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JURY TRIAL OF CRIMES

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"No freeman shall be taken or imprisoned or disseized or outlawed or banished or in any way destroyed—except by legal judgment of his peers or by the law of the land." These ringing words, written into Magna Carta 750 years ago, have often been referred to as the historical basis for our right to trial by jury.

It matters little today that the words were not written for this purpose or that trial by jury as we know it did not exist in 1215. Great traditions are often more important than historic facts. Lord Coke, in the debates on the Petition of Right in 1628, attributed the right to trial by jury to Magna Carta. It has since been viewed as the cornerstone of that right throughout the English speaking world.

Today, however, there are some who think that trial by jury in criminal cases is outmoded. Although most critics have only urged its abandonment in civil cases,[1] the growing use of administrative procedures and of the contempt power to enforce law directly suggests that trial by jury may be facing a period of critical re-examination.[2]

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[1]For a recent discussion of the civil jury system see Sacks, Preservation of the Civil Jury System, 22 Wash. & Lee L. Rev. 76 (1965).

[2]Serious efforts have been made in recent times to avoid or to limit Constitutional provisions stating that the trial of all crimes shall be by jury. For example, the federal government argued, unsuccessfully, that civilians accompanying the armed forces overseas in peacetime should be tried by courts-martial since jury trials would be inexpedient. See Kinsella v. Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1. (1957). There has also been a steady expansion in recent years of the contempt power of the courts and the imposition of more severe penalties for contempt. See, e.g., United States v. Barnett, 376 U.S. 681, 739-53 (1964) (Goldberg, J., dissenting).

Moreover, dissatisfaction with verdicts, especially in certain cases of widespread public interest, has also prompted criticism not merely of these questionable verdicts but of the system itself.

As our society grows more complex and as we tend to rely more and more on new legislation and governmental regulations to solve our problems, pressures for abandonment or avoidance of trial by jury in criminal cases may well increase. This impels us to look behind the tradition to the facts to see if trial by jury in criminal cases is worth preserving. It is particularly important that we do so now, while we can reason objectively, free of the context of excessive emotion or national crisis.

I.

Comments on the History of Trial by Jury

The history of the institution of trial by jury should of course be the starting point for evaluating its continued usefulness. It may be helpful to state several generalizations that can be drawn from that history.

The first is that trial by jury developed initially as a rational alternative to trial by ordeal or trial by combat, the non-rational means of ascertaining truth that was used in medieval England. Its initial growth and popularity owe much to this fact.[3]

But the second and more important generalization is that the political climate of England in the Seventeenth Century and of the American colonies in the Eighteenth Century was probably the most significant factor in the crystalization of the institution and its virtual enshrinement in our Federal Constitution.

The tenacity with which Englishmen clung to trial by jury and steadfastly resisted the many attempts to evade it was due in large meas-

[3]Trial by jury as we know it developed principally from a custom brought to England by the Norman Kings to aid in collecting taxes. This custom permitted the king to acquire information about a locality by examining its inhabitants under oath. Henry II first used the practice in the administration of justice in the Assize of Clarendon in 1166. Twelve "lawful men" from each district were examined under oath as to persons known or reputed to be criminals within their district. Those named as suspects were then arrested and tried by ordeal. See, e.g., Green, A Short History of the English People, 110-11. Since there was great dissatisfaction with trial by ordeal, over the next century the jury developed into an alternative method of trial. For a while persons charged with crime had a choice between "Trial by God," or "Trial by country." When the medieval church at the Fourth Lateran Council in 1215 forbade the clergy to participate in trials by ordeal, only trial by jury remained. See 1 Holdsworth, A History of English Law, 323-27 (7th ed. 1956). While trial by combat existed for the nobility, it soon fell into disuse. Nobles could initially only be tried by nobles of equal rank. See 1 Holdsworth supra, 356-58, 386.

ure to the widespread use of prosecutions for treason in attempts to enforce political and religious conformity. In such trials under the Stuarts, jurors began to refuse to convict persons charged with such offenses.[4] And by the end of the Seventeenth Century, it had become clearly established that every Englishman had the right to be tried by jury.[5] The two means that had been used to evade jury trial had been defeated. The infamous Court of the Star Chamber was abolished and courts-martial in peace time were anathematized.

