Journal of Criminal Law and Criminology

Volume 18
Issue 1 *May*

Article 8

Spring 1927

Revolt of the Jury, The

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THE REVOLT OF THE JURY

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"In my opinion the weak spot in our administration of the criminal law is not so much in our police forces, or our prosecutors, or our courts as in our juries, which is equivalent to saying—in our people's general attitude to the criminal. The tendency of the American jury is not to deliver a verdict, according to the evidence but to pronounce a sort of judgment of Solomon, although the qualifications of the jurors for such a delicate piece of work are usually in striking contrast to those of the monarch whom they imitate." (Scribner's Magazine, January, 1926, page 95.)

Judge Nott, the author of this paragraph, is but one of many jurists who bewail the present attitude of juries. Juries will not, it seems, do what they are supposed to do, render a verdict on the evidence given. They will not convict when the evidence is clear and they will, as he says, persist in rendering a kind of verdict of Solomon. The result is that the machinery of justice has more or less broken down or at least it doesn't function according to the original plan.

The facts are, I doubt not, as the learned judge has stated, but what is to be done about it? He insists, you will note, that the attitude of the jury is but a reflection of the attitude of our people, and the root of the evil he thinks lies in the fact that we no longer believe in discipline and have a sentimental easy-going tolerance for the criminal as witnessed by the provision for moving pictures and baseball games in our prisons.

I doubt very much if the remedy for this particular situation lies in an increased emphasis on the spirit of discipline, however much this might be useful in other ways, or in a return to that administrative policy of prison discipline that Bernard Shaw in his introduction to Sidney and Beatrice Webb's book on English Prisons terms "giving them Hell." The remedy would, I believe, be futile for the simple reason that the causes of the difficulty are not those alleged.

I am quite convinced in my own mind that the present attitude of juries is the result of the spread of general education and the development of a better understanding of the crime problem, and that however detrimental all this may be to the present machinery of justice it will in the long run make for progress in the age long fight against crime. The present attitude of juries is but a revolt of common sense, it is a protest against abstract justice of the blind-fold goddess type

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which the common people have come to believe is far apart from divine justice, bearing little resemblance to that which they strive to copy.

What now is the part which juries are supposed to play? To understand their part, one has to know what all the other participants are expected to do, and he ought in addition to know the purpose or end they are all jointly aiming to accomplish. For example, to understand the play of a baseball player or of a football player, it is necessary to know what the team as a whole is striving to accomplish and what each individual is supposed to do in order to assist in bringing about this end.

To begin with, the purpose or end of the administration of criminal justice is to protect society from acts detrimental to its continued existence and growth. There are many players and the rules are innumerable and extremely complicated. For our purpose, however, we will mention only the chief players and indicate very briefly what they individually do. Legislatures decide from time to time what acts are detrimental to society. Not only that, but in their great wisdom they also decide what is to be done with those who commit these acts. The police are supposed to catch those who have committed these acts. Now the police may not catch anyone or they may catch the wrong man and to make sure that the man brought in is the man who actually did the deed is the work of the court. The determination by the court of the guilt or innocence of the accused is often a difficult thing to do and constitutes a game or play within the larger game or play in which lawyers, the judge and the jury all take part. But before describing this smaller game within the larger game, it is necessary to mention a fourth set of players, prison officials for the most part, who take the convicted man and do with him what the aforementioned legislature said should be done with the doer of this act.

To sum it all up, the aim or the purpose is to protect society. Theoretically, this is accomplished, first by the legislature specifying acts that are detrimental to society and by determining what shall be done to those who commit these acts, secondly, when the police catch these individuals that do these acts, thirdly, when the court identifies these people and fourthly, when the officials, charged with carrying out punishments determined by the legislature have performed their duty.

There are, we must admit, many other groups of great assistance in this struggle to protect society from crimes. The school and the church are two great agencies that help. All the social forces that are working for better housing facilities, more and cleaner forms of relaxation and amusement, for better physical and mental health, will,

we are convinced, do much toward lessening the number of crimes that are now committed. We will not, however, include any discussion of these, merely noting that the machinery of criminal justice after all is only one among several agencies that are working toward this end.

