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The Jury: Trial and Error in the American Courtroom

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THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM. By *Stephen J. Adler.* New York: Times Books, a division of Random House. 1994. Pp. xvi, 285. Cloth, $25.

In 1974, just after former U.S. Attorney General John Mitchell and former Commerce Secretary Maurice Stans were acquitted of conspiracy charges stemming from the Watergate affair, a reporter on the courthouse steps asked Mitchell if he had been worried about the outcome of the trial. "Not at all," Mitchell replied as he strolled toward his waiting limousine, "we've got the jury system, and that always works."[1]

Always? From high school civics classes to works of popular culture, the lore of American law is replete with paeans to the almost mystical virtues of the jury. Yet, it is hardly surprising that a prominent citizen like Mitchell, who successfully avoided the guilt and shame of a criminal conviction and the specter of a prison term, might be moved to sing the jury's praises. At the same time, a generation of Americans that has watched juries render what many people seem to view as surprising verdicts in the notorious cases involving Rodney King, the Menendez brothers, and Marion Barry, can be forgiven for doubting that the jury system, for all its vaunted virtues, *always* works.

Steven Adler's book, *The Jury: Trial and Error in the American Courtroom,*[2] gives voice to this conflicted view of the jury. "We love the idea of the jury," he writes, "but [we] hate the way it works. We celebrate the jurors' democratic power but no longer trust the decisions they reach" (p. xiii). Adler's book endorses our long-standing commitment to the jury system, explores the ways in which it appears to be betraying our trust through "shoddy" and "patently stupid" decisions (p. xv), and offers suggestions for its improvement.

History, someone once said, is "a fable agreed upon."[3] Because it is impossible to know the truth about any past event with utter certainty and accuracy, any account of that event is inevitably doomed to be both uncertain and inaccurate — in the strict sense, a

1. This reviewer heard Mitchell make this statement.

2. Steven Adler is a Legal Editor, for *The Wall Street Journal.*

3. Fittingly enough, history has not yet agreed upon a source for this quote. This reviewer has seen it attributed to Voltaire and Napoleon Bonaparte. *See* THE CONCISE COLUMBIA DICTIONARY OF QUOTATIONS 122 (Robert Andrews ed., 1989) (attributing the statement to Voltaire); THE HARPER BOOK OF QUOTATIONS 204 (Robert I. Fitzhenry ed., 3d ed. 1993) (same); *but see* INSTANT QUOTATION DICTIONARY 158 (Donald O. Bolander et al. eds., 1972) (attributing the statement to Napoleon Bonaparte); THE POCKET BOOK OF QUOTATIONS 138 (Henry Davidoff ed., 1952) (same).

fable. Nevertheless, because today's choices and tomorrow's actions must often be predicated on yesterday's events, *some* fable must be accepted as the operative version of the past.

Nowhere is this more true than in the courtroom. An event — a crime, a tort, a breach of contract — has allegedly taken place in the real world. The court must establish the meaning of that event: blame for its occurrence must be assessed, and liability for its outcomes must be imposed. Our system of liability and punishment can operate only on the basis of an official version of "what happened." Therefore, we must have some way of agreeing upon a fable — of establishing an official, albeit imperfect, history of past events. As Adler notes, the jury is the body we authorize to choose the fable upon which the parties, the judge, and the rest of us must agree.

> Perhaps the most surprising and distinctive task of the American jury is to serve as official historian in any case in which facts are in dispute. . . . Whether [jurors] do their jobs well or poorly, what they decide is typically perceived as true, both legally and historically. Once a jury speaks, journalists no longer refer to an accused person as the "alleged" slayer; "murderer" suffices.
>
> Literalists may argue that juries don't decide what is true; they merely decide whether the government has presented its facts convincingly. A not-guilty verdict, they say, doesn't mean a person is innocent, only that the government has failed to meet its burden of proof. Still, this is so only in a formal sense. As a practical matter the not-guilty person leaves the courthouse with all his freedoms and most of his privileges intact, while the guilty person goes to prison and, if he emerges, continues to suffer the consequences of having been found guilty. . . . Boxer Mike Tyson will live his life as a convicted rapist. Physician William Kennedy Smith will not. Their juries didn't just evaluate the government's proof; they wrote history. [pp. 5-6; footnote omitted]

This observation immediately makes clear the scope and gravity of the jury's awesome power. It also makes clear why it is so important to our system of justice that juries function properly.

