw the accused at the bar table, however, seemed to take more notice of the evidence – fully 49 percent of the variance in likelihood of guilt was accounted for by the strength of the evidence ( $B = .09, \chi^2 = 97.5, df = 1, p < .001$ ) compared to only 30 percent for those who saw the accused in the glass dock ( $B = -.07, \chi^2 = 63.2, df = 1, p < .001$ ). As with punitiveness, those in the open dock condition were about half way between the two, at 38 percent ( $B = .09, \chi^2 = 63.2, df = 1, p < .001$ ).

**Table 6. Likelihood that accused guilty, by punitiveness and strength of evidence**

	<i>Per cent of variance (<math>R^2</math>) explained by terms in model</i>				Ratio of glass dock: bar table
	Bar table (n=134)	Open dock (n=135)	Glass dock (n=135)	Total (n=404)	
<b>A. Evidence only</b>					
Strength of evidence	0.53	0.44	0.41	0.46	0.77
<b>B. Adding punitiveness</b>					
Punitiveness	0.05	0.08	0.13	0.08	2.81
Strength of evidence	0.49	0.38	0.30	0.39	0.62
<i>Total, variance explained</i>	0.53	0.47	0.43	0.47	0.82

The magnitude of the dock effect can be examined further by comparing the interaction effects associated with the dock conditions in an analysis of variance model that includes all three conditions together with interactions, rather than examining each condition in turn (as we have done above). Seeing the accused at the bar table significantly reduces the impact of punitiveness on perceived likelihood of guilt ( $B = -.11, \chi^2 = 4.2, df = 1, p = .04$ ). However being at the bar table did not significantly change the impact of strength of evidence on likelihood of guilt ( $B = .02, \chi^2 = 1.7, df = 1, p = .19$ ). These are, respectively, the interaction effects of punitiveness and strength of evidence with dock position (being at the bar table) on likelihood of guilt. So while seeing the accused at the bar

table can be said to significantly reduce the effects of prejudicial attitudes on perceived likelihood of guilt, the evidence is consistent with strength of evidence being more important for the bar table condition than the other conditions on likelihood of guilt, but the differences are not sufficiently great to reach standard thresholds for statistical significance.

It is useful to reflect on why the dock may have an impact both on the activation of prior attitudes and the weight given to strength of evidence (even if as in this study the latter effect did not achieve statistical significance). The position of the accused in the courtroom, we tentatively suggest, might play a role as a ‘tie-breaker’ for those who find the evidence inconclusive. The need for a ‘tie breaker’ may be more of an issue for those who see the accused at the bar table, to the extent that evidence is more salient as an issue for them. In other words, jurors who see the accused at the bar table give relatively more weight to the strength of evidence than jurors seeing the accused in the dock. Their increased emphasis on the evidence arguably expresses itself in terms of a presumption of innocence (rather than a cue indicating guilt). So it is, we suggest, the image of the accused at the bar table that has the greater effect. Those who see the accused in the dock meanwhile – particularly the glass dock – have their prejudices already triggered by this visual stimulus; they have less need of further stimuli, and, at any rate, the strength of the evidence is less of an issue for them. These hypotheses would require further testing with larger data sets, but they do indicate that, while the prejudicial effect of the dock is clear, the precise mechanisms for how it operates upon juror thought-processes requires further testing.

## VI. DISCUSSION

Based on the results of this study, we conclude that jurors may be more likely to convict a person sitting in a dock than if the person were sitting at the bar table. The evidence presented here is consistent with our first hypothesis, namely, that being in a dock increases the chances that a defendant will be found guilty. However, the size of the effect varies somewhat between groups. The

dock appears to have more impact on jurors who have higher than average levels of punitiveness. It also has more impact on those who are uncertain about the strength of the prosecution case. Where the evidence is perceived to be strong or weak, the jurors appear to make their decision mostly on the evidence, with little variation associated with the position in the courtroom of the accused. However, jurors whose assessment of the evidence strength is neither very strong nor very weak, they may turn to other cues (such as whether the accused is in a dock) to assist their decision.

While the overall impact between glass and open docks is similar, nevertheless there are groups for whom the glass dock does have a significant impact on their verdicts, specifically women, older people and professionals. The effect of age on the prejudicial impact of the dock, the evidence suggests, was entirely confined to women.

