

# Jury Trial and The Independent Bar

By Leonard Decof

Consider the absurdity of the following concept. Twelve persons, probably without any prior contact with courts or the judicial system, are randomly chosen to sit together and listen to evidence, often of a highly complex nature. Afterward they will deliberate in secret and return a verdict that affects the liberty or property or even life of persons who have appeared before them. The jurors receive no training for this task, nor are they required to give reasons for their decisions. Each person is responsible to his or her own conscience but to no higher authority. At the conclusion of the trial, each member disappears from the judicial scene and may never ever serve on a jury panel again.

Opinions regarding the role of the jury system in the United States are notable both for their lack of unanimity and lack of moderation. Hyperbole is commonplace. The jury system has been a continuous source of controversy. Famous political philosophers and lawyers who have expressed their views on the necessity and viability of the jury system include Alexander Hamilton, de Tocqueville, Blackstone, Pound, Wigmore, and Holmes.

On one hand, the jury has been vilified:

"We commonly strive to assemble 12 persons colossally ignorant of all practical matters, fill their vacuous heads with law which they cannot comprehend, obfuscate their seldom intellects with testimony which they are incompetent to analyze or unable to remember, permit partisan lawyers to bewilder them with their meaningless sophistry, then lock them up until the most obstinate of their numbers coerce the others into submission or drive them into open revolt." (Oppenheimer, "Trial by jury," U. Cin. L. Rev. 141, 142 (1937).)

On the other hand, the jury has been extolled with eloquence and vigor. For example, over a century ago, the distinguished Alexis de Tocqueville wrote:

"The jury, and more especially the jury in civil cases, serves to communicate the spirit of the judge to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged, and with the notion of right. It teaches men to practice equity, every man learns to judge his neighbor as he would himself be judged. It invests each citizen with a kind of magistracy, it makes them all feel the duties which they are bound to discharge toward society and the part which they take in its government. By obliging men to turn their attention to other affairs than their own, it rubs off that private selfishness which is the rust of society. -I think that the practical intelligence and political good sense of the Americans are mainly attributable to the long use they have made of the jury in civil cases." (*Democracy in America* 285-287 (Bradley ed. 1945).)

Even earlier, in 1765, the British jurist, Sir William Blackstone, in his *Commentaries on the common Law*, a book that enjoyed phenomenal sales both in England and in the American colonies (J. Bryce, *The American Commonwealth* (1869); S. McCart, *Dial by jury* 9 (1964)) wrote:

"But in settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice have an ample field to range in. ... Here, therefore, a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be the best investigators of truth, and the surest guardians of public justice."

Finally, in a less serious vein but still a succinct appraisal of the virtues of the jury system, British novelist and essayist G. K. Chesterton, after serving as a juror, wrote:

"Now, it is a terrible business to mark a man out for the vengeance of men. But it is a thing to which a man can grow accustomed, as he can to other terrible things; he can even grow accustomed to the sun. And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it.

... Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men [and women] standing around." (G. K. Chesterton, "Twelve Men," in *Premendous Difles*).

What is the condition of this institution that has been alternatively damned and deified? How did the concept of dispute resolution become entrusted to twelve "ordinary" men and women?

The American jury system began with the arrival of the first colonists. (R. Simon, editor, Introduction, *The Jury System in America* 15 (1975).) The Charter granted to the Virginia Company that established Jamestown in 1606 guaranteed the colonists all the rights enjoyed by Englishmen, including trial by jury. King James I thereby established the precedent in the Seventeenth Century which was followed subsequently in British colonizations and conquests in North America as well as in Asia and Africa.

A trial by jury on one's peers is enshrined in the Magna Carta of 1215 and as an ideal often stirs democratic reverence because it is an ancient institution.

However, the mist of centuries has befogged the true origin and purpose of the Magna Carta, leaving most of us with a romantic misconception.

The Magna Carta was not a constitution or a declaration of human rights. It was nothing more than a treaty between two warring factions—the barons and King John. It represented the triumph of one faction of the aristocracy over the other, and was designed to benefit the victorious nobles who had rebelled against John by forcing him to negotiate.

The Magna Carta didn't provide for a trial by jury. At the time of the battle of Runnymede, there was no jury trial for crimes. It wasn't until that same year that trial by ordeal was abolished. This created a vacuum which several years later was filled with the jury trial.

The Magna Carta thus guaranteed only a trial by one's peers, in these words "Nisi per legatē iudicium parium suorum ad per legem terrae" meaning "Only thru legal judgment of their peers through the laws of the land."

Trial by ones peers, as guaranteed by the Magna Carta, had an entirely different meaning than we ordinarily attribute to it. "Peer" has two meanings—even today.

As we normally understand it, *it* means equals. But in England in 1215 *it* meant nobility. In England today, in Burke's Peerage and the House of Lords, it still describes the aristocracy. (C. Rembar, *The Law of the Land* 167, 168.)

Thus, in the Magna Carta, the barons, far from insuring a jury trial for the masses, by the masses, were merely guaranteeing that they would be tried by one not lower on the social scale than themselves.