Almost exactly a century later the battle for preservation of trial by jury was renewed in America. After the French and Indian War the British government attempted to enforce new policies of taxation and trade regulation on the American colonies. They found, however, that American juries would usually not convict fellow Americans for violations of these unpopular laws. To avoid this impasse, the crown resorted to courts of admiralty initially and to courts-martial ultimately to obtain a higher percentage of convictions.[6] This violation of one of the most fundamental rights of Englishmen[7] was one of the principal causes of the American Revolution.[8]

After the Revolution, the right to trial by jury was expressly protected in the constitutions of most of the new states as well as in our Federal Constitution. Indeed while it appeared initially in the Federal Constitution,[9] it was doubly protected by the Sixth Amendment.[10]

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[4]It should not be thought that the heroic jurors defying the king did so with impunity. While their unanimous verdict was a prerequisite to a conviction of the accused, jurors could themselves be fined and imprisoned for contempt if they refused to bring in the verdict directed by the judge; and many were. See 1 Holdsworth, supra note 3, 342-44. Indeed it was not until 1670 that it was established that jurors could not be punished for their verdicts. Bushell's Case, VI State Trials 999. See also, Mason, The Four Jurors in Bushell's Case, 51 A.B.A.J. 543 (1965); Nager, The Jury that Tried William Penn, 50 A.B.A.J. 168 (1964).

[5]The nobility could demand trial by the House of Lords, which functioned as both judge and jury. See 1 Holdsworth, supra note 3, 388, 389.

[6]See Reid v. Covert, 354 U.S. 1, 27-29 (1957).

[7]Blackstone wrote of trial by jury "as the glory of the English law ... [it] is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected in his property, his liberty, or his person but by the unanimous consent of twelve of his neighbors and equals." 3 Blackstone Commentaries 79.

[8]"[George III] has combined with others to subject us to a jurisdiction foreign to our Constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation: ... For depriving us, in many cases, of the benefits of trial by jury ..." The Declaration of Independence.

[9]U.S. Const. art. 3, § 2 provides "the Trial of all Crimes, except in cases of Impeachment, shall be by Jury;".

[10]The Sixth Amendment provides "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. ..."

II.

THE JURY AS A FACT FINDER

Our system for the administration of criminal justice is designed to assure that the key question of guilt or innocence will be decided by impartial men solely on the basis of reliable evidence fairly presented in open court. In our system that ultimate decision rests with twelve fellow citizens who constitute the jury. These jurors are chosen from the public at large. Unlike the original English jurors, today's jurors are not expected to have any knowledge of the crime alleged or any preconceived opinions as to the guilt or innocence of the accused. Indeed it is basic to our system that those selected to try the case should be free from knowledge of the crime and also free from prejudice or bias.

At the trial, the jurors are expected to make their decision solely on the basis of the evidence properly presented to them. Each juror may of course evaluate this evidence in the light of his own experience. So in a sense, the evidence is weighed in the light of the experience of all twelve jurors.

This collective judgment tends to compensate for individual shortcomings and furnishes some assurance of a reliable decision. In addition, since a single jury tries only a limited number of cases before being forever discharged, when it makes mistakes it has little opportunity to repeat them. Its errors are therefore unlikely to become institutionalized.

Despite its complexity, our system of trial by jury has functioned fairly well. There are of course exceptions. Sometimes a jury will bring in a verdict of guilty that is obviously prejudicial and contrary to the evidence. Such cases may involve sensational crimes with widespread pretrial publicity. But the trial judge and appellate judges have the opportunity and the duty to correct this abuse by setting the conviction aside.[11]

Sometimes the error is the other way, and a jury will refuse to convict in the face of overwhelming evidence to the contrary. When this abuse occurs the criminal goes free and a grave malfunction of justice results. Yet, there is no way under our system by which an acquitted criminal can be punished thereafter for his offense.[12]

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[11]See, e.g., Rideau v. Louisiana, 373 U.S. 723 (1963); Marshall v. United States, 360 U.S. 310 (1959); Chambers v. Florida, 309 U.S. 227 (1940).

[12]The Fifth Amendment to the United States Constitution provides that "...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb..." But under the federal system the same facts may constitute one crime under federal law and another crime under state law, and it has been thought

Strong arguments have been made that there are superior methods for finding facts. In England, jury trial in civil cases has virtually disappeared. In this country, in the vast and growing field of economic regulation, our legislatures have created state and federal agencies and given them broad powers to try cases. In adopting procedures for those agencies we have rejected the jury system and its accompanying rules of evidence. We have instead developed the new procedure of administrative law where technical experts, or lawyers aided by such experts, are free to consider almost any kind of information in arriving at their decisions.

