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THOUGHTS ON THE CIVIL JURY

*William H. De Parcq

The attack on the citadel of the jury proceeds apace. The attack threatens the very existence of an adversary system because without the jury none of its basic elements can remain. The attack no longer comes from professors in their ivory towers writing for the law reviews, or from crackpots on the lunatic fringe, but from the governor of a great state on one coast and the chief judge of a great state on the other coast—men who stand in positions of power and influence in the profession.

The attack on the jury system in civil cases is two-pronged. It is said that it is the cause of delay and of court congestion, and it is also said that the jury is inherently incapable of doing the job which is entrusted to it. Some of the critics of the jury support both counts of the charge. Most do not. Thus Justice Peck, a leading critic of the jury on grounds of delay, has said repeatedly that jury verdicts are generally fair judgments upon a case. He has not noticed any difference in results between trials before a court without a jury and a jury trial.¹ He does not share the feeling which some lawyers and judges have, that jury verdicts are not trustworthy on the merits.² On the other hand, Professor Milton Green concludes that the delay caused by the jury can be remedied, but that there is no remedy for the fact that the jury is incompetent to perform the difficult task assigned to it.³ Thus many of the principal attackers disagree with the basic premise of others in the attacking group. Many aspects of the issue or issues have not yet been objectively studied and objectively tested. Too much of the discussion is a matching of quotations—a Hamilton against a Jefferson, a Hand against a Wigmore—rather than a factual discussion of the matter. Where facts are available, each side manages to find comfort in them. Thus Justice Peck and Justice Foster decry the delay caused by the jury. When it is pointed out that very few cases are actually tried to a jury they regard this as proof that we do not need the jury any longer and that we should not preserve the shadow of the jury system as a stalking horse for settlement negotiations.⁴ Yet Judge Curtis Bok finds this same fact the saving

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¹ Peck, *The Future of the Trial Lawyer*, 40 J. AM. JUD. SOC'Y 38, 42 (1956).

² Peck, *Do Juries Delay Justice?*, 18 F.R.D. 455, 457 (1956).

³ Green, *Juries and Justice—The Jury's Role in Personal Injury Cases*, 1962 U. Ill. L. F. 152, 166 (1962).

⁴ Peck, *supra* note 1, at 43.

grace of the jury system. The public, he says, seems willing to experiment with different ways of settling litigation as long as it has the right to use the old one when it feels the need.⁵

What about the studies by the Chicago project, Judge Hartshorne, and others, which demonstrate that in general the result reached by the jury is similar to that which the judge would have reached. To the friends of the jury this fact is proof that juries are not moved by caprice, and do not decide according to prejudice or the persuasiveness of the lawyer. But Justice Peck and others find in this fact evidence that the quality of justice will not be diminished by doing away with the jury trial.⁶

IS THE JURY THE CAUSE OF DELAY?

The Chicago study indicates that a jury trial takes about 40% longer than a non-jury trial. Yet the length of the trial is not the only measure of court congestion and delay. Eighty per cent of a group of Ohio lawyers and judges thought that there are serious delays in a number of non-jury cases due to the fact they are held under advisement by the judges. In this connection it is significant that New York has felt it necessary to adopt a statute providing that the court must render a decision in a non-jury case within sixty days after the matter has been finally submitted. Whoever heard of a jury taking sixty days to render its verdict? Again it is asserted that the New York Court of Claims is almost four years behind in its docket, yet this court sits without a jury.

CAN DELAYS BE REMEDIED?

The long delay which occurs in a few large metropolitan areas is an intolerable scandal. Certainly efforts should be made to remedy this situation. Procedural reforms—better evidence rules, better jury instructions, and others—can do much. A Chicago jury study found that New Jersey courts were trying personal injury cases comparable to those being tried in New York, approximately 40% faster. Thus, if the New York jury trial could be brought up to the speed of the New Jersey jury trial, the total saving hoped for in the abolition of the jury would be achieved. Better juries, better judges and better court house facilities can do much to improve the situation.

The real need, however, is increased facilities for doing justice. A Chicago study finds there is one judge for every 125,000 people in Cook County, though the original plan had been one judge for every 50,000 people, and concludes that in Illinois the cause of court congestion is the failure to provide enough judges and juries. The Perry Nichols Committee Report of 1961 made the same findings and the same conclusions. Significantly, the outcry regarding the jury system in buttressed only by examples drawn from the large centers of population and nothing

⁵ Bok, *The Jury System in America*, 287 *Annals* 92, 95 (1953).

