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## Essay

# The Jury—Some Thoughts, Historical and Personal

by

PETER G. KEANE\*

The origins of the jury are obscure, its beginnings glimpsed more readily through cloaks of myth, legend, and folklore, than found in traceable history. Even accounts of its birthplace are contradictory. Some credit it to pre-Christian Britain as the method used by Celts to settle disputes.<sup>1</sup> Others claim it developed in Asia and came west during the Crusades.<sup>2</sup> Still another version has it as a product of Norman France imported to England after the 1066 conquest.<sup>3</sup>

Whatever the jury's true beginnings, Britain is where the seed of the system took hold, where it blossomed and from where it was ultimately transplanted to the United States. In order to fully appreciate the development of the jury in the British Isles, one must consider the historical environment in which it all occurred. Early Britain not only embraced the jury system, it grafted onto it existing traditions and mechanisms of dispute resolution which were unique, colorful and barbaric.<sup>4</sup> The primitive Anglo-Saxon form of a trial, although crude, had a lure of simplicity. Anglo-Saxons believed resolving a dispute was a contest where truth emerged, not from any human effort, but through the intervention of God.<sup>5</sup> One form of Anglo-Saxon trial was the Ordeal, where the Almighty was appealed to through brutal physi-

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1. MAXIMUS A. LESSER, *THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM* 6 (William S. Hein & Co. 1992).

2. *Id.* at 6-7.

3. *Id.* at 7.

4. THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 109 (1929) (for instance, "placing the accused between two boards and piling weights upon him until he accepted trial by jury or expired").

5. S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 410 (1981).

cal abuse and torture.<sup>6</sup> In criminal cases, a more blunt method of Ordeal trials was simply to bind the accused and toss him in the river.<sup>7</sup> Ultimate reliance on the Lord clearly decided the issue: if the defendant floated, he was guilty; if he sank, he was innocent.<sup>8</sup>

Historically, the cultural and religious reasoning which sought truth and justice in the Ordeal developed other procedures with the same kind of finality, if not terrific reliability. Trial by battle was another example.<sup>9</sup> A champion hired by the plaintiff hacked away with sword or ax at another armed champion paid by the defendant.<sup>10</sup> Once again, the underlying faith and trust was that the Lord would decide, and whoever was left on his feet prevailed.<sup>11</sup> We have a similar system today, only now the champions are called lawyers, who wield laptop computers to bash and batter one another with motions and interrogatories.

I outline the evolution of dispute resolution not to highlight what seems bizarre by modern standards, but to emphasize a point. Virtually everything we have in our present legal system has similar rough-hewn beginnings, and our understanding of them is buried in the lost, primitive traditions which gave them birth. We have taken those processes and softened the edges, sanitized the game to some extent. But at its core, much of what we do is merely a prettier version of tossing people into rivers or bashing in one another's brains with axes.

It is only by recognizing the primitive traditions underlying our legal system that we can honestly analyze the jury in its present form. One must understand the modern jury's roots and acknowledge that it, too, was created and developed by the same reasoning that produced the Ordeal and Trial by Battle. An essentially ritualistic, tribal and religious nature produced all of these forms. Indeed, the religious roots of the jury are exemplified by the contradictory accounts of how twelve people became the standard number of jurors used in early British, and later, American juries. One story, perhaps apocryphal, is that the number twelve was chosen in commemoration of the twelve

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6. PLUCKNETT, *supra* note 4, at 102-03 (e.g., the ordeals of hot iron, boiling water, and the cursed morsel).

7. *Id.* at 103.

8. *Id.*

9. *Id.* at 104.

10. *Id.*

11. PLUCKNETT, *supra* note 4, at 104.

apostles of Christ.<sup>12</sup> In another account, the number twelve was chosen because of the Biblical twelve tribes of Israel.<sup>13</sup>

The early jury bore little resemblance to the protected and carefully insulated creature which we know today. Jurors were a group of neighbors who came together and pooled their collective knowledge about a dispute to reach an agreement on the proper resolution.<sup>14</sup> How ironic that over centuries the modern jury evolved into its present form. Today, if a potential juror has any personal information about the case, it is a complete bar to that person serving.<sup>15</sup> Instead of neighbors familiar with each other, the parties, and the facts, an anti-septic detachment now characterizes jurors. As a result, the modern jury is a microcosm of the anonymity of our present society and time. It embodies the cold disconnectedness of each of us to others in our community.