That what started out as an instrument to protect the privileged became the temple of democracy is a marvel of political and social evolution.

Why the number twelve was selected as the optimum number of jurors remains a mystery. To theorize, one would suppose that twelve was a workable size, large enough to demonstrate an impressive consensus but not so numerous as to become unwieldy. Twelve is also an important number in our folklore—twelve months in a year, the twelve hour segments in our day and, prior to the introduction of the metric system, we dealt in dozens and grosses. Or perhaps we find odd numbers frightening, even supernatural. After all, there were twelve apostles, twelve tribes of Israel; twelve patriarchs; twelve officers of Solomon. (Rembar, 159-161.) In any case, twelve had traditionally been the fixed size for juries both in England and the colonies since the middle of the Fourteenth Century.

Independence of the jury from interference by the crown was an important aspect of the colonists' drive to sever their dependence upon Great Britain and provided an impetus to the development of the jury system in America. Colonial judges were instruments of the crown inasmuch as they were appointed by the king who also determined their salaries. Understandably, during our colonial history trial judges often dominated juries. But a preview of radical changes yet to come

took place in 1734 when John Peter Zenger, a New York City newspaper publisher, was arrested for printing allegedly libelous stories about the royal governor, William Cosby. At the trial, the government-appointed judge, James De Lancy, ordered the jury to decide the sole question of whether Zenger had published the offending statements.

As judge, he thought that he would then decide whether the statements were libelous. Zenger's attorney, Andrew Hamilton advised the jurors that they had the right to decide *both* the law and the facts. In defiance of the judge's orders, the jury returned a not guilty verdict and established not only freedom of the press but asserted the independence of the jury from judicial and royal control. (M. Bloomstein, *Verdict* 23 (1968); McCart, *Trial by Jury* 8-9 (1964); Van Dyke, *Jury Selection Procedures* 228 (1977).)

The jury question received prominent attention in the colonists' catalogue of grievances justifying their revolt, the Declaration of Independence. (H. Hyman and C. Tarrant, "Aspects of American Trial Jury History," in *The Jury System in America* 30 (K. Simon, ed., IV Sage Criminal Justice System Annuals 1975).) Yet, interestingly, the 1787 draft of the Constitution contained only one reference to jury trials. Article III Section 2, Clause 3 provided:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trials shall be held in the State where the said crimes shall have been committed."

The vagueness of this provision, according to one scholar, was one reason for opposition manifested toward the Constitution during the 1787-1789 ratification period. (J. Van Dyke, *Jury Selection Procedures* 7 (1977).)

Strong opposition to the infant constitution arose from the outset. On the very day the Constitution of the U.S. was made known to the people by publication, there was published immediately adjacent to it in the same newspapers a virulent attack upon it, signed by Cato. Cato was known by everyone to be Governor Clinton, the Governor of New York, and a powerful political figure of his time. Many similar attacks followed, authored by some of the most powerful political figures of New York, and signed with Roman pseudonyms.

Alexander Hamilton, then 30, was a staunch supporter of the new Constitution. As a lawyer in New York, he had taken a prominent role in the events resulting in the constitutional convention and the drafting and adoption of the Constitution. He was the only New York member to sign the Constitution.

In the fight for ratification, he undertook to respond to the attacks. His first two articles, written under the name of Caesar, were bitter, acrimonious, and scornful of Clinton's appeal to "the majesty of the multitude." Persuaded that such personal attacks would not help gain support for ratification, he altered his style, and authored the first number of "the Federalist," under the name Publius.

There then appeared, from October 1787 to April 1788, a continuing stream of Federalist papers over the signature Publius. These articles were published in newspapers throughout the country. There appeared as many as four articles a week from the prolific pen of Publius. They were published in book form even before they had all appeared in newspapers.

Although the Federalist articles were at first thought to be authored only by Hamilton, it was soon known that actually three men wrote as Publius; Hamilton, John Jay and James Madison.

The question of guaranteed jury trial was of great moment to the public. It was of such great concern that the opponents of the Constitution felt they could use its alleged exclusion as a basis for defeating ratification. Knowing the sentiment for jury trial in criminal and civil cases, which was one of the great issues of the revolution, the opponents of the Constitution argued that it should not be ratified because it did not provide for a Civil Jury *Trial*. Their argument was that since it provided only for a jury trial in criminal cases, by omission it abolished civil jury trials, and therefore should not be ratified. In opposition, Hamilton and Publius asserted not that the civil jury trial was unnecessary, but that the Constitution did preserve the right to civil jury trials. Thus, all, opponents and proponents, were agreed that civil as well as criminal jury trials must live.

Hamilton wrote as follows in the Federalist, Number 83:

"The objection to the plan of the convention which has met with *most success* in this State and perhaps in several of the other States, is that relative to *the want of a constitutional provision* for the trial by jury in civil cases. The disingenuous

form in which this objection is usually stated has been repeatedly adverted to and exposed, but continues to be pursued in all the conversations and writings of the opponents of the plan. The mere silence of the Constitution in regard to Civil Causes is represented as an abolition of the trial by jury, and the declamations to which it has afforded a pretext are artfully calculated to induce a persuasion that this pretended abolition is complete and universal, extending not only to every species of civil, but even to criminal causes. With regard to civil causes, subtleties almost too contemptible for refutation have been employed to countenance the surmise that a thing which is only *not provided* for is entirely abolished. Every man of discernment must at once perceive the wide difference between *silence* and *abolition*.