⁶ Peck, *Address to New York State Bar Ass'n.*, 28 *N.Y. St. B. Bull.* 338, 340 (1956).

is heard from the smaller communities where the dispensing of justice is done promptly.⁷ Is it any wonder that cities like New York and Chicago have fallen behind in case dispositions? We are all familiar with the statistics which establish overwhelmingly that while population as well as car registrations have doubled, tripled and quadrupled, only a sprinkling of judges have been added here and there to the judiciary. To assume that 1935 judicial manpower can meet the needs of today, is, to say the least, unrealistic. Instead of providing more manpower and additional court facilities to accommodate growth, emphasis seems to be directed toward finding an easy way out—one which will somehow dispose of this “nuisance business.”⁸

Indeed, the potential litigation increases at a faster rate than does the population. If there are two people in the society there is one possible pair of litigants. But if there are four people in society, there are six possible pairs of litigants and this effect is heightened because the increase in population brings with it congestion on the highways and elsewhere which increases the chance of a litigation provoking incident. If the courts are too crowded the solution is to provide more courts—and more justices—to cope with this business.

IS THE JURY SYSTEM TOO EXPENSIVE?

It has been said that “the jury system is wasteful of time, money, and human energy. The cost to the State of maintaining the civil courts for a single day often exceeds the entire amount of the verdicts rendered.”⁹ And again it has been argued that the public would not be willing to bear the cost of more courts and more juries.¹⁰ Even if this were true, it is hardly an argument against the jury system. Providing lawyers for indigent criminal defendants is expensive, but we do not measure the cost against the vital human right involved. Going to the moon is expensive, stupendously expensive, but we are going to go there because it seems to those in authority a good thing to do, regardless of the expense. So, too, if the jury trial is expensive, but a good thing, then it must be preserved despite the cost.

The fact is that it is not too expensive. The amount of money we spend on our entire judicial system is puny and insignificant compared to the money the American people spend each year on tobacco, liquor, football and other trivial and unimportant activities like sex. The total cost of operating the federal courts in this country is about \$45,000,000 a year; the total cost of state courts is estimated at about \$500,000,000 a

⁷ McKenzie, *What is Truth? A Defense of the Jury System*, 44 A.B.A.J. 51, 52 (1958).

⁸ Hughes, *Address to New York State Bar Ass'n.*, 28 N.Y. St. B. Bull. 341, 342-343 (1956).

⁹ Duane, *Civil Jury Should Be Abolished*, 12 J. AM. JUD. SOC'Y 137, 138 (1929).

¹⁰ Foster, *Address to New York State Bar Ass'n.*, 28 N.Y. St. B. Bull. 322 (1956).

year.¹¹ Even this amount is insignificant, viewed in the total context of governmental expenditure, but only a small portion of it is attributable to the jury system. Of the \$45,000,000 spent annually for operation of the federal courts, only \$4,000,000 goes to the cost of juries.¹² This is one-one hundred and seventieth of one percent of the federal budget. The fortunate defense lawyer who is called upon to pay \$17,000 for his federal income tax is paying \$1 out of that sum for the jury system. Newly-formed countries of which most of us have never heard would sneer if they were given as little each year in foreign aid as this country spends for all its juries, state and federal. Last year in addition to its normal share of foreign aid in the amount of \$500,000,000, Viet Nam received at least one additional allotment of 125 million dollars.

HOW DOES THE QUALITY OF JUSTICE COMPARE?

The arguments against the jury on the grounds of delay and expense are unconvincing. The critical question is whether better justice is done because a jury is potentially available in a civil action. The matter must be viewed comparatively. An experienced trial lawyer has said that when he was young, he thought the jury system was perfect, ideal, and almost strictly from heaven. Later he came to think that it was at least tolerable and probably worked better than any other system that could be devised by the wit of man. Now he has come to feel about the jury as Winston Churchill did about democracy, that "it is the worst possible system, except all those other systems." Although Justice Peck and some of the other critics of the jury think it does a good job, there are critics who have been savage. A recent writer asserts that "the jury is inherently inimical to justice."¹³ Another critic has said that "in civil disputes an average jury cannot be trusted to hold the scales of justice. It is the misfortune—rather than the fault of the average juror that he has neither the native ability nor the acquired experience and skill to deal with complicated issues of fact."¹⁴

Dean Wigmore put forward a more perceptive view. He said: "There is, for our purposes, no intrinsic goodness or badness in jury trial. We *must* have *some* kind of personnel for trying facts. Jury trial, then, is either better or worse than judge trial. Such is the issue."¹⁵ There are

¹¹ Burger, *The Courts on Trial: A Call for Action Against Delay*, 44 A.B.A.J. 728, 739 (1958).