Adler assesses the strengths and weaknesses of the jury by analyzing the performance of particular juries. He tells the stories of six trials, both civil and criminal, from various parts of the country. Based on his review of trial transcripts and on extensive post-trial interviews, Adler attempts to reconstruct not only what the jurors heard, but also how they perceived and processed what they heard and how they eventually arrived at their verdicts. For the most part, he wisely avoids notorious, media-saturated trials in favor of more "ordinary" cases. This approach enables the reader to focus on the facts of the cases and the performances of the juries, free from preconceived notions about the trials or their outcomes.

The first trial embodied the ideal: a model jury performed its duties in impeccable fashion under extraordinary pressure. In the trial of Mark Allen Robertson, who in 1989 brutally murdered two people in Dallas, the jury lived up to our most exalted aspirations. It featured a healthy mix of ages, genders, backgrounds, personalities, and ideologies. Two members, while acknowledging their distaste for capital punishment, solemnly promised not to let their personal views interfere with their application of the law. All twelve jurors rigorously honored their commitment not to discuss the case with anyone outside their formal deliberations. One juror spent hours before the start of the trial diligently reading books on the most effective modes of jury deliberation, and then assumed an almost fatherly role in guiding his fellow jurors through their arduous task. Adler uses the Robertson jury to reaffirm the "age-old faith" that "the common sense of the common man — and woman — can produce a correct and just result."[4]

The other five case studies, however, do not inspire such confidence. The second trial involves the unsuccessful 1990 federal prosecution of former Philippine first lady Imelda Marcos and international financier Adnan Khashoggi (pp. 48-83). Adler sets the scene by describing a sumptuous postacquittal celebration hosted by a tearfully grateful Marcos, with ten of the bedazzled jurors as guests of honor (p. 49). He then recounts how during the course of the trial the jurors grew "hopelessly starstruck" by the celebrity of the defendants and how, as a result, they became "blind to the prosecutors' factually strong case" (p. 82). Their verdict, he says, was "driven by ignorance and misplaced sympathy" (p. 82).

In the third vignette (pp. 84-115), a wily plaintiff's attorney spun the straw of an apparently weak case into the gold of a lucrative settlement by cleverly manipulating both the jury selection process and the emotions of the jurors themselves. Adler describes how the jury, on the basis of evidence that might charitably be characterized as slender, seemed poised to find against Pizza Hut Corporation — a deep-pocketed defendant — and in favor of a highly sympathetic plaintiff.

The fourth case study (pp. 116-44) tells the story of Rocky Phillips, a North Carolina "good ole boy" who left the trout streams of the mountain country to heed a summons to jury duty in federal court in Greensboro. Hoping for a juicy murder trial, Phillips instead found himself foreman of a jury in a seven-month antitrust battle between two giant tobacco companies. It is painful to read Phillips and his colleagues' accounts of their efforts to follow the

4. P. 25. The Robertson jury convicted the defendant and authorized the death penalty. P. 35. For Adler the result is less important than the jury's composition and the manner in which it performed its job.

testimony of expert witnesses discussing "predatory price discrimination," "average variable cost," and "cross-elasticity of price and demand" — concepts that baffle many upperclass law students. Long before the case was over, they simply gave up trying.[5] When the trial finally ended and the jurors found themselves confronted with eighty-one pages of jury instructions and an eleven-part special verdict form, they did the only thing they could do: they followed their gut feelings. The U.S. Supreme Court later overturned their verdict, holding that a "reasonable jury" could not have arrived at such a conclusion.[6]

The bafflement of the North Carolina antitrust jury was matched by that of a Colorado panel that faced the task of assessing damages in a personal injury case (pp. 145-75). The defendant, a blood bank, had failed to test its blood supplies adequately for HIV, and, as a result, a woman patient contracted AIDS.[7] The calculation of the woman's medical expenses was relatively straightforward. But how were damages to be calculated for the woman's pain and suffering? For her loss of enjoyment of life? For her husband's loss of consortium? What about punitive damages against the blood bank? The jurors quickly came to the conclusion that "[y]ou can't really translate pain into money" (p. 164). Nevertheless, they dutifully made the translation, just the same. A formula for calculating noneconomic damages somehow "drifted into their minds" (p. 166). A figure for the loss of companionship that the plaintiff's husband suffered and will suffer likewise simply "materialized" (p. 169). Because one of the jurors had heard that attorneys typically take one-third of the judgment as their fee, the jurors increased the award by thirty percent so as not to shortchange the plaintiff (p. 170). The final result was a verdict against the blood bank for $8.15 million, a figure for which none of the jurors could offer any persuasive rationale (p. 170).

