1963

Book Review

William Burns Lawless
Notre Dame Law School

seem to be a weighty one, if only because of their embodiment in so much of our law. Of course morality can make no claims; persons, human beings have claims and wants and needs. And in society they should be able to ask of the law a commitment to meet many of them. As we come to know more of the irrational, we may hardly decide that much of our morals legislation can be securely justified. But we may well find that such laws are much more than religious relics and may in fact be expressive of proper needs of our citizens.[7]

The basic problem of having the law enforce private morality as such, as we are confronted with it, arose as Lord Devlin stated when the state recognized freedom of worship and conscience. Professor Hart in these lectures does not seek a means of evaluating the claims of morality as such on the law; rather, he successfully disposes of some of the justifications offered by others for the enforcement of morals. If these grounds are admittedly unsatisfactory, it remains true that Professor Hart has broken no new ground in dealing with the larger problem. His impressive contribution is to clarify the situation, to enable us to get on thus with the main task ever present: to maximize the good our best moral perceptions and thought can add to the law.

ROBERT B. FLEMING
Professor of Law
State University of
New York at Buffalo

CIVIL JUSTICE AND THE JURY. By Charles W. Joiner. Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1962. Pp. 238. $6.95 (Under the Auspices of and in Collaboration with the International Academy of Trial Lawyers).

Delay in the courts, mounting jury verdicts and the increased cost of administering civil justice have converged in the last decade to question anew the value of the jury in civil cases. Although our Federal Constitution requires a jury trial in the Federal Courts in certain "suits at common law," it does not require a trial by jury in civil cases in state courts. Most state constitutions and statutes require it, but these provisions are subject to change. Hence, the question arises whether the several states should follow the lead of Great Britain, some European and most South American countries in limiting jury trials to

---

we all generally do the same in facing our lives; the newer sciences, particularly psychiatry, daily yield more insights to help us.

7. Consider, *e.g.*, the work of Robert Rodes, *A Prospectus for a Symbolist Jurisprudence*, 2 Natural L. Forum 88 (1957). In this original and provocative essay Professor Rodes effectively argues for a symbolic role of the law as fulfilling vital human needs. In doing so, he (rationally) makes deep inroads upon what Professor Henkin and others would seem to consider irrational beyond hope. Of the participants in the controversy discussed herein, Stephen, if he can be considered such, is the only one who shows much appreciation for the role of symbolism in the law. This should not be overlooked, however much his harshness repels us.

criminal cases. For automobile negligence cases in particular, an administrative tribunal has been urged.

In this setting, Dean Joiner's latest book makes a clear and convincing case for continuing jury trials in civil litigation. His study sketches the history of the system, forcefully states its strength, recognizes areas where improvement is necessary and concludes that the quality of justice provided by a jury is worth the small additional premium we pay in time and taxes. In contrast to trial before a single judge who would determine questions of fact and law, the author outlines the advantages of trial by jury. He asserts that the jury brings to bear in each case the application of general community standards. Its range of deliberation is not restricted to the reach of a single judge. Rather the cumulative wisdom, variety of personality and diversity of backgrounds of the jurymen focus in on the facts in dispute and resolve them from a broad base of attack.

The author believes as most trial lawyers believe, that the process of "deliberation" is, on balance, the unique strength of the jury system, whether in criminal or civil cases. Here, twelve disinterested men bring to bear their cumulative experience in life upon the fact in dispute. Twelve sets of eyes scan the witness, twelve minds reflect upon the words of the witness, and twelve judgments merge to test the witness, his credibility, his accuracy and his reliability. When we contrast this process of jury decision with judge-decided facts, basic differences are apparent. As Dean Joiner points out, each single judge has limited experience in life; he is usually an exception to his community in that he has spent more of his life in the temples of formal education and the courts and less of it in the workaday world. His life is more withdrawn from the everyday activities of the market place, and his single reaction to a witness or his single analysis of the fact is certainly more vulnerable to error and predilection than the composite mind of the jury.

A single judge may misunderstand some of the evidence. He may have some degree of subconscious bias in the decision-making process as the result of his restricted experience. As the author points out, unless our decision-making process provides some means for deliberation, argument and exchange of ideas, these biases may not be brought to the surface where, exposed to view, they will lose their controlling significance. The author supports this point by citing a number of psychological studies carried on in the past two or three decades. While these studies did not involve juries, they did consider other small groups with decision-making tasks. They indicate that on the whole, group decisions are more efficient and more accurate in fact-finding than are the decisions of an individual. It was found that the inter-action during deliberation was the crucial difference that made group decisions more just than a single judgment made without the give and take of deliberation.