In equally strong language, Hamilton then proceeds to illustrate how the failure to specifically include mention of civil jury trials does not mandate their abolition, finally concluding:

"The pretence, therefore, that the national legislature would not be at full liberty to submit all the civil causes of federal cognisance to the determination of juries is a pretence destitute of all just foundation. From these observations, this conclusion results: that the trial by jury in civil cases would not be abolished; and that the use attempted to be made of the maxims which have been quoted is contrary to reason and common-sense and therefore not admissible..."

He continues:

"The friends and adversaries of the plan of the convention, if they *agree in nothing else*, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government."

Undoubtedly, fears expressed by the constituency produced the Bill of Rights, adopted as the first Ten Amendments to the Constitution in 1791, in which trial by jury was accorded a prominent role. Specifically, the Fifth Amendment declared that no person could be criminally charged "unless on a presentment or indictment of a grand jury;" the Sixth Amendment guaranteed that accused persons would have a speedy, public trial by an impartial jury in the state where the alleged offense was committed; and the Seventh Amendment preserved the right to trial by jury in all cases at common law where the amount in controversy exceeded twenty dollars. (Hyman and Tarrant 31-32; Van Dyke 7.) Thus the Constitution firmly established the prerequisite of a jury verdict before a person could be convicted of a crime or denied freedom.

In the face of continued praise and blame, how has the jury trial fared? As noted above, with the expansion of the British Empire the jury system was introduced in North America, Africa, and Asia. The French Revolution was also instrumental in bringing the jury system to the continent as a symbol of popular government. The jury went first to France and, through Napoleon, to the Rhineland, then to Belgium, the German States, Austria, Hungary, Russia, Italy, Switzerland, Holland, and Luxembourg. Immediately after Napoleon's defeat in 1815, Holland and Luxembourg abolished the jury system. In the countries remaining, the use of the jury was limited to trials of major crimes and political crimes.

Little by little, beginning in the mid-Nineteenth Century, jury trials on the European continent were prohibited in cases of treason, libel, and political crimes. In 1919 Hungary suspended the jury trial completely. Germany abandoned the concept in 1924. France never reintroduced the jury after it was abolished by the Germans during World War II. Japan's short-lived experiment ended in 1943. After World II, Austria reintroduced a weakened jury system. Even in England itself, its use is limited by statute to a small number of cases. Not surprisingly, the Soviet bloc and fascist states abolished juries outright. (10 *Encyclopedia Britannica* 361 (15th ed. 1979).)

By implication, modern critics of the jury point to Britain's virtual abandonment of juries as evidence of the jury system's obsolescence. For instance, Chief Justice Burger in an address to the National Conferences on the Causes of Popular Dissatisfaction with the Administration of Justice, in 1976 suggested a re-examination of the effectiveness of our methods of dispute resolution. Specifically, the Chief Justice noted that an appropriate subject for consideration would be the viability of civil juries, reminding his audience that England, "the fountainhead of all our legal institutions," had abandoned the use of the civil jury trial in most cases forty years ago." (Higgenbotham, "Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power," 56 *Tex. L. Rev.* 47, 48 (1977).)

As we have seen, the Chief Justice's reference is attenuated. The jury trial as we know it is uniquely American. We saw that its concept at the time of the Magna Carta was totally foreign, in fact 180 degrees from our present concept. But the English themselves cannot take credit for the idea of the jury. The idea of individuals as jurors, long before appearing in England, appeared in France, Scandinavia and Rome. It was first introduced into England by Henry II in the Twelfth Century. Henry was

half French, one quarter Anglo Saxon. His language was French. He learned to speak only the crudest English to communicate with his subjects. He came to power after the disastrous reign of King Stephen. In as poor a rule as England ever had, the people under Stephen were subject to robbery, extortion, torture, murder, rape and every crime imaginable by the nobility - "the devils in the castles." The intelligent Henry took as his first order of business the establishment of order in the kingdom. One of the most common ills suffered by the people during the anarchy of Stephen's reign was dispossession. Henry sent out his men to determine the rights to possession of the land. Tracing title to determine ownerships would have been impossible. The best that could be hoped for was to put things back the way they were before the tempestuous reign of Stephen. To this end, Henry ordered his officials to question the local citizens and find out what had belonged to whom. In this context, the officials could be called justices and the locals they questioned to determine the facts, jurors. The person claiming to have been dispossessed had his claim decided by his neighbors who gave sworn answers to the justice. Thus the word juror, from the Latin "jurare," to swear. The judicial action and the order creating it had the delightful name: the Assize of Novel Disseisin. (Rembar, 127-129.)

In contrast to the United States, Britain has no constitutionally mandated right to civil jury trial. Consequently, no constitutional safeguards existed to prevent Parliament from severely restricting the use of civil juries. The death knell for the civil jury in England, therefore, came in the form of legislation: the Judicature Acts of 1873-75; the Juries Act of 1918; and the Emergency Provisions of 1939.