¹² Report of the Judicial Conference Committee on the Operation of the Jury System, *The Jury System in the Federal Courts*, 26 F.R.D. 411, 487 (1960).

¹³ Note, *A Condemnation of the Jury System and a Possible Alternative*, 21 U. PITT. L. REV. 52, 60 (1959).

¹⁴ Duane, *supra* note 9, at 138.

¹⁵ Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUD. SOC'Y 166 (1929).

sound reasons to think that jury trial is better than judge trial, and this is our present choice.

SUPERIORITY OF THE JURY AS A FACT-FINDER.

The most obvious advantage of the jury system in fact-finding is that there are twelve jurors and one judge. "The judgment of twelve persons instead of one on questions of fact cannot help but bring more equitable results. The jurist may be intelligent and able, but his experience can hardly equal the composite judgment of twelve men and women."¹⁶ What lawyer cannot recall instances in which the judge, in reviewing the evidence in his charge to the jury, has misstated some of the evidence, even though he has taken careful notes throughout? One person can be mistaken in his recollection, and if he sits alone, there is no check upon him. Twelve persons are less likely to share the same mistake. A number of psychological studies made in recent years show that group decisions are fairer, more efficient, and more accurate in fact-finding than are the decisions of an individual. The give-and-take of deliberation is the factor which makes the difference.¹⁷ Simply because there are twelve jurors, more thought is given to the end result. If we assume that three hours is a fair average for the amount of time a jury deliberates, then 36 man hours of thought have gone into the decision. What judge would, or could, give that much thought to the *average* case heard by him without a jury?

Our institutions from time immemorial have recognized the safety which numbers provide. In the common law courts in England, cases were heard by a single judge and jury on circuit, but motions were argued before the court *en banc* at Westminster Hall. Is there an appellate court in the land which does not have more than one judge—and frequently as many as nine—participate in the determination of all matters? We would never trust one judge to serve alone as an appellate court and to read the record, deliberate with himself, and to write an opinion without the advice and consultation and correction furnished by other appellate judges. Dean Wigmore's comment remains pertinent: "If we need a variety of minds to give us, in the long run, the most dependable judgments on supposedly definite rules of law, how much more do we need a variety of minds to give us dependable judgments on indefinite masses of facts?"¹⁸

A dramatic example of the need for many minds to pass on the matter is presented by the familiar case of *Quercia v. United States*.¹⁹ In that case, a federal judge, commenting on the defendant's testimony in his

¹⁶ Hughes, *supra* note 8, at 341.

¹⁷ JOINER, CIVIL JUSTICE AND THE JURY, 26 (1962).

¹⁸ Wigmore, *supra* note 15, at 171.

¹⁹ *Quercia v. United States*, 289 Sup. Ct. 466 (1933).

charge to the jury, said: "You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie." The case was, of course, reversed by the United States Supreme Court. If the district judge involved there had been hearing a civil case without a jury his half-baked and unsound psychological notions would have meant sure defeat for the unfortunate litigant who wiped his hands while testifying. In the jury room, on the contrary, a juror with such a simplistic test for truth-telling would be hooted down by his fellows.

Trial by judge alone offers far greater possibilities of bias affecting a decision than does trial by jury. It is much easier to get rid of a biased juror than it is to get rid of a biased judge. There are unconscious predilections which will escape detection in either event, but "whereas in a jury individual bias and prejudice is diluted 1 to 11, in a one-man court the mixture would be 1 to 0. That individual judges sometimes become known for rather set and highly personal attitudes in some matters—which are then catalogued by lawyers—is evidence in the tendency of lawyers to try to steer certain cases away from certain judges, or to adjourn motions and the like until a different judge is sitting, and so on."²⁰ Judges are not free from individual predilections. District Judge Edelstein has candidly avowed what every lawyer recognizes: "It cannot be denied that judicial opinions, from the lowest to the highest courts, represent in some measure the personal impulses of the judge, in relation to the situation before him, and that these impulses are determined by the judge's lifelong series of previous experiences, reflecting his temperament, personality, education and environment. If that applies at all to the legal opinions of a judge, how much more it must apply to the decisions of a judge functioning as a jury."²¹

Consider an obvious example. Hugo L. Black and John M. Harlan are universally regarded as judges of great ability, unquestioned integrity, and devotion to the law. Despite these outstanding virtues, can anyone really think that the plaintiff in an FELA case, to be heard without a jury, would have as much chance of succeeding if Justice Harlan were the judge as if Justice Black were presiding.