Adler's final study (pp. 176-211) concerns precisely the kind of case at which juries are thought to excel: a classic he-said, she-said murder trial in which the defendant either ruthlessly stalked and murdered his ex-wife's lover, or accidentally shot his ex-wife's lover

5. After one particularly complicated exposition of economic theory, an attorney observed that the jurors appeared to be in good spirits and dared to take this as a sign that they were following his version of the case sympathetically. In fact, the high spirits owed to the fact that the jurors had decided the day before to mock the attorneys by dressing entirely in black and white — the colors of the generic cigarette packages that were among the subjects of the lawsuit — and were pleased with themselves for having pulled it off. The attorneys were as incapable of comprehending the joke as the jurors were of comprehending the central issues of the case. P. 127.

6. P. 141. *See* Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578 (1993).

7. Or so the jury found; Adler strongly suggests they were wrong on the issue of liability. P. 171.

while trying to wrestle his gun away from the enraged victim. The defendant and his wife were the only witnesses. Adler finds the circumstantial evidence weighs overwhelmingly against the defendant, but the jury acquitted him. Why? Some of the jurors did not find the wife sufficiently "foxy-looking" to make it believable that an ex-husband would kill out of jealousy over her (pp. 184-85). One juror thought the clean-cut, well-dressed defendant simply looked and sounded as though he "couldn't hurt a fly" and was finally persuaded when the defense attorney wept during closing argument (p. 203).

Perhaps the most disturbing and frustrating lesson of Adler's case studies is the degree to which juries perform poorly because of factors that are inescapably built into the system. He describes jurors who are for the most part good-hearted, well-meaning, and hardworking. They also tend to be unlearned in the law, unsophisticated in grappling with complicated, delicately nuanced arguments, and easily swayed by appeals to emotion. In other words, they are typical run-of-the-mill American citizens — just the kind of people who are, according to the standard mythology, *supposed* to sit on juries. Adler's anecdotes force the following question: Do we really trust juries made up of such people to make momentous decisions about other people's lives, liberty, and property? Would we want to place our own fate in the hands of such jurors? Would we not be better off leaving the job to professional judges, or to "blue ribbon" juries of exceptionally qualified individuals, as was standard practice in earlier times?[8]

In the end, Adler concludes that we are better off agreeing on the fables concocted by juries than on those formulated by judges or expert panels. First, he suggests that the very innocence and naivete of the jury is a virtue as well as a vice: Judges, hardened by having "heard it all before[,]" quickly lose their sense of participating in "the awful court of judgment, something the jury, for all its faults, almost never does" (p. 207). Second, the fact that a jury was involved can legitimize a surprising or unpopular verdict in the public mind, making it harder for outsiders to come to the "corrosive conclusion[ ]" that the verdict may have been corrupt (p. 207). Finally, Adler concludes that the jury system is simply too central to

8. As late as the 1960s, some American courts were still using the so-called keyman system, under which certain "pillars of the community" were designated to select those deemed worthy to serve on particular juries. P. 263 n.1.

Adler is curiously double-minded on this issue. While singing the praises of the "commoner" jury (p. 242), he also speaks favorably of the ideas of using "professional judges" (p. 201) and of permitting a " 'complexity exception' to the Seventh Amendment right to jury trial in civil cases. In other words, if a judge doesn't think the jury will understand a particular civil case, he decides it without a jury" (p. 143). He also does not address the fact that the vast majority of civil cases are already conducted as bench trials.

our notion of ourselves as "a government of and by the ordinary people" (p. 215).

None of this, however, means that Adler sidesteps the issue of how to delegate and wield more judiciously the jury's democratic powers. In the last chapter, he suggests how the jury system should be changed. First, Adler persuasively argues that the jury system — and the entire justice system in general — has been tailored to accommodate the needs and interests of lawyers, judges, and other courthouse personnel and that the needs and interests of jurors have gone by the wayside. Indeed, Adler notes, jurors are often treated like "annoying interlopers" (p. 225). Adler proposes a "jury-centric courtroom," one in which the needs of jurors and juries are placed at the heart, rather than at the periphery, of the process (p. 235). His prescription comes in two parts. The first remedies how juries are selected; the second addresses how they go about actually performing their roles.