Prior to 1873, probably ninety percent of all cases in Britain were tried before juries. It was not until World War 1, with the passage of the Juries Act of 1918, that manpower shortages curtailed the use of the civil jury. A jury trial was required only in cases of fraud, libel, slander, false imprisonment, seduction, malicious prosecution, breach of promise to marry, divorce, or probate. With the 1925 repeal of the Juries Act of 1918, jury trials reemerged. Discontent mounted; trial delays and excessive costs were attributed to the civil jury system. Consequently, Parliament passed the Administration of Justice Act of 1933 which again severely restricted the general right to a jury. The courts, however, retained the discretion to order a jury trial in any cases where it was not required.

World War II and the Emergency Provisions of 1939 effectively terminated the civil jury trial in England. At least one prominent British jurist, Sir William Diplock, attributed the disappearance of the civil jury to habit and inertia: "Habit, the most potent force in procedural matters, which had previously operated to preserve the jury trial now operated against its revival." (Higgenbotham, 56 *Tex. L. Rev.* 50-53.) Habit, manpower shortages due to two devastating World Wars, and the existence of a bar unaccustomed to the tradition of the civil jury, probably all contributed to its demise.

The British experience is an example of the evils of passivity, and of bowing to expedience. It is an example of how pressures or exigencies of the moment, real or imagined, may serve to erode what we leave unprotected.

The jury system, even as it presently exists in criminal cases in England, is much different in practice from the system in the United States. This is primarily due to the inherent differences in our legal systems. Theirs utilizes a specialized bar and a specialized judiciary. Attorneys function in a completely oral legal system, without a hearsay *Gideon* or a *Miranda* rule (the police decide when a lawyer will be available to a suspect), without discovery except for documents, with virtually no contact between the attorney and client or witness before trial. (Stafford, "Trial by jury The English Way," 66 *ABA journal* 331 *passim* (1980).)

Appeals in Britain are rare, and the roles of the attorneys themselves are highly regimented. The solicitor prepares a case and the barrister tries it, in marked contrast to the legal system in the United States.

With the British jury so severely restricted, the United States has emerged as the last haven for the jury system. Approximately 120,000 jury trials are conducted here annually or more than ninety percent of the world total.

The English jury in civil as well as criminal cases plays a much less important role than its American counterpart. The trial of a case in England is developed largely thru papers, pleadings in the forms of statements and counterstatements, back and forth. Oral Testimony is frequently nothing more than an acknowledgment or reaffirmation of these statements. The trials are usually perfunctory, dry and under rigid control of the judge. The barrister does not have the freedom of movement, expression or persuasion of the American lawyer. There is little opportunity for bringing matters of original impression to the jury. On appeal, the jury's findings of fact are subject to review, further weakening its role. In our system, of course, the appellate courts ordinarily review only the law. The jurors are the sole judges of the facts and their findings will not be disturbed unless there is no evidence to support them upon which reasonable minds could differ.

By the same token the English judges play a lesser role. They are more dominant in one way -enforcing the rituals of the Courts. But in the far more important area of establishing precedent, shaping the law to the needs of the community, they play virtually no part.

Even the appellate courts rarely plow new ground. Appeals are argued, sometimes for days, but amount merely to a rehash of the facts addressed at trial. (There is rarely a record made of the testimony.) No briefs are filed. The appellate court has no opportunity for research, and it usually renders its opinion orally from the bench. This may develop a facility with extemporaneous phrases, but it surely does not encourage departure from precedent. As a result, England generates little in the way of reports.

While in England two years ago, I noted a set of reports covering a small wall in, a barrister's office. I inquired and my English friend informed me that those were the English reports since Charlemagne. I was appalled. I informed him that my state, the smallest in the union, has generated more reports.

The American lawyer and the American judge have the greatest power of any lawyers or judges in the world -power to help the people directly by making law and establishing precedent which will make their lives better.

The English system is an entirely different animal. Do we really want it?

[Maybe, we might say, the English should look to us, not we to them. And they are. For the past several years, they have been studying our system with a view toward changing to it.]

At least one study, in comparing English and American lawyers, concluded that lawyers in the United States were relatively more important than those in England and have a greater impact on society. The lawyer in America is more influential in business and government and more often relied upon as an advisor, advocate, and policy maker. Furthermore, litigation is more important in the United States than in England, and courts play a more decisive role as instruments of social control and change. (Q. Johnstone and D. Hopson, *Lawyers and Their Work: An Analysis of the Legal Profession in the United States and England* 5 80, 5 81 (1967).) According to the authors, a lack of vitality apparently pervades the English legal profession probably because of its preoccupation with maintaining the status quo. The result is a more defensive, less aggressive legal community which may be the result of its more static legal institutions. (Q. Johnstone and D. Hopson 11.) The disappearance of the British civil jury may have been yet another contributing factor.