The jury system serves as a barrier and a deterrent to tyranny and corruption and this is eternally true whether one agrees with Justice Holmes that judges are naive and simple-minded men, or with Dean Joiner that they are the elite of the elite, chosen generally from lawyers

²⁰ Flynn, *Public Preference for the Jury*, 30 N.Y. St. B. Bull. 103, 109 (1960). To the same effect, see Teller, *The Selection of Judges: The Faults of the Pennsylvania Plan*, 41 A.B.A.J. 137 (1955); Lambert, *In Defense of the Civil Jury*, 29 NACCA L. J. 27, 31 (1963).

²¹ Edelstein, *A Kind Word for the Civil Jury*, 17 NACCA L. J. 302, 207

who are leaders in community affairs. We all know that occasionally we do get the mediocre judge, the senile judge and the political hack whose uncle knew the governor. This is unusual, and unfortunate, and the jury does serve at least as a restraint in that kind of situation.

There is, too, the factor that the jury is a nonprofessional, non-permanent group. This has several implications. Jurors, to whom the case is new, will follow it with a keener interest than will the judge, who hears this sort of case every week. As John McKenzie has said, "It is infinitely easier to arouse a jury to a full sense of their duty and the solemnity of their task than it is to awaken in a busy judge the same dedication when the matter being presented is to him a boring repetition of a familiar tale."²² The freshness of the jury means, too, that it will decide this case on its particular facts, rather than viewing it simply as a familiar type of case. Judge Edelstein has told us: "The occupational hazard of the judiciary is hardening of the categories, and when a judge sees similar situations before him, time and time again, year after year, they may unconsciously on his part, merge into one."²³ There is a final advantage in the fact that the jury is an ad hoc body. "The very anonymity of a verdict, and the prompt fading away of the jurors into the community mass, gives the individual juror a mental and moral freedom to believe and to say, 'That witness X is a liar,' which the judge never could have; for the judge would have to write it down in his opinion, in black and white, for all to read forever."²⁴

Next, there is the obvious fact that the jury is a cross-section of the community, and is familiar with the every day affairs of life. When the time comes to decide what a reasonable man should have done, or to put a dollar sign on the value of pain, or to look into a man's eyes and form a judgment as to whether he is speaking the truth, a cross-section of the community with a wide variety of background and of experience, is likely to be more successful than a single community leader. There are those to whom the very fact that the jury is representative is enough to condemn it. One scholar says, "to be a jury, within constitutional definitions, it must be a fair cross-section of the community. As such it will never be a competent fact-finder, and it will never be able to make an intelligent application of the law to the facts."²⁵ However the problem is one of better or worse and jurors in their collective wisdom in the affairs of life are likely to make their errors fewer than those of a single judge.

There is, finally, what has been termed "the legitimate lawlessness of the jury."²⁶ By this is meant the power of the jury to soften the rigor of

²² McKenzie, *The Selection of Jurors and Other Matters—A Reply to Professor Newman*, 46 A.B.A.J. 70, 71 (1960).

²³ Edelstein, *supra* note 21, at 308.

²⁴ Wigmore, *supra* note 15, at 169.

²⁵ Green, *Juries and Justice—The Jury's Role In Personal Injury Cases*, 1962 U. Ill. L. F. 152, 166 (1962).