Just as we rarely consider the crude, tribal traditions from which the jury system sprung, we rarely explore the true dynamics of the jury system and what having juries really means for society. If we consider the jury at all, we usually misperceive it and endow it with characteristics which it does not have. For example, we often applaud the institution of the jury as a hallmark of a democratically involved citizenry.<sup>16</sup> But this is not true. The jury is a collection of citizens, but it is not democratic. Democracy has the common feature of majority rule. The jury historically, and still overwhelmingly, demands unanimity; a simple democratic majority will not do. Nor can we honestly call democratic the way a jury arrives at a result. It does its work in secret. It does not give any reasons for its decision. If it wants to, a jury can entirely ignore the laws which were democratically enacted by the community at large.

One true democratic element of juries results from the broad net that society uses to scoop in potential jurors. At least in theory, and for the most part in practice, the modern American Jury is made up of a wide variety of people—of different ages, economic groups, races, religions and backgrounds. Few of them embrace the experience willingly. Indeed, most of them are drawn into that net with little or no

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12. SAMUEL W. McCART, TRIAL BY JURY 4 (1965). This can lead to speculation about the potential for bribing and corrupting at least one juror, if one considers that Judas was one of the twelve.

13. LLOYD E. MOORE, THE JURY 41 (1973).

14. PLUCKNETT, *supra* note 4, at 109-10.

15. *See, e.g.*, *Hard v. Burlington Northern R.R.*, 812 F.2d 482, 486 (9th Cir. 1987).

16. *Jury Duty is not a Burden*, THE PATRIOT LEDGER (Quincy, Mass.), May 3, 1996, at 10.

enthusiasm for being there. Many try their best to avoid the experience.

The full extent of people's reluctance to be jurors can be described through illustration. Twenty-five years ago I was trying a criminal case as defense counsel in the town of Walnut Creek, California. We started the trial on a Friday morning, which is very unusual. Most jury trials begin in the early part of the week, and the court is able to draw potential jurors from large panels of people who were ordered to appear for jury service on Monday. By the noon lunch break of our trial, we were still in the process of jury selection. We had exhausted the few remaining panel members and it was clear we would need a fresh supply to continue picking a jury that afternoon.

The judge was a stern, no-nonsense character. He told the bailiff to assemble a new panel for 1:30 that afternoon. The bailiff told him there were no more potential jurors left in the courthouse. The judge, relentless, ordered the bailiff to have them present nevertheless. To the hapless bailiff's plaintive wail, "Where am I going to get them at noon on a Friday?" the judge replied threateningly, "You get them."

A few minutes later, I sat on a bench in the first floor hallway of the courthouse and nibbled away at my brown-bag lunch. As I ate, I watched the bailiff anxiously stalking the corridor. He positioned himself in a place of ambush next to a window counter where people came and paid traffic tickets. Each time some poor victim dashed up to the counter, on a quick lunchtime errand to take care of a parking fine, the bailiff pounced.

"Are you a resident of Contra Costa County?"

"Uh, well, yes."

"Get in the courtroom."

Our trial resumed that afternoon before a courtroom filled with an enraged mob. They angrily protested their kidnapping, shouting and sobbing to the unsympathetic judge about their double-parked vehicles outside the building and about their vulnerable children and elderly relatives waiting anxiously for their return. He brushed it all aside. We went ahead to select a jury of which about three-quarters had been shanghaied by this black-robed tyrant. Yet despite their understandable indignation, when the trial got underway the following Monday, they settled down into their roles as jurors. They carefully followed the evidence, deliberated for a proper period of time and unanimously came to a verdict.

This episode, more than any other in almost thirty years of trying cases before juries, gave me a deep understanding and a healthy re-

spect for the resilience and basic soundness of the jury as a component of our system of justice. Periodically, our society goes through agonizing soul-searching and much hand-wringing about the efficacy and worth of the jury system. We are in the midst of such a period of analysis now as we again discover, to our seeming shock, that one of our human-created institutions has some all-too human flaws. But the flaws of juries, on balance, are really quite few and their benefits of stability, common sense, sound judgment, and wisdom, far outweigh the faults we might identify.

The jury has evolved with us and is a reflection of us. It carries all the rich baggage of our heritage and origins as a communal people. It is both what we have been and what we are now. From the jury's first crude forms developed by our primitive ancestors in thick groves of forest clearings, to contemporary juries in modern courtrooms listening to testimony about DNA and E. Coli Bacteria, the institution has been adequate to the tasks we give it. A jury is a more representative societal mechanism of our culture than anything else in which we participate as citizens. I suspect it will always be with us, no matter how much we may grouse about it. Whether we realize it or not, we are better off because we have it.