TRIAL BY JURY

By Ronald D. Krist

The following exchange between a Texas trial lawyer and a potential venire man recently occurred in a Houston courtroom:

> Question: Mr. Blackstock, I see that in response to the written jury questionnaire relating to whether or not you felt there should be reforms made in our civil justice system that you indicated you felt that certain changes were in order. Would you mind elaborating on the type of changes that you feel are in order?
> Answer: Well, I just think that things are out of control and that there should be some limitations or caps on the damages that some juries have been tossing around.
> Question: In other words, it is your belief that juries have been awarding damages without supporting evidence.
> Answer: Well, I mean it just seems like the system is out of control and I think there should be certain changes.
> Question: Well tell me if you will, Mr. Blackstock, what changes you think should be made. By that, I mean, do you think that there should be some alternative form of dispute resolution other than trial by jury?
> Answer: Yes I do. I think that these matters should be handled by some other sort of panel. I don't believe that personal injury cases such as the one that you have described to us should be handled by juries.

Mr. Blackstock was not alone in his disbelief in the jury system. Two of Mr. Blackstock's fellow venire men likewise shared his condemnation of trial by jury.

Trial lawyers have assumed that our cherished right to trial by jury was a value shared by all Americans. Recent experience has shattered that notion.

The U. S. Constitution guarantees one the right to trial by jury. Art. 3, Sec. 2 of the U. S. Constitution as adopted in 1789 provided that the trial of all crimes except impeachment shall be by jury. In 1791 the sixth and seventh amendments were added as part of the Bill of Rights. The sixth amendment assures a person accused of crime "a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have previously been ascertained by law. . ." This amendment merely underscores or amplifies the right protected in the original constitution. The seventh amendment guarantees the right in federal civil cases: "In all suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . ."

By way of adoption, the original states also guaranteed the right to jury trial.[i] Similar assurances were provided in the constitution of every state that subsequently joined the union.[ii] The right to trial by jury is protected in some form by both federal and state law. As part of the due process requirements imposed on the states, the U. S. Supreme Court has held the right to trial by jury in serious criminal cases.[iii]

The American commitment to jury trial is explained in part by the fact that it was among the rights of Englishmen for which the revolution was fought. The Declaration of Independence accused the king of depriving colonists "in many cases of the benefits of Trial by Jury" and of transporting colonists to England for trial "for pretended offenses." English vice-admiralty courts sat in the colonies without juries, and this was perceived by colonists as a step toward slavery.[iv]

Alexander Hamilton observed the following:

> The friends and adversaries of the plan of the convention, if they agree on nothing else, concur at least in the value they set upon 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. For my own part, the more the operation of the institution has fallen under my observation, the more reason I have for holding it in high estimation; and it would be 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 a hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government.[v]

These sentiments can best be understood in their historical context. Those who emigrated from England "brought with them this great privilege as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power."[vi]

The concept of jury trial as it existed at the time of the American Revolution was not the product of a preconceived theory of jurisprudence. Rather, it was the outgrowth of forms previously in use and contained elements of several systems of varying origin.[vii] Historians have traced these elements to Anglo-Saxon and Norman institutions bearing the influence of systems in ancient Greece, Rome, and Germany.[viii] The concept resulted from several centuries of experience rather than from a specific plan.[ix]

Justice Byron R. White in a 1968 U.S. Supreme Court ruling observed:

> The guarantees of jury trial in the Federal and State Constitution reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitution knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against such arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous

> prosecutor and against the compliant, biased or eccentric judge. If the defendant preferred the commonsense judgment of a jury to the more tutored but perhaps less sympathetic reaction of a single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Government in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

A lily-white jury handed down a verdict in the *Rodney King* case that so outraged the black community and others, that Los Angeles was transformed into an urban war zone. Shortly thereafter, a black jury rendered a verdict exonerating football star O. J. Simpson for the murder of his wife and her male friend. The acquittal of the King police officers for the brutal beating of a black man long after he was submissive and compliant seemed incomprehensible to the black community who, however, readily supported an acquittal of O. J. Simpson notwithstanding overwhelming scientific proof establishing, to the majority of Americans, his guilt beyond a reasonable doubt. There are many other, in this writer's opinion, examples by the thousands of verdicts rendered by something less than fair and impartial juries. One would think that seemingly aberrant verdicts would give rise to a groundswell of support for a refinement of our jury system aimed at enhancing the likelihood of fulfilling the entitlement of a fair and impartial jury. Surprisingly, many among the bench and bar are encouraging a movement that would severely restrict or even completely eliminate peremptory challenges. Perhaps it is not the intent of the establishment to abolish the jury system as much as it is simply a by-product of their larger plan to reform our tort reparation system; but whatever the objective, the result is the same. Exaggerated anecdotes, half truths and distorted results have all played their part in undermining the public's belief in one of our most cherished and valuable rights. Clearly this movement was driven by a desire to enhance the corporate bottom line.