In contrast to England, the jury system in the United States from the outset established its own independence from the crown by refusing to yield to the influence of appointed judges. The jury acted as a buffer between the bench and the bar so that the presence of the jury, important for its own function and power, also insulated the attorney and therefore his client from the vagaries of despotic judges.

Our jury system, both civil and criminal, as it developed, perpetuated not only its own independence, but also assured continued independence of both the judiciary and the practicing bar. I hear the jury system being assailed by unfriendly voices in high places. I hear the chipping of hammers and chisels at the cement which holds together our system of law as we know it. With its numbers diminished, its unanimity cast aside, I view the future of the jury trial with misgiving.

What precisely are the shortcomings of the jury system? Faced with delay and congested trial calendars, detractors claim that jury trials are inefficient- waste time, money, and human resources. Some critics view the civil jury as parochial, prejudiced, and unpredictable; incapable of deciding highly complex cases. Indeed, one legal scholar labelled the jury "cumbersome, dilatory, and expensive" but conceded that it was too entrenched in our legal system to be a fad. (Rendleman, "Chapters of the Civil jury." 65 Ky. L. Rev. 769, 770-71 (1977) -) Courts themselves view the jury system with ambivalence. (Rendleman, 772.) Detractors of the jury system also stress that judges are intellectually better equipped to resolve disputes. Judge made decisions would provide greater expertise and efficiency, and intellectual consistency could be maintained. These, the critics argue, are the preferable qualities in dispute resolution and should outweigh our persistent romantic attachment to a "transient, everchanging, ever-inexperienced group of amateurs." (H. Kalven and H. Zeisel, *The American Jury* 3-4 (1966).)

I don't intend to lapse into sentimentality and to equate the jury with perfection.

But let us look at the benefits of the jury system from all sides.

It is the one opportunity every citizen has to participate actively in an integral function of our government. It gives the juror the chance to see the system at work, to be a working part of it. It educates him. It impresses upon him the fact that he is a part of the government, that it is his *government*, that the words "of the people, by the people, and for the people" are not just words. It invigorates him, uplifts him, renews him, and his faith and understanding of our system. It brings to life for him the principles upon which our government is based—fairness, equality, freedom.

It gives him faith in our system of justice; that it is not an elitist system, run by and for an exclusive fraternity of lawyers and judges whom he doesn't understand and isn't sure he trusts.

Is there a trial lawyer among us who has not experienced the strange alchemy of the jury; who has not wondered at the mysterious process by which the jury as a unit somehow becomes greater than the sum of all its parts? There is a magic in a jury which is not brought to it by any single member. It did not exist in the members, individually or collectively, before they came together as a jury, and will never exist again once they are disbanded. But while they function as a unit, it is there.

Haven't we all recognized, time and again, the extraordinary attention, the high purpose, the dedication, the spirit of the jury to do the *light thing*. And haven't we also seen the collective judgment and conscience of the jury to be beyond what would be expected from each of the individual members; and which time and again, will cut through hypocrisy, deception and artifact to find the truth.

Haven't we marveled at how readily a jury will recognize a liar?

Who better to decide the facts? A jaded, experienced judge who has heard it all before? Or a fresh jury who can bring their collective experience to bear on these facts, uncluttered by any other cases where similar or dissimilar facts would cloud the instant issue?

What's the first question asked of a potential juror? "Are you familiar with the facts of this case?" And what is the caveat most often repeated to them by the judge? "Don't judge this case on anything other than the evidence adduced in this courtroom!"

Can any judge - any human - divorce himself from the experiences of a thousand prior cases he has heard?

The very inexperience of a jury is its greatest asset. Its transience precludes rigidity of ideas. The jury is not as prone to a mind-set or bias that sometimes characterizes trial judges who have seen it all before.

As judges of the facts, jurors bring a composite of learning, judgment and experience that, regardless of education, surpasses that of any given individual. And they have the vital tool of discussion. They have the opportunity to put the evidence into the crucible of argument, exchange ideas and distill them down to a decision. A judge cannot argue with himself. A single person cannot talk himself out of preconceptions or misconceptions.

Juries educate judges to the needs of society. They pass through their courtrooms by the thousands. The judge is one court, one mind, one experience. With juries, the problems filter through thousands of minds. There is thus great input from the public.

Further, the jury is totally independent. It is not elected or appointed. It answers to no one but its own conscience. It is subject to no control. It is almost always anonymous.

Finally, the jury system, as I view it, imbues our judicial process with humanity so that the letter of the law remains tempered by the spirit of the law. I view the jury and its workings as a continuous and vibrant experiment in the resolution of human problems.

The decision-making process requires an intricate balance of power between the judge, counsel, and the jury. The jury checks the powers of the judge through a verdict that represents contemporary community values. With the number of jury trials decreasing, particularly in federal courts, I feel that the bar must exercise greater vigilance than ever before to act as a direct check upon judicial power. I think, for example, that elimination of diversity jurisdiction from the federal courts will reduce the presence of the jury in these tribunals so dramatically (Higginbotham, 58-59) that the judicial predominance will be virtually guaranteed. The bar must become increasingly aware of its responsibility as the advocate of the public.