In trials for crimes, however, both we and the English have steadfastly adhered to trial by jury. We have done so in spite of the fact that superior methods of fact-finding may be available.

We have tolerated the occasional acquittals of criminals in the face of overwhelming contrary evidence as the price that must be paid for the over-all good that results from the jury system. Since much of that good derives from the role of the jury as a political institution, we should next consider its function in our system of government.

III.

THE JURY AS A POLITICAL INSTITUTION

De Tocqueville has stated that the jury "places the real direction of society in the hands of the governed... and not in... the government... He who punishes the criminal... is the real master of society. All the sovereigns who have chosen to govern by their own authority, and to direct society, instead of obeying its direction, have destroyed or enfeebled the institution of the jury."[13]

In England and America the jury has provided in essence the same kind of popular check on government once fleetingly provided by the Roman tribune.

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that acquittal in a trial by one government normally does not bar trial by the other. See Bartkus v. Illinois, 359 U.S. 121 (1959); Abbate v. United States, 359 U.S. 187 (1959). It is uncertain, however, whether the application of the Fifth Amendment to the states by the way of the Fourteenth Amendment in the recent decisions of Griffin v. California, 380 U.S. 609 (1965); and Malloy v. Hogan, 378 U.S. 1 (1963), may ultimately affect the continuing validity of the Bartkus and Abbate cases.

[13] 1 De Tocqueville, Democracy in America 282 (Reeve transl. 1948). Thomas Jefferson also wrote that "were I called upon to decide, whether the people had best be omitted in the legislature or judiciary department, I would say it is better to have them out of the legislative. The execution of the laws is more important than the making of them." 3 Works of Thomas Jefferson 81-82 (Wash. ed. 1854). See also 1 Holdsworth, A History of English Law, 347-50, where the author states that the jury system "tends to make the law intelligible by keeping it in touch with the common facts of life."

As observed earlier, trial by jury was one of the central battle grounds in the struggle for English liberties in the Seventeenth Century. Next to Partiament, no other institution played a more important role in ultimately limiting the power of the crown. And in the long intervals when the Stuarts attempted to govern without Parliament, the jury afforded the only institutional check on executive power.

The framers of our constitution were well acquainted with what was then recent English history and were well read in the classics. They understood the political significance of trial by jury. For them it was an essential part of the system of checks and balances.[14] This system was carefully fashioned and fortified by a written constitution to preserve individual freedom for themselves and future generations.

This popular check can limit the executive, the legislature, and judges in the crucial area of personal freedom. It is obviously important in the trial of persons charged with a crime against the person or property of others—behavior that is outlawed in all civilized societies. But the check of the jury is of even greater significance in the trial of offenses against the state, such as treason and sedition. The pages of history are filled with examples of abuses in prosecutions for these "political" crimes.

It was just such abuses that caused our English and American forebears to prize trial by jury so highly. We need only look at recent events in other nations to see the flagrant distortion of justice to serve the political ends of those in power. The Reichstag fire trials in Nazi Germany, the purge trials of 1938 in Soviet Russia, and the stadium trials of Castro's Cuba show that the judicial system is often perverted for political and social ends.

And it should not be thought that the political abuse of justice is perpetrated only by cynical, evil men. There always have been many conscientious, and sometimes even devoted, men who have believed that their ends justified this means.[15] In instances where a majority, or at least a substantial minority, are opposed to the political policy sought to be enforced through the criminal prosecution, the jury can effectively protect the individual being prosecuted by refusing to convict him.

On a less heroic scale, the jury can ameliorate or even veto laws

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[14]For a discussion of the historic role of the jury in criminal cases, see Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582 (1939).

[15]In our own history, trials for heresy and treason were sometimes conducted by churchmen who undoubtedly thought that they were serving God and Country through such prosecutions.

that a substantial portion of the population regard as unjust or unfair.[16] The refusal of numerous juries to convict contributed substantially to the ultimate repeal of nationwide prohibition. While the popular veto of the jury if widely applied could lead to anarchy, in practice the fundamental good sense of the public in England and America has demonstrated that this fear is unjustified.

The jury has kept the law not too far distant from the public opinion. It has thus helped to maintain the public respect for our legal system that is a prerequisite to the day to day maintenance of law and order.

Various procedures are available to help assure the selection of an unbiased jury. These include examination of prospective jurors on *voir dire,* the peremptory challenge, postponment of the trial and change of venue.[17] Convictions contrary to the law and the evidence, often attributable to high public feeling or popular prejudice, can also be set aside by judges.[18] In addition, the executive can pardon the wronged individual and the legislature can indemnify him.