A further hypothesis that is raised by the analysis – but would require a larger study to confirm or refute – is that the position of the accused may change the weight given to other factors. This analysis looked at the proportion of variance explained by prior attitudes and the strength of the evidence. Juror attitudes that could be considered prejudicial, such as punitiveness, appeared to be relatively unimportant for jurors who saw the accused at the bar table. On the other hand, existing prejudices appeared to be triggered by seeing the accused in the glass dock, with the effect size for defendants in the open dock somewhere in between. Meanwhile, the dock had a dampening effect on the weight given to the evidence, with jurors seeing the accused at the bar table considerably more likely than the other jurors to use their assessment of the strength of the evidence in coming to their verdict.

How generalisable are these conclusions? This is the first experiment of its kind, so as with any such study, greater confidence in the conclusions will come with replication. There are several features that suggest the findings are likely to be reasonably robust; there are others that give cause for caution. The fact that both docks had a similar impact on guilt levels does suggest that there was no overall shock value in seeing a defendant shut in behind a glass screen, nor indeed any great

advantage in being placed in what appears to observers to be a reasonably dignified and comfortable open dock. Nor is the position of the dock in the courtroom likely to make too much difference. Some of the jurors looked directly across the room at the accused (the standard position in NSW, South Australia and Western Australia); others had to turn to look at him (as they would in England and Wales, Victoria, and Queensland). Some in the public gallery could hardly see him at all, at least not in the glass dock.

The courtroom used for this experiment was a modern design, with both the secure and open dock blending in with the other features of the courtroom. For instance, the secure dock was recessed, so that the glass front was flush with the side wall of the court. In England and Wales, many secure docks are retro-fitted (glass has been added to existing docks in older style courtrooms) and are perhaps more jarring on the eye. This may mean that such docks have a stronger impact on jurors. Future experiments might involve testing the effect of jurors seeing accused persons in retro-fitted secure docks in older style courtrooms.

How realistic was the study? Despite the authentic setting and the strong acting performances, it was, in the end, a mock trial with actors, lasting 45 minutes, with the jurors voting immediately after the performance. A real trial of a similar nature would likely last a number of days or weeks, if not months, with the jurors having many opportunities to review the mountains of evidence before retiring to deliberate for as long as they wished. While this simulation was more involved than many studies of juror decision-making that typically involve brief written materials, it is possible that first impressions may be overtaken by other influences during the course of the trial. Controlled experiments, such as the current study, allow a question to be tested with much more rigor, especially when causal relationships are predicted. A necessary trade-off in achieving such levels of control is, however, the generalisability of the study. Although this study provides the first systematic data about the influence of courtroom design on how defendants are perceived, further research is needed to complement this experiment, in order to improve the generalisability of the findings.

The type of case, too, could have an influence on the way the dock is perceived and the generalisability of the findings. For persons charged with white collar offences, their position in the courtroom might have little impact on the jury, whereas the position of those charged with, say, gangland slayings might become very important in the eyes of a juror. Moreover, it is possible that, where the evidence is circumstantial, as it was in the scenario used in the study, jurors may look to alternative cues such as the attractiveness of the defendant, the confidence of the prosecutor, or the position of the accused in the courtroom. Indeed, when the case hinges on the credibility of, say, an eyewitness or the sworn testimony of the accused, other heuristic devices might become more important. While it is true that terrorism might not be a typical offence to go to a jury, it was selected for the current study because it is one that has attracted considerable public debate, and changes to practices in the courtroom for terrorism trials have been observed in the two high profile cases in Australia mentioned above, as well as in France and Northern Ireland. Clearly further work is needed to establish whether the design, generally, of the courtroom influences how the defendant is perceived when charged with other types of offences that differ in level of violence and threat to the public.

Should the dock be retired from use in Australia and the United Kingdom as it largely has been in the US and increasingly in Ireland and New Zealand? This study has confirmed the view of most judges who have opined on the matter that the dock is potentially prejudicial and should be abandoned. Problem-solving courts, Indigenous courts, and certain restorative justice practices (such as family conferencing and sentencing circles) all recognise the importance of the design and choreography of the process.<sup>72</sup> In restorative justice conferences, for instance, much attention is paid to where the offender sits relative to other parties.<sup>73</sup> Courtrooms are no different. This research provides some preliminary evidence that the design of the courtroom can influence the outcome and hence the fairness of the trial.

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<sup>72</sup> M. Rossner, and D. Tait, 'Contested emotions: Adversarial rituals in non-adversarial justice procedures' (2011) 37 *Monash University Law Rev.* 241.

<sup>73</sup> M. Rossner, *Just Emotions: Rituals of Restorative Justice* (2013).

There are two other objections to the dock that this study did not test – effective access to counsel and the dignity of accused persons. The initial US judgments on the dock largely centred on lawyer-client contact, while many ECHR decisions have included a strong focus on dignity. Another objection to the glass dock, and one not tested in this study either, is that it may limit the defendant's ability to hear the case against them.