The role of the lawyer in making the jury system work cannot be overestimated. Throughout our history he has played a prominent and courageous part. Certainly, without our juries acting as buffers between the bench and the bar, our independence and with it our freedom to defend unpopular clients and causes would have long since disappeared. But it is the dogged, persevering trial lawyer who time and again has brought the issue to the jury, often at great personal sacrifice.

As an example of this heritage, consider the uneasy calm that permeated Boston in March 1770 on the eve of the Boston Massacre. British troops were garrisoned in the city and the friction between the army and the inhabitants, increasing steadily, finally broke into violence on the evening of March 5, 1770. A single sentry guarding the custom house became embroiled in an argument with a passerby. Six soldiers, a corporal, and a captain answered his call for help. The captain was John Preston, a forty-year-old Irishman with fifteen years in the commissioned service. A mini-riot ensued; the soldiers fired, and three people died instantly; one shortly after the incident; and a fifth person a few days later.

Acting-Governor Thomas Hutchinson and General Thomas Gage agreed that since Preston had not acted pursuant to orders from a civilian authority, he could only justify his actions by evidence of an actual attack. A grand jury indicted Preston and the eight soldiers in five separate indictments, and all of them went to prison. At the outset, neither Captain Preston nor his soldiers were able to find counsel to represent them. Finally Josiah Quincy and Robert Auchmuty agreed to represent the prisoners on the condition that John Adams also agree.

Quincy's, decision to represent the unpopular defendants prompted a letter from his father questioning his son's decision and warning him that the case would certainly endanger his son's reputation. In reply, Quincy defended his decision and reminded his father that "...these criminals, charged with murder are *not yet legally proved guilty*, and therefore, however criminal, are entitled, by the laws of God and man, to all legal counsel and aid."

After innumerable delays and a defense decision to sever Preston's trial from that of the soldiers, the proceedings began on October 24, 1770, and continued for five days. On the morning of October 30, 1770, the jury returned a verdict of not guilty probably because testimony failed to show whether Captain Preston had actually given the orders to fire. Acquittal for six of the eight soldiers followed in December 1770. Only two of the defendants were found guilty. The crime was manslaughter, still a capital offense, but a far cry from murder as originally charged in the indictments.

We have very little insight into the circumstances of John Adams' retainer in the case except that Adams never regretted defending the group that was so abhorrent to the colonists. As late as 1815, however, Adams still felt chastised by his countrymen for his part in the trial. (3 *Legal Papers of John Adams* 1-31 (L. Wroth and H. Zobel ed. 1965); Kunstler, *The Case For Courage* 58 (1962).) In 1816, Adams wrote to a friend concerning his fee in *Rex versus Preston*. "A single guinea was put into my hand... for a retaining fee, ten guineas were offered on the first trial and eight at the second. The nineteen were all the fees I ever received for a whole year of distressing anxiety, and for thirteen or fourteen days of the hardest labor I ever went through.

The pages of our legal history are replete with similar courageous acts by lawyers. Frequently, however, their zeal is maligned or misinterpreted. Consider the charge by Chief Justice Burger that "all too often" overzealous advocates commit a variety of improprieties in the courtroom. He finds too many "adrenalin fueled lawyers cry out that theirs is a 'political trial'" with the unfortunate result that rules of evidence and ethical considerations have become irrelevant.

The American trial lawyer is fiercely independent. He can be abrasive, obnoxious, cantankerous, obstreperous. He is always argumentative. But he is also resourceful, inventive and imaginative. He creates great heat in the courtroom. But that heat generates light.

He is the champion of the little person-the underdog. He is the protector of the rights, the guardian of the Grail, the keeper of the flame.

It is he who implements the Constitution to "keep the government off the back of the people" in the late justice Douglas' words.

He is often inclined to be technical, but Frankfurter has stated "the history of our freedom lies largely in the enforcement of procedural safeguards."

The American trial lawyer is the foot-soldier of the legal profession. He engages in hand-to-hand combat in the trenches; the courtrooms of this country. He is misunderstood, mistrusted or even reviled by diverse elements, including members of his own profession. The saddest part of all is that the people whose cause he champions don't even realize that he is the protector of their rights, their freedoms. Because of the bad image of the trial lawyer, created by various forces in our society, some with good intention, some with bad, the person who needs him most, regards him with suspicion.

Yet, this stubborn foot-soldier continues to slog through the mud, carrying on his lonely fight, often in the face of overwhelming odds.

Look at the great cases of our history - *Brown v. Board of Education*, *Escobedo v. Illinois* and on and on. They were all cases of little people, without advantage, fighting against great odds.

The trial lawyer is always in the front lines of these pitched battles. And any military man will tell you that it is the infantryman who turns the tide of battle.

I feel there is a distinct correlation between the existence of an unfettered jury and an unintimidated trial bar. As trial lawyers, if we permit the demise of the civil jury system in the United States, I believe we will contribute to the demise of our own independence. In the words of Harry Sacher, "a country with an intimidated bar is a country whose liberties are in danger."

