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THE AMERICAN JURY: A JUSTIFICATION

TOM C. CLARK†

Introduction

The Board of Editors of the *Valparaiso University Law Review* is to be congratulated upon its decision to include in this inaugural issue an article on the *American Jury*. It is a timely subject and one that is of great importance to the effective administration of justice. I deem it a high privilege to respond to the call of the Board to contribute an article which, as they requested, "would essentially comprise an historical, moral and pragmatic justification for the continued adherence to the jury system in America."

In approaching the subject it should be remembered that it is hardly "possible to say anything very novel or very profound"¹ about the jury system. With a background of some seven centuries it has withstood assault again and again. We find it today under continual fire as being an antiquated, arbitrary, expensive, delaying and unfair judicial instrumentality. Indeed, in England where it was conceived and developed the civil jury has, since World War I, ceased to exist, save in about two percent of the litigated cases. In Canada, excepting Ontario Province, it is likewise out of use and in the rest of the Commonwealth it has disappeared altogether. Although the system is written into our Bill of Rights the same thing could happen here. If the jury is the "lamp that shows that freedom lives,"² its usefulness must be proven to Americans both of law and laity as a necessary judicial tool in the field of litigation. In this paper I shall attempt to make an analysis of the "pros and cons" of our American jury system in an effort to shed more light than heat on the subject. In assessing its present day value we must not overemphasize the historical background of the system. Our society has changed considerably since those early days and we must base our appraisal on contemporary attitudes, needs, and values rather than ancient

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1. DEVLIN, TRIAL BY JURY 3 (1956).

2. *Id.* at 164.

ones. History, on the other hand, is important in showing us the function that the jury has served.

Origin of the Jury System

Some claim that the jury had its beginning by accident. But assuming that this is true, our adoption and retention of it certainly has been deliberate and we, therefore, must face up to our long involvement. The jury is, of course, uniquely English. There is authority that the English copied it from the Continent but this theory has been discredited.³ Nor does it appear to be Anglo-Saxon, springing from the institutes of Alfred The Great or from the Scandinavians who venerated the number twelve.

Sir Patrick Devlin, no mean authority, attributes its early beginnings to the Norman inquisition or inquest which the King inaugurated to obtain information on his subjects and their behavior. Who would be better to so inform than one's neighbors! As a result the King compelled a group of twelve in a community to take an oath and to make a report on such matters as called for by him. The report was based on the jurors' personal knowledge rather than on the testimony of witnesses and was made under their oaths. The inquest was not associated, however, with trials. Guilt or innocence was still settled by combat or by the accused bringing to his side as many compurgators as possible. A pitched battle often resulted.

Subsequently, Henry II conceived the idea of using the inquest as an implement of justice. If it was helpful to the King in securing information, it might be equally potent in the settlement of disputes. Originally the Royal Writ authorizing the summoning of a jury was limited to disputes involving the title to land. The jury continued to decide the issue on their personal knowledge, under oath, without the benefit of outside witnesses. The party who first obtained twelve oaths on his side was the winner.

Henry II also founded the jury of presentment or accusation. The Assize of Clarendon (1166) provided for this grand jury procedure. However, the grand jury had nothing to do with the trial on the merits. This continued to be determined by ordeal or battle. It was in 1215 that Pope Innocent forbade Ecclesiastics to participate in trials by ordeal. The Pope's decree had the effect of abolishing this practice. The judges gradually adopted the practice of hearing the accused or the parties consent to "put himself upon the country," *i.e.*, to be judged by his neighbors. The jury was thus transformed from one that acted on its own knowledge to one that heard testimony and reached its decision solely from the evi-

3. See C. M. JOINER, *CIVIL JUSTICE AND THE JURY* 162-71 (1962).

dence offered. However, in the transformation the number of jurors remained at twelve in accordance with the twelve "oaths" of the earlier inquest. There are many romantic explanations for the use of the "magic twelve." It is said that the number sprang from the twelve patriarchs, who were begot by Jacob and who in turn spawned the twelve tribes of Israel; the twelve officers of Solomon and the twelve Apostles. Just as the twelve officers of Solomon reflected his wisdom and the twelve Apostles revealed and preached the truth—why should not the number twelve be appropriate to render justice between man and man? Perhaps Henry II concluded that twelve was a sufficient number of men to create a favorable public opinion and still was not so large as to end in a public brawl. The general rule of unanimity on the verdict also came from the twelve oaths requirement of Henry II's procedure as to land disputes. It is also interesting to note that in grand jury proceedings the jury is composed of twenty-three, but twelve votes are required for affirmative action.