In the mind of this reviewer, Adler's most provocative, and most promising, suggestion is that we resolve to take jury duty as seriously in practice as we do in our democratic mythology. Adler demonstrates how sizeable sectors of society are systematically excluded from jury duty. Registered voter lists, from which courts typically draw jury pools, often include as little as 70% of the local population (p. 219). Various ordinances and court rules give blanket exemptions to broad categories of people.[9] Of those who do receive summonses, studies show that anywhere from 55%-67% simply ignore them, usually without penalty; many others get excused from service with little difficulty, presumably on grounds that they have more important claims on their time (p. 220). According to Adler, this means that college-educated individuals and business people — those whose contributions might be particularly helpful in deciding complex cases, especially civil cases involving business and financial issues — are often the first ones out the door.[10]

Adler's solution is to make jury service mandatory (pp. 220-21). It is interesting to picture a society in which everyone is genuinely subject to jury service at virtually any time — one in which individuals, families, and employers would consistently have to make the sacrifices necessary to permit jurors to serve, and one in which

9. New York state automatically exempts the following categories of people from jury duty: lawyers, physicians, clergy, dentists, pharmacists, optometrists, psychologists, podiatrists, registered and practical nurses, Christian Science practitioners and nurses, embalmers, police officers, correctional officers, firefighters, sole business proprietors, prosthetists, orthotists, and licensed physical therapists. P. 219.

10. In the Mitchell-Stans trial, 196 potential jurors were called in. While 88 of these had attended some college, the final panel included only one individual who had advanced past high school. P. 52 (citing Hans Zeisel & Shari Seidman Diamond, *The Jury Selection in the Mitchell-Stans Conspiracy Trial*, 1976 AM. B. FOUND. RES. J. 151).

courts would exercise their authority to force the reluctant to participate. Could we really live with such an approach? Adler believes we could:

> The same people who ridicule the acquittal of Imelda Marcos or the hung juries of the Menendez brothers should by rights embrace a jury system in which everyone is required to show up for jury duty periodically and in which jury evasion is taken seriously. In such a system, enforcement costs spike initially, but soon all law-abiding people — the kind who file tax returns every year — are also fulfilling their jury obligations. . . . The culture accepts jury service, and everyone participates. [p. 221]

The other aspect of the jury selection process in need of overhaul, Adler argues, is the use of peremptory challenges, which he derides as "the lawyers' ultimate poker game" (p. 221). He attacks peremptories at some length and with some vehemence, arguing that they should be banned (p. 223). His arguments, however, are unpersuasive.

Adler observes that trial lawyers "don't necessarily want conscientious juries; they want favorable juries[,]" and he sees peremptory challenges as the primary device by which unscrupulous attorneys attempt to manipulate trial outcomes (p. 53). At the center of his argument lies his description of jury selection in the Marcos-Khashoggi trial. He details how both sides in that trial admittedly used their peremptories to remove potential jurors who they suspected — often on the basis of racial and ethnic prejudices — of being unsympathetic to their respective cases.

Adler's apparent belief that peremptories inevitably pollute the entire trial process seems, however, to outweigh his evidence. At the level of mere arithmetic, peremptories can have little more than a marginal impact on the ultimate composition of the jury. In the Marcos-Khashoggi trial, 150 potential jurors were initially called in for screening (p. 51). The prosecution had six peremptory challenges, the defense ten (p. 54). Therefore, the attorneys could excuse only about 10% of the potential jurors without the judge's approval, leaving almost 90% of the panel beyond their reach. At these rates, there is not much scope for the kind of mischief Adler decries.

Adler also makes much of attorneys' tendency to exercise peremptory challenges on the basis of "a vast, mostly secretive lore concerning what sorts of people make what sorts of jurors," in which the classifications "usually weigh heavily toward ethnic, class, and racial stereotypes" (p. 53). No one doubts that peremptories can be, and have been, abused in this regard; Adler rightly applauds

the U.S. Supreme Court's ruling in *Batson v. Kentucky*,[11] which barred the use of peremptory challenges on racial grounds (p. 222).