The continued use of juries in America as well as the existence of a bar independent from the bench are not wholly the result of historical accident or conservatism. Both arise from the basic ideological and philosophical premises upon which our political system and social contract are based. The differences in the American and British judicial systems are the products of different ideals and values which lie at the heart of each political system. It is no coincidence that in Britain the use of juries is all but nonexistent and at the same time the bar and bench are essentially a single entity, while in the United States juries remain and the bar is distinct and independent from the bench. For the two concepts, juries and an independent bar, are political *institutions* which serve to effectuate our society's political and social ideals and values.

In John Locke's *Second Treatise of Government*, which served as the source of political philosophy for our own Declaration of Independence and Constitution, the fundamental enlightened concept of separation of the powers of government appeared for the first time in political thought. Locke spoke of "balancing the power of government by placing several parts of it in different hands" (Section 107). The concept of the tripartite system of checks and balances is a permanent fixture in American political thought and experience. Separation of powers is the lynchpin of our system. It lies at the very base of our liberty.

With this in mind it is important to view the jury system not as a *device* of our judicial process, but rather as an *institution* in our political system. The oft-quoted De Tocqueville, preeminent observer of American society, noted,

"It would be a very narrow view to look upon the jury as a mere judicial institution; for however great its influence may be upon the decisions of the courts, it is still greater on the destinies of society at large. The jury is above all a *political institution*, and it must be regarded in this light in order to be duly appreciated." (I A. De Tocqueville, *Democracy in America* 282.)

The view of the jury system as an institution rooted in the ideals of separation of powers was espoused by John Adams who noted that the jury system introduced into the government "a mixture of popular power" and as a result "the subject was guarded in the execution of the laws" so that "no Man could be condemned of Life, Limb, Property or Reputation without the concurrence of the voice of the people." (Charles F. Adams, Ed. *The Works of John Adams*, Vol. 111, 48 1.) The jury system provides a check, arising directly from the will of the people, on the power of the bench to make law. The law making function of the judicial branch occupies a significant position in our political scheme. This quasi-legislative role of our judicial system is a major reason why the jury trial must be maintained in its present form. As one commentator noted, the American judiciary has assumed a "different institutional role than the one taken by their English brethren. In our tripartite system of government, the power of judicial review is inextricably linked with the concept of an independent judiciary and its attendant risk of autocratic behavior." (Higgenbotham, "Continuing the Dialogue: Civil juries and the Allocation of judicial Power," 56 *Tex. L. Rev.* 52 (1977).) The practice of judicial review established in *Marbury v. Madison* inevitably resulted in a politically conscious judiciary. This unique role of the American judiciary requires an infusion of the will of the people in the form of the democratizing influence of the jury. The jury, extracted from the community, acts as a check against the autocratic tendencies of the judiciary.

As Professor Cox has noted, "the power of the great constitutional decisions rests upon the accuracy of the Court's perception of this kind of common will and the Court's ability, by expressing its perception, ultimately to command a consensus." (A.Cox, *The Role of the Supreme Court in American Government* 118 (1970).) Indeed the jury acts as an institutional check on a politically conscious judiciary by providing the judicial process with an expression of community values as they relate to the issues of each case.

Just as the jury system must be viewed as a political institution arising from the fundamental concept of separation of powers and checks and balances, so must one view the independent bar. The independent bar, a representative of the people apart and distinct from the bench, provides a check upon the judiciary in a manner similar to that of the jury.

Historically, there is evidence that a movement away from the use of a jury system accompanied a loss of the American bar's independence. Thus one historian notes:

"One of the leading measures of growing alliance between the bench and bar on one hand and commercial interests on the other is the swiftness with which the power of the jury was curtailed after 1790." (*The Transformation of American Law 1780-1860*, Morton J. Horwitz (1977).)

As the bar became more closely tied with commercial interests and the bench, the power of the jury was curtailed in three respects: (1) more "special cases" for judges, (2) new trials were granted where verdicts were against the evidence and (3) jurors became exclusively triers of fact. Justice Story noted "to my surprise ... the opinion is rather popular among merchants. They declare that in mercantile cases, they are not fond of juries" *Id.* This points to the subtle interrelationship between the jury system and the independent bar. Just as the bar in 1790 became more dependent and allied with big business and government. The jury, made up of the common interests the bench and mercantile interests, the bar in the past two decades has become allied with -the private citizens, the consumers -becomes a threat to the interests allied with the bar. Further, as the bar and bench become more closely allied, the jury is viewed as an illogical, irrational intrusion into the "law" practiced by an elite legal community. Thus, just as in 1790, so today, cries to curtail the use of the jury system are heard from the bench.

But to pay heed to those cries is to ignore the delicate tripartite balance inherent in the judicial system. The jury and the independent bar both serve to act as checks upon the judges. The check provided by the jury arises from the common will of the people reflecting all of the good and bad that comprise that will. The check provided by the bar is a professional one, arising from the years of training, practice and education in the law. Remove the jury and the democratizing influence is gone. Remove the independence of the bar and the check disappears as the bar and bench become a single entity. The demise of either of these institutions destroys the internal balance of the judicial system and thus promotes the risk of unchecked autocratic behavior on the part of a judiciary which, while performing its function to make law, is divorced and isolated from the will of the people. But the jury system and the independent bar, while on the one hand serving as a check on the judiciary, on the other hand are the roots of its independence.