In the United States, unlike England, written constitutions have played a part in the adoption and continuation of the right of trial by jury. Prior to the Revolution all the colonies had some form of trial by jury. Those states which adopted written constitutions prior to the federal constitution either expressly or by implication provided for trial by jury. The original draft of the federal constitution of 1789 made no reference to the right of trial by jury in civil cases. A storm of criticism resulted and the Bill of Rights made specific provision for both grand juries (fifth amendment) and petit juries (sixth amendment) in criminal cases and also civil juries (seventh amendment) where the amount in controversy exceeds twenty dollars. These requirements are restrictions only upon the federal government and not upon the states. However, all of the states except Louisiana have broad general provisions in their constitutions respecting the right to trial by jury. Some of the states also have constitutional provisions authorizing the legislature to provide for the waiver of jury trials in certain cases; conditioning the right upon a specific demand or upon the type of offense or the amount involved; permitting the use of less than twelve jurors in some cases, and abandoning the ancient rule of unanimity.

Purpose and Values of the Civil Jury

Many people believe that the jury is a separate institution with absolute power to determine the facts. This is, of course, not true. There is no separation of powers between the law and the facts. Indeed, in some states the jury passes on both. In most jurisdictions the law re-

mains the province of the judge but he also has much to do with the facts. For example, the verdict of the jury has no legal effect unless the judge accepts it. He can set it aside and direct that a new trial be had. Likewise, the judge may find the evidence is insufficient to go to the jury and end the case by directing a verdict. Even the amount of the verdict is subject to his control through the practice of remittitur. It might be said, therefore, that the jury occupies a subordinate role to the judge. Its function is to arrive at a verdict on the facts of the case. It is not required to explain its action. It answers "yes" or "no." This immunity from rationalization is an essential ingredient of the system, although in the time of Henry II, jurors were subject to varied sanctions if their verdict was found to be erroneous.

The demands of the law are strict while those of the jury depend upon its collective conscience. It is the jury, therefore, which is able to make the best accommodation between the law and the merits. It adds a humanistic touch to the law relaxing it at times so as to allow a more equitable judgment. And sometimes where the law demanded too much the jury has run over it rough shod. Witness prohibition! The result is that the jury purveys the type of justice the people want. As Sir Patrick so well put it :

For more than seven out of the eight centuries during which the judges of the common law have administered justice . . . trial by jury ensured that Englishmen got the sort of justice they liked and not the sort of justice that the government or the lawyers or any body of experts thought was good for them.⁴

It was also thought that the jury was "the reasonable man" about which the law often speaks. Should not the collective judgment of twelve people be more reasonable than that of one? This is not to say that the jury is the representative of the country. Often it is "blue ribbon" or vice versa. On balance one might conclude that it is average in education, income, age, and intellect. It remains, however, predominantly male.

Blackstone often referred to the jury as a safeguard against the violence of the government or its judges. The first object of a tyrant is to make the will of others subservient to his own. History has proven that trial by jury has been a bulwark of liberty, for no tyrant would dare leave a subject's freedom in the hands of a jury of his peers. In our own times, the jury often has served as a deterrent to ambitious officials who wish to crush before them those who stand in their way. From

4. DEVLIN, *supra* note 1, at 160.

where I sit, reviewing some 3,500 cases a year, I often see the arbitrariness of a judge sitting as the thirteenth juror. One can easily imagine the extent of his severity when he sits alone! Juries in this manner are not only a safeguard but through their experience and verdicts they exert tremendous influence on the molding of the national character. As the distinguished Alexis de Tocqueville wrote over a century ago:

The jury, and more especially the jury in civil cases, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged, and with the notion of right. . . . It teaches men to practice equity, every man learns to judge his neighbor as he would himself be judged. . . . It invests each citizen with a kind of magistracy, it makes them all feel the duties which they are bound to discharge towards society, and the part which they take in the Government.⁵

Objections to the Civil Jury

Many distinguished and learned judges and lawyers have suggested that the jury be dispensed with in civil cases. They argue that the jury is arbitrary. In many cases this is true. But judges are also arbitrary at times; and along with it they often get calloused from the daily routine of hearing other people's troubles. I submit that history is against those who depend on this fault—700 years of jury verdicts without a change in procedure is heavy weight to overcome.