Money, hype, sloganeering, scapegoating, sound-bite advocacy, and the power of repetition can effectively obfuscate the truth. The relentless propaganda campaign pressed by tort reformers is omnipresent in the United States today. *Newsday* magazine recently wrote "the war against lawyers is at bottom a camouflaged aggression against the jury system." *Newsday* is not alone in suggesting that corporate America would favor less or no jury involvement especially in cases brought by individuals against companies. Tort reformers claim juries have an antibusiness bias and operate under what might be described as a deep pocket syndrome. Corporations have encouraged desertion of the court system with its juries in favor of binding arbitration. This reminds me of a form of judicial Federal Express, i.e., the courts privatized.

Suffolk University law professor Charles P. Kendregan has stated:

> There has been a mass public relations campaign by manufacturers, marketers, insurance companies, and others to persuade the general public and many legislators that the tort

> system is somehow bad for the economy and I don't think the public has effectively heard the other side.[x]

Those of us who labor in the trial vineyard as criminal defense lawyers, prosecutors, insurance defense counsel, plaintiff specialists or business litigators have done an extremely poor job of defending the justice system and the jury system in particular. We know that many well-publicized verdicts are rare aberrations or gross distortions. We know that jurors do not serve as keepers of a smorgasbord where deep-pocket defendants provide a feast for undeserving plaintiffs led by unscrupulous, greedy, self-centered personal injury lawyers. Rather than defend our system, many among us who represent the establishment have, in fear of offending large clients, echoed the sentiments and perpetuated the myths concerning the poor quality of our justice system.

In his book *We, the Jury*, the political scientist Jeffrey Abramson points out that no other institution of government places so much power directly in the hands of citizens. The jury thus manifests and probes a fundamental American truth: that the people are capable of governing themselves. In turn, our respect (or disrespect) for the jury system, as citizens and lawyers, shows how seriously we take the concept of self-governance.[xi]

Only 5 percent of criminal trials in Britain now are decided by juries, and the jury's role has likewise diminished across much of Europe. Many suggest that we are clinging to an outmoded system--the New World slipping behind the Old.[xii]

Alexis de Tocqueville marveled at the importance of juries in the United States. He noted that the jury gives the citizens another voice in their government. He wrote that jury service educates citizens about their rights and their institutions. It gives citizens "habits of the judicial mind," which are conducive to freedom. And it reminds the citizen of his responsibilities to those around him. In Tocqueville's communitarian-sounding phrase, "By making men pay attention to things other than their own affairs, [juries] combat that individual selfishness which is like rust in society."[xiii]

Juries act as a check on official power. They bring the public into the judicial branch of government. They operate as a school for citizenship. They reassure the litigants. And they provide an outlet for the community to refine and to express its moral will. Our juries do not always achieve these outcomes, but then none of our democratic institutions is altogether failsafe.[xiv] Juries become part of the grass root administration of public justice. They play an indispensable role in our experiment of government by the people. Our system and the jurors who serve it are better for having done so.

Lord Justice Patrick Devlin has said of the English jury:

Each jury is a little parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So

that trial by jury is more than an instrument of justice and more than one wheel of the constitution; it is the lamp that shows that freedom lives.

It can be neither reasonably expected nor desired that jurors leave their everyday experiences at the courthouse door. Moreover, a jury is attitudinally composed of, or is at least significantly influenced by, the sum total of its composite experiences. It is a given that jurors should be reflective of a cross section of our community. However, our country seems to be increasingly experiencing polarization of community views and beliefs, resulting in untoward effects on our jury system. Critics would suggest that verdicts are, in fact, conclusively predictable once a jury is selected. Cynics claim society has become so "me oriented" that fairness and impartiality are unobtainable goals. Could it be that we have developed such an intractable rancor between the competing elements of our society, whether on an economic, racial, geographic or occupational basis, that trial by an impartial jury, as that term is understood, is an unrealistic objective? Has our society become so entrenched in its diverse but self-serving beliefs that these beliefs have become intractable biases that evidence cannot displace? Hopefully not, but, if so, the jury system can no longer serve as an integral part of our jurisprudential system. If fairness, impartiality and verdicts based on evidence cannot be expected as the rule rather than the exception, we will necessarily be required to join the Old World order and leave fact-finding problems to entities other than juries. Judges, commissioners, agencies and others who would have their senses dulled by the repetitiveness of their function would replace the jury. Should this, in fact, come to pass, we will have lost one of our dearest, most sacred and honored liberties. Lawyers should be bold in defense of our entire judicial system and particularly outspoken in defense of our precious system of trial by jury. Our efforts in recent years have been woefully inadequate. Benign timidity by the bar has allowed the fight to go as if by default.