From a social stance, Dean Joiner considers as a basic strength of the civil jury system its acceptance by the public itself. He admonishes that "we

must always remember that law ultimately derives its support from the public," and that public acceptance is vital. He cites Professor Kalven of the Chicago Jury Project as indicating that 70% of the public favored jury trial while only 9% favored trial by judge. This does not mean to say the author contends that the jury is Utopian. Rather, he admits that the system needs strengthening in a variety of ways. He urges the better selection and use of jurors, sees no magic in the number 12, suggests improved standards for lawyers, better judges, more realistic rules of evidence, and other procedural reforms.

Part Two of the book entitled, "What Others Say About The Jury," reprints selected endorsements of the jury system by prominent scholars, lawyers, barristers and judges. They range from Blackstone and Holdsworth through de Tocqueville and Choate to Sir Patric Devlin and the distinguished jurist of our time, Arthur T. Vanderbilt. While these selections are interesting in themselves and fully support the author's confidence in the jury system, they tend to distract the reader from the author's own excellent narrative flow throughout Part One. It is helpful to have these opinions collected in one place, but they might have been just as conveniently incorporated into the text itself. Further, the selection omits some impressive authority, especially in the Colonial period. The endorsement of Thomas Jefferson is not included although he viewed trial by jury "as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." (3 Writings of Thomas Jefferson [Washington Ed.] 71). Alexander Hamilton in the Federalist Papers emphasized his loyalty to the jury system in civil cases. (The Federalist, Nos. 81 and 83). Chief Justice Jay, charging the jury in *Georgia v. Brailsford*, 3 Dall. 1, 6, indicated that " . . . it is presumed that juries are the best judges of facts." In our time, the dissenting opinion of Mr. Justice Black in *Galloway v. United States*, 319 U.S. 327, 396 [1943] provides an interesting Civil Rights commentary upon the use of juries in civil litigation.

One chapter in this section reprints a 1937 comparison of jury verdicts and judge decisions in Wayne County, Michigan which led the author of that study to the conclusion that juries and single judges take essentially the same view as to the assessment of damages. We question the value of this 25-year-old study today. It is out of date, and it draws broad conclusions from limited facts. Excerpts from the University of Chicago Jury Project [1959], set out in the last chapter of the book, indicate that awards from bench judgments are, on the average, about half the size of awards made in jury trials. This conclusion is far more realistic today than those developed in the Wayne County Survey. In the New York courts at least, there is little evidence to support the thesis that a Judge will award damages with the same generosity as a jury in roughly comparable cases. Court of Claims Judges have rarely shown this propensity.

On balance, the book is a timely, scholarly, and successful defense of an ancient system worthy of continuance but in need of revision. It refutes

the thinking of some that the best way to cure court congestion is to remove the jury's head. Dean Jointer presents a more temperate therapy. This volume will prove particularly useful to those students of government who are concerned with improving the judicial system.

WILLIAM B. LAWLESS
Justice, New York State Supreme Court

EX-COMMUNIST WITNESSES. By Herbert L. Packer. Stanford California: Stanford University Press, 1962. Pp. 279. $4.95.

This well-written and carefully documented volume is the result of what is obviously a painstaking and detailed examination of many pages of testimony and various court proceedings, hearings before the House Un-American Activities Committee and hearings before several Senate Committees and Subcommittees, some of which were used by the late, and to many of us, unlamented, Senator McCarthy, in his rise to notoriety.

Indeed, the author has revealed that he did examine over 2,000 pages of testimony in such proceedings. The book may be characterized both as a serious study of the inadequacies of administrative hearings in determining facts and the limitations of our courts in the investigation of political and social problems. Further, it is a variety of non-fictional "who dunnit."

Mr. Packer's announced purposes are twofold:

(1) To examine the advantages and disadvantages of court proceedings involving the activities of members or alleged members of the Communist Party as their activities may have involved some of them in violations of either the Smith Act, contempt of Congress, or perjury, and

(2) To examine the limitations of congressional investigations, as the same are conducted in this country, into the activities of the Communist Party and its members or alleged members. In this writer's opinion, he has succeeded in demonstrating that the administrative hearing before a congressional committee is woefully inadequate for a variety of reasons, not the least of which is the complete failure to provide for the traditional safeguard of cross-examination. In a similar manner, but not quite as convincingly, he has also made a case for the inadequacy of the court trial for investigations of the social and political problems which inevitably arise in this country from legislative attempts either to outlaw or to regulate the activities of the Communist Party and/or its members.

But by far, the more fascinating aspect of his book is the method that he has utilized for demonstrating his points of view. It is this method that commends his work to the serious student of these problems. He has selected four of America's most prominent witnesses, or, depending upon one's biases, four of America's most notorious witnesses, who have given testimony since the