A more recent and cogent reason suggested for abolishing the civil jury is that it brings about docket congestion. The time used in selecting the jury, the opening and closing of counsel, the charge and the deliberation on their verdict are items that are not involved in a trial before the judge alone. But studies on the problem indicate clearly that a case tried before the judge does not proceed with as much dispatch as one before a jury. Interruptions for adjournments, etc., to accommodate the court, the lawyers or witnesses are often permitted. In most cases the judge, at the close of the evidence, takes the case under advisement. Often briefs are filed and other delays are indulged. I remember well when I was in the practice attending court awaiting the beginning of a trial in which I was counsel. A non-jury case was being completed. Upon its submission to the court the judge announced that he would take it under advisement. One of the lawyers—about two years in practice—said to

5. DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 289 (rev. ed. 1900).

the court: "Your Honor, I certainly want you to give my case your most careful consideration, however, this makes three cases of mine that you now have under submission. You now have my entire law practice under consideration. I do hope you will speed up the process—with deliberateness!"

There is much authority to the effect that the time difference is small between jury and non-jury trials. Professor Joiner points out that when one considers the time consumed by the lawyers in preparing briefs, that consumed in waiting for the transcript of the record to be prepared, the writing of the findings, the opinion and other paper work, "the jury trial may be the shorter of the two."⁶ Moreover, the statistics indicate that two-thirds of the jury cases are settled before verdict while only forty percent of the non-jury ones are disposed of in this manner. Furthermore, the experience of such courts as the Court of Claims of New York and the United States Court of Claims indicates that backlogs pile up in non-jury dispositions. Both of these courts are at least two years behind and only this year, in response to this problem, the Congress added two more judges to the latter court.

It is claimed that the jury system is an expensive luxury. It is true that the jurors must be paid; but their *per diem* is nominal. Moreover, in some jurisdictions the party calling for the jury must deposit its cost with the court each day of the trial. This practice could eliminate the "expensive luxury" objection entirely. Furthermore, empirical studies indicate that the expense of maintaining the jury system is no greater than the cost of non-jury trials. If the jury were eliminated it would be necessary to have additional judges. In the federal system, the first year a new district judgeship is created the cost to the taxpayers is \$92,100. Each year thereafter the figure is \$81,600. This cost is exclusive of quarters which, if not available, cost annually an additional \$20,000. Add on to this the dilatoriness inherent in the final determination of non-jury cases; the higher percentage that are appealed (which requires the time of an appellate court of at least three judges); the decrease in the number of settlements prior to final judgment in non-jury cases and the increased cost of counsel in that type of disposition, and you can easily see that the jury system, on the whole, is the cheaper procedure.

Alternatives to the Abolition of the Jury

Before concluding to abolish the jury in civil cases I believe that we should try other methods and techniques to modernize and streamline

6. DEVLIN, *supra* note 1, at 72-73.

the system. During the past three years we have been studying the question through the Conference of Metropolitan Court Judges. Considerable progress has been made through the use of pretrial settlement procedures. If the jury were abolished, this would not be possible, for the judge who tries a non-jury case should not take part in any settlement procedures. Such a practice could be potentially prejudicial in case the procedures were not successful. The Conference is also devising ways and means of saving time on the initial selection of the jury panel. Rather than using the old, wheel-method, computer devices are being utilized in some jurisdictions to select a jury panel mechanically from the voting lists. In addition, time saving on the *voir dire* examination is being realized by the use of questionnaires mailed to the veniremen before trial. The time of service of the panel is likewise being reduced to one or two weeks rather than the present period of one to three months. This would largely avoid excusing jurors because of economic hardship. In some jurisdictions facilities are provided the jurors for telephoning, dictation, etc. This eliminates many excuses by businessmen. There are many other techniques which could be utilized. For example, Senator Joseph Tydings of Maryland, Chairman of the Sub-Committee on Improvements in Judicial Machinery of the Senate Judiciary Committee, has proposed that the courts utilize more computer devices, enlist the services of efficiency experts and adopt modern business methods in the fight on the backlog of litigation.

Conclusion

In conclusion, it is submitted that the jury system improves the quality of justice that is dispensed by the courts. It is, therefore, the duty of every citizen to always honor the call to jury service. We of the Bench and Bar must face up to the faults in the system as now operated. We must modernize it and reduce the sacrifices incident to such service. Jury service is the only remaining governmental function in which the citizen takes a *direct* part. It is, therefore, the sole means of keeping the administration of justice attuned to community standards. Daniel Webster tells us that justice is the great interest of man on earth. Let us not cut its jugular vein!