We should learn from our experiences in *King*, *Simpson* and other less notorious verdicts. Lawyers should defend the system and acknowledge that no system of self-government is perfect; but we should resist the temptation of the public to throw the baby out with the bath water because of a few unpopular and perhaps erroneous results. We should, however, insist on a fair and impartial jury.

The jury's legitimacy has always rested in its capacity to express fairly the community's conscience; what has changed over the centuries is how a jury best expresses the community's conscience. Different definitions of "peer" and "community" are therefore not just of academic interest but help determine how well the jury can fulfill its role. Ensuring the jury's integrity may necessitate different approaches in today's complex society than in medieval England or colonial America.[xv]

Our dedication to freedom of expression prevents any effort aimed at controlling or curtailing what any group or interest, corporate or otherwise, wishes to do relative to influencing or even brainwashing our population and thus ultimately juries. Efforts by many to create a favorable jury matrix and reap the benefits of a pre-trial voir dire will simply have to be dealt with by both bar and bench. These phenomena can and should be dealt with and effectively. We must be forever conscious of the efforts of those in our society who would undertake to precondition jurors and shape attitudes that would prevent evidence from dislodging preexisting proclivities. Countermeasures by the bar are surely in order as a matter of balance and honesty. Many

deserving cases are lost. It is not nearly as one-sided as tort reformers would suggest. As a matter of fact, in our current environment, quite the contrary is true. The most effective solution, it is submitted, lies with the courts. We should encourage or, better yet, insist upon judicial involvement. Judges should be forever watchful for those who possess not just strong beliefs but prejudicial partiality, harmful warps and impermissible proneness. There can be no room for these attitudes on any jury because they are totally inconsistent with fair, impartial and balanced administration of public justice. Courts should be forever vigilant in the protection of the jury system and liberally discharge any juror who manifests the slightest partiality, bias, prejudice or disbelief in either parties' claim or defense. Judges are not merely masters of ceremony, if you will, but must themselves champion the cause for and insist upon a jury that can be proper, legitimate, straightforward and aboveboard. Then and only then will trial by jury of one's peers be what it was envisioned to be.

We are all entitled to impartial jurors—unbiased, unprejudiced and unbigoted. A jury that is objective but not detached or disinterested. Neutral and without favoritism. A body that is evenhanded, fair-minded, true and square.

After thirty-three years of representing the halt, the lame, the blind, the crippled, the dispossessed, tattered and disfigured members of society, it is probably an inescapable bias favoring the plaintiff's perspective that fashions the matrix of my views. On the other hand, my proclivity is somewhat softened by my representation, in recent years, of several Fortune 500 companies. Having, however, confessed my probable prejudice, even though obviously tempered by the fact that my practice is financially more balanced than many, there is one unassailable truth that I have observed about tort reform through the years and it does not matter whether we are talking about an astronaut's widow, a major corporate president, a clergyman, a college professor or a blue-collar worker, and that truth is simply this: When it happens to others and they seek redress at the courthouse, it is clearly lawsuit abuse, but when it happens to oneself or one's loved ones, it is a quest for justice that requires filing of the inevitable suit.

Reformation of our tort reparation system is troubling to most of us. What the trouble is depends upon the perspective of each of us in relation to our jury system and how it should be reformed or eliminated.

It has been said: "With most people, unbelief in things is founded upon blind belief in another." And so it probably is with me.

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[i] *Duncan v. Louisiana*, 391 U.S. 149, 153 (1968).

[ii] F. Busch, *1 Law and Tactics in Jury Trials* 17-42 (1959).

[iii] 391 U.S. at 149 (1968).

[iv] V. Hale Starr and Mark McCormick, *Jury Selection*, 2d ed. (Canada, U.S.: Little, Brown & Company (Canada) Limited, 1993), §1.0, 4)[hereinafter cited as Starr and McCormick] (quoting Pole, *The Pursuit of Equality in American History* 24 (1978)).

[v] *Id*. at 4, 5 (quoting *The Federalist* No. 83, at 499 (A. Hamilton) (The New American Library 1961)).

[vi] *Id*. at 5 (quoting *Thompson v. Utah*, 170 U.S. 343, 349-350 (1898)(quoting 2 Story, Comm. on Const. §1772 (1993)).

[vii] W. Forsyth, *History of Trial by Jury* 6 (1852).

[viii] M. Lesser, *History of the Jury System* (1894).

[ix] Starr and McCormick, *supra* at 5.

[x] *Id*. at 263, 264.

[xi] Address by Independent Counsel Kenneth W. Starr, State Bar of Texas Meeting in Dallas, Texas (June 20, 1996).

[xii] *Id*

[xiii] *Id*

[xiv] *Id*

[xv] J. Van Dyke, *Jury Selection Procedures* 6-9 (1st Ed. 1977).