Few of our jurists have considered what may be called the time element in the administration of criminal justice. It is not at all unusual to find that a legislature meeting in session one hundred years ago determined not only that such and such an act was detrimental to society but determined also what was to be done with an individual not yet born and about whom nothing could be known who would commit that act in the year 1926. On the face of it, this seems to me to be not an impossible thing to do, but a very foolish, nay even a wicked thing to do and the only excuse or reason why it ever has been done is because the whole attention in the legislature was focused on the act or crime and not on the man or woman who might commit such a crime.

Now before we go any further with this idea of the time element and its importance in this scheme for the protection of society, let us turn for a moment to what goes on within the court, to an examination of this smaller game within the larger game. The police bring in their man, he is charged formally by the state with having committed the act in question. The trial proceeds with the Judge as presiding officer and with the attorney for the defense doing his best to prove that the man did not commit the crime. The jury's part is to listen to the evidence on both sides and to determine whether the man actually did or did not commit the crime in question. That is all they are supposed to do, and this is what they are now more or less refusing to do. Either they will not bring in the man guilty when the evidence plainly shows that he is or as Judge Nott has said they try to render a judgment of Solomon in the case. We are now prepared I think to understand their point of view. Consciously or unconsciously they are opposed to the part which they are supposed to play in this game, the purpose of which is the protection of society. As in any other game, the success of the team depends on each player doing his part, but it is very difficult to get a player to do his part, to be as it were on his toes, when he no longer believes that the end can be accomplished even when he does play well the part that is assigned to him.

Let us illustrate this situation by an example. One hundred years ago a certain legislature decided that an individual who took property in a certain way was doing something detrimental to society. The

legislature decided that anyone who committed this act would be sent to the penitentiary for ten years. Now in the year 1926, a man is brought into court by the police, charged with having taken property in this obnoxious way. The jury are asked to determine on the basis of the evidence offered whether this man actually did commit this act. If the evidence is sufficient and they do what they are supposed to do, this man will be committed to the penitentiary for ten years. This is indeed the "dead hand" with a vengeance. How could a legislature one hundred years ago say what ought to be done with this man then unknown, yes even unborn. Did they know what kind of a man he would be, what kind of education he would have, under what kind of social and economic conditions he would be born and brought up, what his heredity would be, did they know also what ten years in idleness in an over-crowded penitentiary would do to this man? No, they knew nothing of these things. They were bent on determining the injury suffered by society from this act and in placing on the other side of the scale an injury to the perpetrator equivalent to the wrong suffered by society.

Now whatever our statute books may say on the subject, we as a people no longer believe in this sort of justice. The present attitude of juries is not due to the relaxing of discipline nor is it to be traced to the influence of sentimental and moon-struck maidens who waste their tears on criminals. There has taken place in our minds a complete revolution on this subject of crimes and criminals. We no longer care for abstractions and, whatever anyone may say, our criminal law is fundamentally an abstract thing, the product of the formal logicians of the eighteenth century, who believing that all men were created equal could build a system of criminal justice wherein mere man did not figure at all. If all criminals were equal, then of course the determining thing was the crime. The result of this abstract way of thinking was the development of a system of criminal justice that revolved around the crime not around the criminal, around the act not around the actor. We have, thank God, changed all this in dealing with juvenile offenders. The purpose of the juvenile court is not to hand to the guilty individual a punishment that some past and forgotten legislature determined for the then unborn child; its purpose is first and foremost to turn this child from evil ways. The whole emphasis is on the child, not on his crime. This is a sign of the revolution that has occured in our way of thinking about criminal justice. We are at last interested in the criminal. Never again will we be able to compel juries to shut their eyes to the criminal while focusing their

mind on his act. This I repeat is a great gain and will ultimately be acknowledged by jurists to be so. At the present time it is, of course, disconcerting to those who insist on going on playing the old game. The thing to do, however, is to remodel the game or, if anyone objects to my calling it a game, to install new machinery for the administration of criminal justice.