One of the criticisms leveled against our system is the absence of a remedy for an unjustified acquittal by a jury.[19] The imposition of a check on this abuse by permitting the state to appeal would require amendment of our Constitution to abolish the prohibition against double jeopardy.[20] The founding fathers, in light of history, decided that the balance here should be struck in favor of the individ-

[16]For example, freedom of the press in this country owes much to the bold New York jury that acquitted John Peter Zenger of seditious libel in 1735. See Harlan, The Bill of Rights and the Constitution, 50 A.B.A.J. 918, 920 (1964).

[17]See, Note, Community Hostility and the Right to an Impartial Jury, 60 Colum. L. Rev. 349 (1960).

[18]For a discussion of the history of the relationship between the trial judge and jury, see Note, The Changing Role of the Jury in the Nineteenth Century, 74 Yale L.J. 170 (1964) In many state courts and in federal courts the judge also is permitted to advise the jury as to the applicable law. See Holtzoff, Modern Trends in Trial by Jury, 16 Wash & Lee L. Rev. 27 (1959). For a discussion of the problems involved in protecting fair trial in face of widespread publicity, see Powell, The Right to a Fair Trial, 51 A.B.A.J. 534 (1965).

[19]When this occurs, it may often be the result of (i) the lack of adequate procedures designed to assure the selection of unbiased jurors representative of the community as a whole, or (ii) from the failure of local officials to enforce such procedures. Accordingly, repeated unjustified acquittals of crimes of violence in a particular locality should not be viewed as an inherent fault of the jury system, but rather as an indication of the failure of those responsible for its operation to carry out their duties properly. The remedy for correction of these abuses is to improve the machinery for the proper administration of the selection of unbiased jurors and judges rather than abandonment of the jury system.

[20]See note 12, supra.

ual. To reverse this today would negate the key role of the jury as a popular check on government. It might even unbalance our entire system of constitutional checks and balances.

IV.

Alternatives to Trial by Jury

We should not, however, remain devoted to trial by jury in criminal cases because of tradition alone. Constitutions can be amended if better ways of assuring individual freedom and human happiness can be found.

It is well, therefore, to look at possbile alternatives to trial by jury. We should weigh them, however, not theoretically, but practically in the light of human experience.

The most obvious alternative to trial by jury is trial by judge.

A strong case can be made for the superiority of a judge over the jury as a fact-finder. The judge is usually well educated and experienced. More often than not, he will be superior to the average jury in both these regards. Moreover, his whole professional training and the code of ethics by which he judges are designed to aid him in minimizing his own personal feelings and prejudices and to reach decisions objectively. Especially where he has secure tenure, he usually is less susceptible to public pressure or passion than a juror.

It is understandable, therefore, that our English cousins have turned to trial by judge as the principal means for resolving private law suits. In our country certain civil cases are also tried by the judge alone. This practice has been traditional in courts of equity.

Many criminal cases are also tried by judges when the accused waives trial by jury.[21] Trials of certain minor offenses and misdemeanors have long been by judge and not by jury.[22] Trials for contempt of court have usually been by judge.[23] In recent years, the

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[21]In federal trials, the government must also consent. The states are split on whether state consent is required. See Singer v. United States, 380 U.S. 24 (1965); Note, Accused in Multiple Prosecution Held To Have Absolute Right To Waive Jury Trial, 59 Colum. L. Rev. 813 (1959).

[22]See examples cited in United States v. Barnett, 376 U.S. 681, 749-751 (1964) (Goldberg , J., dissenting).

[23]But it is also true that abuses of the contempt power in the early half of this century led to the enactment of provisions permitting a person accused of contempt in antitrust and labor dispute cases to be tried by jury upon the request of the accused. The Clayton Act, 18 U.S.C. §§ 402, 3691 (1964 ed.) and the Norris-LaGuardia Act, 18 U.S.C. § 3692 (1963 ed.), are notable examples. See also, Frankfurter & Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers, 37 Harv. L. Rev. 1010 (1924).