Because all our courts enjoy the unique power to make law, it makes our law flexible. It makes it comport to the needs of the people. And who brings the needs of the people to the attention of the courts? The trial lawyer. This is quicker, more direct, simpler, yes, and less expensive than the legislative alternative.

Every great case, every opportunity to make a step forward for society, to make law to improve the human condition, originates in the trial court, with the trial lawyer. Our appellate courts have no way to originate these cases. They must wait for the issue to be brought before them in order to enunciate their principles.

The jury as a forum encourages the lawyer to bring his case before them because they are representatives of the people. They mirror society -its needs, its moods and its mores. And the lawyer, to properly present his case, must understand the people. He thus becomes acutely attuned to the problems of society and the ideal instrument for bringing the issues of the day to the examination of the judiciary. Legal development always lags behind sociological development. But the gap is narrower in our country than any other. This is because in our country, the little person can find an ear. He can fight city hall. The trial court is a forum where a cause can be brought directly; where a private individual can cut through all the red tape, all the bureaucracy involved in the legislative process; where he can avoid the overwhelming power of the special interests which have such a lobby in all legislatures.

There is no paid lobby in the trial court- or the appellate courts. The individual with no great fund of money, no lobby, and no resources other than an independent trial lawyer can bring his cause to hearing with closer to even odds in the trial court. It is

the great leveler. The needs of the public are thus brought directly to the judiciary giving them the opportunity to respond directly-and independently -without coercion, control or influence from any source - to shape the law as they feel it should be.

Where was the independent judiciary in Nazi Germany, when millions were decreed to sterilization, imprisonment, and worse; when any judge, independent enough to refuse to issue the barbaric order, would himself be derobed, disbarred and imprisoned?

Where was the independent bar in Nazi Germany, when all Jewish lawyers were disbarred; when any lawyer having the temerity to represent a Jew was disbarred? Where in Nazi Germany, was that hallmark of independence, the great writ, the writ of habeas corpus (which incredibly, has been the most recent target of the Chief Justice)?

Contrast instead the Watergate experience. Agonizing as it was, it represented the triumph of the independent bar, the independent judiciary. Although at first blush lawyers appeared the villains, lawyers and judges were the heroes of Watergate. Lawyers uncovered it. Lawyers prosecuted it. A federal district judge tried it. Appellate courts and the Supreme Court itself made historic decisions. And the true defendant was the President of the United States! The highest officer of the land did not have the power to stop the legal process of the courts, the lawyers, the people.

Archibald Cox was not disbarred. Elliott Richardson was not disbarred. They were fired. But it was Mitchell, Dean, and the other officials of the President's team who were disbarred. And imprisoned.

What greater example could there be of the genius, the beauty of our system? The glory of Watergate was that our country survived the nightmare. The system worked.

The trial lawyer, the jury and the judge interact. The lawyer serves as a buffer between judge and jury, as a gear engaging the jury to the judicial mechanism. The three, judge, jury and lawyer function together to meet the needs of society.

We must keep our pulse on the public. The law does not exist in books. It is not a jurisprudential exercise in abstract logic or semantic gymnastics. It is not an opportunity for courts to compose witty, eloquent, or deathless prose which will survive as examples of literary gems in the history of legal writing. Its purpose and function is instead to do justice, create standards by which the people can live in peace, in dignity, and in freedom. It is a living thing. The law must accommodate itself to the people -not the people to the law. The law is the servant of the people - the people are not the servants of the law. Law is made, acts are passed in aid of the preservation of human liberty and human rights.

Alexander Hamilton said of the jury trial:

"For my own part, the more the operation of the institution has fallen under my observation the more reason I have discovered for holding it in high estimation; and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to as a defense against the oppressions of an hereditary monarch than as a barrier to the tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious than beneficial, as all are satisfied of the utility of the institution and of its friendly aspect to liberty."

"The strongest argument in its favor (in civil cases) is that it is a security against corruption... and it will be readily perceived that this complicated agency tends to preserve the purity of both institutions (the court and jury)."

In commenting on encroachment upon the jury system, he said:

"It may be added that these encroachments have generally originated with the men who endeavor to persuade the people they are the warmest defenders of popular liberty, but who have rarely suffered constitutional obstacles to arrest them in a favorite career."

We must take great care before we tinker with the delicate machinery of justice.

Let us all re-examine our system in perspective. Let us emulate the juries; refresh ourselves, renew ourselves. Let us look to our history-to our founding fathers to our Constitution. Let us not deny our heritage. Let us not permit to slip away through passivity, indolence, or misguided appeals to expedience that which has been so hardly won.

Edmund Burke has said, "the only thing that is necessary for evil to triumph is that good men do nothing."

We must be activists, not passivists, if we are to preserve our institutions.

We must not disarm our foot-soldiers.

We must not leave the ramparts unmanned.

We must not blind the eyes or still the tongues of our sentinels.

I pray God to preserve to us the "adrenalin-fueled" trial lawyers.