Perhaps the more pressing question is why the dock has survived so long in the English-speaking world (outside the US) if there are so many objections to it. It is worth reviewing these possible reasons to get a sense of what strategies might be pursued to change the design of courtrooms. The first reason, offered by court managers, is that fewer security staff are required to maintain order in an Australian or English court than in an equivalent US court. Once the accused is firmly constrained within the dock, the argument goes, a single security officer can manage most court situations. Even if this cost saving is only partly realised, the appeal to financial prudence is an attractive one, particularly when new courts are being built – it is easier to put in a dock than to be certain of getting an adequate annual budget for security staff into the future.

The second reason is that many lawyers do not see the need to sit with their clients. A cultural practice, built up over many generations, is for prosecutors and defence lawyers to consult frequently with each other, so it is very convenient for them to share a common bar area. Historically, it was solicitors only who talked to their clients, before briefing the barristers whom they assigned to the trial. Such a distinction was never adopted in the US. If English or Australian barristers need to get information from their client during a court session, they can send their solicitor over to talk to them in the dock, or wait until a break in proceedings. From the perspective of many in the Bar, there is no particular advantage to them in having their clients beside them. This is compounded by the fact that most bar tables tend to be fully occupied; there is no additional space. This problem is largely addressed in most Australian states, at any rate, by having the dock in close proximity to the bar table.

A third objection that could be raised, particularly in the light of the findings from this study,



is from prosecutors – why would they give up the ‘conviction premium’ they potentially get from having the jury see the accused in the dock? Such objections would be, no doubt, phrased obliquely, such as giving some accused an ‘unfair advantage,’ or cluttering up the bar table. All things considered, it could be anticipated that some resistance would come from prosecutors.

One very simple, but perhaps fundamental, reason why the dock maintains its preferred status relates to the design of the courtroom in common law countries. For the most part, courtrooms in these countries have a long bar table facing the judge. By contrast in the US, the prosecutor and defence have separate tables. Having two bar tables makes it logistically simpler to accommodate the accused alongside their lawyer.

## VII. CONCLUSIONS

The history of the dock reveals that its use has been varied and inconsistent. Lawyers, judges, and scholars have pointed out problems associated with this practice. Yet it persists. We have provided some reasons why this is so, namely legal traditions, security concerns and costs. This experiment is the first to test empirically the relationship between the placement of the accused during a trial and a juror’s particular verdict. We present evidence to suggest that the placement of the accused in a dock, either glassed-in or open, increases the likelihood that a juror will return a guilty verdict, independent of any other aspect of the trial or evidence. This leads us to conclude that that placement could pose a fundamental challenge to the presumption of innocence. As Stumer reminds us, this presumption should never be relaxed when it might lead to the innocent being convicted.<sup>74</sup>

Our recommendations are consistent with recent calls to modernise courts across England and Wales.<sup>75</sup> A significant reform of the court estate is already underway, with 86 courts and tribunals to

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<sup>74</sup> Stumer, *op. cit.*, n, 41.

<sup>75</sup> Her Majesty’s Court and Tribunal Service, *Proposal on the Provision of Court and Tribunal Estate in England and Wales* (2015), <<https://www.gov.uk/government/consultations/proposal-on-the-provision-of-court-and-tribunal-estate-in-england-and-wales>>; JUSTICE, *op. cit.* n 2; Rt Hon. Sir B. Levenson, *Review of Efficiency in Criminal Proceedings*,

be closed,<sup>76</sup> an ambitious digitization project launched,<sup>77</sup> and a rethinking of the function of court spaces undertaken.<sup>78</sup> Indeed, the Lord Chief Justice of England and Wales has remarked that docks might not be necessary.<sup>79</sup> We agree. While further research is needed to replicate our findings, our tentative conclusion is that there should be a phasing out of the dock in criminal courts where they now exist, and a moratorium placed upon their presence in the design of new courtrooms.

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*The Judiciary of England and Wales* (2015).

<sup>76</sup> Her Majesty's Court and Tribunal Service, *op. cit.*, n. 2.

<sup>77</sup> Ministry of Justice, Lord Chief Justice of England and Wales, and the Senior President of the Tribunals, *op. cit.*, n. 2.

<sup>78</sup> JUSTICE, *op. cit.* n 2.

<sup>79</sup> <http://www.standard.co.uk/news/terribly-expensive-docks-could-be-abolished-says-uks-most-senior-judge-10002543.html>.