Supreme Court has affirmed that contempt trials are exceptions to the constitutional command that the trial of all crimes shall be by jury[24]—at least where the penalty imposed does not exceed that "provided for petty offenses."[25]

Outside the English speaking world, trial by judge is the almost universal method for trying criminal offenses.[26] Where occasional exceptions exist, the mode of trial is by courts-martial or by so-called "popular" trials which are really not trials at all but lynchings carried out under sponsorship of the state.[27]

In countries that rely on trial by judge exclusively there is, however, no evidence of any marked superiority of this system over trial by jury. Variations in crime rates and police efficiency exist from country to country and within countries but these differences are more directly related to other factors. While the state of law and order in this country may compare unfavorably with the domestic tranquility of Denmark, trial by judge has not brought more security to the Sicilian countryside.

In the realm of enforcement of social, religious, or political conformity, without a doubt trial by judge is usually far more efficient than trial by jury. For dictators in a hurry to remake whole societies or to industrialize "emerging" nations, judges can be controlled more readily than juries.

The Chinese Communist government could hardly have forced the Chinese people to endure the hardships they have suffered in recent attempts to industralize if trial by jury had existed and its integrity had been respected. On the other hand, had the Chinese Communist government been more responsive to popular feelings, a more moderate "leap forward" might not have floundered.

Even under mature democratic systems, judges, however courageous, are not always as independent of governmental pressures as juries. Judges are employees of the state. They are usually dependent upon it for their livelihood. And the use of economic pressure to express displeasure with decisions unfavorable to those in power is not novel. Congress's exclusion of the Justices of the Supreme

[24]United States v. Barnett, 376 U.S. 681 (1964); Green v. United States, 356 U.S. 165 (1957).

[25]United States v. Barnett, 376 U.S. 681, 727 (1964).

[26]In most European countries, crimes are usually tried by more than one judge. In the Soviet Union the three judge court is the usual method, though two of the judges are not trained in the law. See Savitsky, The Public and the Law in the U.S.S.R., 51 A.B.A.J. 143 (1965).

[27]Trials of "landlords" in Communist China, "Batista gangsters" in Cuba, and "Simbas" in the Congo are more recent examples.

Court from the general pay increase for other federal judges last year is an unfortunate example. It demonstrates that even in our enlightened country, judges can suffer economic discrimination by government because of the unpopularity of their opinions.

Judges who make politically "wrong decisions" can sometimes be removed from office or denied promotion and more pliant individuals substituted to replace them. When these pressures are exerted or judges are removed, it can frequently be masked with all the outward forms of legality. Since the number of judges in any society is relatively small, few individuals are directly affected. The likelihood of popular opposition is further minimized because the average citizen usually does not immediately identify himself with the judge.

Reprisals against jurors for verdicts disagreeable to those in power would involve far greater political risks. In countries such as England and United States where the institution of the jury is established, and many citizens each year serve briefly as jurors, the public would readily identify with the jurors and widespread political opposition would be aroused. It is also probable that the personal participation in our system of justice that results from jury duty helps create public understanding and support for the independence of judges.

V.

THE ROAD AHEAD

In times of stress and upheaval, it is difficult for persons and nations to take the long view. During these times, self-imposed restraints are sometimes abandoned. Ocassionally this is done from necessity but more often from impatience. Ironically, the worthier the end, the greater the temptation to justify the means.

In recent years, we have seen growing signs of impatience in our society with restraints of all kinds. On the one hand, we have alarming increases in crime and violence and growing disrespect for law, for order and for due process. On the other, we have cries for the weakening of constitutional restraints on the police powers of government.

Already trial by jury is under some attack. It is also partially endangered through the silent but steady expansion of the contempt power. In my view, these inroads should be repulsed. Trial by jury in criminal cases deserves to be defended and maintained.

This is not to say the system is perfect or that improvements in its administration are not possible and desirable. Juries sometimes fail

to produce just results, especially where passions and prejudices have inflamed the community. Although not confined to the South, this problem has been particularly acute recently in certain Southern jurisdictions where racial prejudice has frustrated justice. Several flagrant examples have provoked national protest and demands for remedial action. Appropriate steps are indeed long overdue to assure genuinely fair selection of jurors and impartial administration of justice, but in accomplishing needed administrative reforms care must be exercised to preserve the jury system itself.

In the long view of Anglo-American history, trial by jury in criminal cases has served us well and has contributed significantly to public confidence in our judicial system. Indeed, jury trial has been a principal element in maintaining individual freedom among English speaking peoples for the longest span in the history of man.

It might be well to recall the following words from that great decision in *Ex parte Milligan:*

> [T]he inestimable privilege of trial by jury . . . is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; . . . but if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of the law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty. . . .[28]

[28]Ex parte Milligan, 71 U.S. (4 Wall.) 2, 123-24 (1866).