Adler fails, however, to observe that most of the "secretive lore" that lawyers use in selecting juries is anything but pernicious; indeed, much of it is so insipid as to be almost laughable. One guide to juror selection — published by a judge, no less — instructs attorneys representing civil plaintiffs to lean toward "emotional, warm, friendly, open-minded people who laugh" and "happily married persons" as well as urging attorneys representing criminal defendants to seek "a jury which represents a cross-section of society."[12] It is difficult to worry about peremptory challenges exercised on such grounds. Even when more substantive criteria are used, the two sides' peremptories will tend to cancel each other out: when one side is trying to exclude, say, women, and the other side men, neither side's efforts are likely to have the intended effect.[13]

Adler also fails to confront the arguments in favor of peremptory challenges, the most powerful of which is that they help legitimize jury verdicts in the eyes of the parties. To see why this is so, place yourself in the position of a civil defendant being sued for an enormous sum of money, or a criminal defendant facing the possibility of a jail sentence. The six or twelve individuals who will decide your case are the most important people in the world to you at that moment. Let us now suppose that a particular potential juror takes the stand during voir dire, and you believe that this particular juror is unfavorably disposed toward you. It may be because she is young, or middle-aged, or elderly, or married, or unmarried, or childless, or nonartistic, or a union activist.[14] It may be simply because of the way she looks at you, or simply because you don't like *her* looks. You may not even know why you feel as you do. What you *do* know is that you will not be able to accept an unfavorable verdict so long as this individual, whom you are convinced "has it in for you," is on the jury. The use of peremptory challenges makes sense in precisely this kind of situation. As one scholar argues, "[t]he ideal that the peremptory serves is that the jury not only should *be* fair and impartial, but should *seem to be so* to those

11. 476 U.S. 79 (1986).

12. ROBERT A. WENKE, THE ART OF SELECTING A JURY, 70-71 (1979).

13. Sometimes attorneys on *the same side* in a case cancel out each other's prejudices. In the Marcos-Khashoggi trial, Khashoggi's lawyers, convinced that Jews would be biased against their Arab client, wanted to exclude all Jewish panel members (p. 57). Meanwhile, Marcos's lawyer was convinced that Jews, who were "sensitive to persecution and suspicious of government power," would make ideal jurors (p. 58). He therefore wanted to seat as many Jewish jurors as possible. In the end they compromised, seating one Jew on the panel (p. 58). Adler offers no indication that the racial background of this particular juror impacted the outcome of the trial.

14. All these characteristics are mentioned in Judge Wenke's guide to juror selection. WENKE, *supra* note 12.

whose fortunes are at issue. As Justice Frankfurter once wrote: " 'The appearance of impartiality is an essential manifestation of its reality.' "[15]

In the second part of Adler's prescription for jury reform, he suggests changing the way in which the jury, once selected, goes about its work. As he states in the introduction:

> All the suggestions stem from the same premise: that if jurors are useful and powerful figures in our democracy, they must be treated that way. They must be given the training, the tools, and the information, along with the comforts and the deference normally provided to people in positions of power. [p. xvi]

That general premise is both familiar and sensible, as are Adler's more particular ideas for reform: allow the judge to give preliminary instructions at the outset of the proceedings regarding the basic nature of the case, the pertinent legal principles involved, and the way in which the trial will be conducted; permit jurors to take notes and ask questions as the trial progresses; make the jury instructions at the end of the trial comprehensible to laypersons (pp. 224-40).

The fact that at least one courtroom has actually adopted similar innovations lends credibility to Adler's proposals. Adler's "jury-centric courtroom" is exemplified by the courtroom of Judge B. Michael Dann of Phoenix (p. 228), who has experimented with all the proposed reforms cited by Adler, apparently with considerable success. As Adler notes, Dann's work offers hope that the jury system truly can be made with minimal difficulty to work better (p. 240).

An experienced attorney once informed this reviewer that the courtroom is the scariest place in the world. Among other things, he feared the caprice of juries, who seem to have an uncanny knack for missing the most obvious points, misunderstanding the simplest arguments, and deciding the most obvious issues wrongly.

As Adler would be the first to admit, there is no way to make juries fully predictable. To some extent it is their very unpredictability that makes them so valuable. But surely there is an argument for making the work of juries more consistent and reliable, so that lawyers, parties, and the rest of us can more confidently agree upon the fables the jury tells. What is at stake, Adler writes, is

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15. Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 552 (1975) (quoting Dennis v. United States, 339 U.S. 162, 182 (1950) (Frankfurter, J., dissenting)).

Babcock is prepared to extend this principle even to the point of allowing litigants to challenge jurors on the basis of racial and ethnic prejudices, citing what she calls "the core of truth in most common stereotypes." *Id.* at 553. "[W]e have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often than not." *Id.* at 554.

nothing less than saving the jury system — "the most potent and ingenious vehicle for self-rule ever invented" (p. xvi). Adler believes it *can* be saved, and his book offers a helpful guide to how the project might be undertaken.

—John C. Blattner