²⁶ Lambert, *In Defense of the Civil Jury*, 29 NACCA L. J. 27, 32 (1963).

harsh, rigid and inequitable rules, and, by bending the rule, keeping it from breaking. Although a student writer has recently admonished that "the unconscionable law must not be changed by the capricious will of twelve haphazardly picked citizens,"²⁷ such famous students of the judicial process as Dean Wigmore, Dean Pound, Justice Holmes, Justice Traynor, and Judge Wyzanski would disagree.²⁸ They have argued that one of the purposes of the jury system is to permit the jury to temper strict rules of law by the demands and necessities of substantial justice, thereby adding a much needed element of flexibility. At a point lost in the mists of history, there was woven into the philosophy of trial-by-the-people the theory that law, basically and in its best and truest sense abides in the mind, spirit and heart of the people and that they collectively are its surest spokesman and its most just administrators. Long ago in Norway there was a body of 36 men, who served in a capacity similar to that of the modern jury. The name of this body, translated into English, was "Law-Amendment Men."²⁹

In an earlier generation, the common example of this "legitimate lawlessness" of the jury was said to be its disregard of the fellow servant rule. Today it is frequently asserted that juries apply a standard of comparative negligence, no matter how carefully they are charged that contributory negligence is a complete defense. But this is not a one-way street, which works exclusively for the benefit of plaintiffs. A lawyer who has enjoyed great success in obtaining defendant's verdicts in FELA cases, says that in every case he has won, he and his associates have convinced the jury on a simple basis that the plaintiff was not entitled to recover because he was unfair and fraudulent. There is surely no rule of law that, where liability is doubtful, the verdict should go for the plaintiff if he has testified fairly and honestly, while the finding should be for defendant if plaintiff overstates and exaggerates. But if this is what the sentiment of the community requires, it is useless to attempt to impose a rule of law at variance with it, and those who represent plaintiffs should simply counsel their clients accordingly.

For the reasons here stated, a jury trial is likely to result in juster justice than is trial to a judge alone. There is an additional reason why it is to be preferred. Surely it will not be denied that "next to doing right, the great object in the administration of public justice should be to give public satisfaction."³⁰ This has implications for the jury system. "In a democracy such as ours, it is of great importance that defeated litigants believe their causes were lost on the merits and not because of partiality,

²⁷ Note, *A Condemnation of the Jury System and A Possible Alternative*, 21 U. PITT. L. REV. 52, 56 (1959).

²⁸ Wigmore, *A Program for the Trial of a Jury Trial*, 12 J. AM. JUD. SOC'Y 166, 170 (1929); Pound, *Law in Books and Law in Action*, AM. L. REV. 12, 18, 19 (1910); Holmes, *Collected Legal Papers*, 237-38 (1920) Traynor, *Fact, Skepticism and the Judicial Process*, 106 U. PA. L. REV. 635, 640 (1958); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1286 (1952).

²⁹ Palmer, *On Trial: The Jury Trial*, 20 F.R.D. 65, 69 (1957).

³⁰ 3 Blackstone, Commentaries 391.

lack of industry or incompetency of the courts. While the disappointed litigant may and usually does question the wisdom of a jury, he seldom questions its integrity. His general attitude in respect of an adverse verdict is one of disappointed resignation. He has had his day in court. Twelve men good and true have spoken. He accepts the verdict and wonders whether he can win on appeal.³¹ The defeated party is likely to go away happier, and public satisfaction in the administration of public justice is likely to be greater, if the party goes away, knowing that twelve men of his community have used their common judgment to determine the issues as best they can, than if the finding against him has been made by a single judge, who the next day may be out on the golf course with the lawyer for the winning side.³²

WHY DISTINGUISH CIVIL CASES FROM CRIMINAL CASES?

One of the remarkable aspects of the movement to abolish the civil jury is that the reformers have no wish to end jury trial in criminal cases. Justice Peck has written: "The constitutional guarantee that a man may not be deprived of his life or long deprived of liberty without a judgment of a representative body of the community is a safety factor of first importance. The same considerations do not apply, however, or at least not to the same extent, to civil cases—ordinary commercial disputes or personal injury cases."³³ Why not? Life and liberty are of undoubted importance, but they do not stand alone. From the time of Magna Charta to the Constitution of the United States, they have been linked with property. Is property a second class right? The man who faces a two year criminal sentence is still to enjoy his right to a jury of his peers, but not the man who is in jeopardy of having his life's savings taken from him, or the man who has been disabled for life and will be a public ward unless he secures a judgment. Truman Rucker has truly said: "If a man is injured, if he is to suffer pain, embarrassment and disability for the rest of his life, then he has received a life sentence."³⁴ Of course every plaintiff's lawyer—indeed every lawyer who has had actual experience in the personal injury field—would agree. Those who claim that the jury is incapable of doing justice should, logically, demand abolition of the jury in criminal cases. They do not. Those who claim that the jury system causes delay and expense are saying that the right to property is a second-class right, which must be confided to a second-class tribunal, because we cannot afford to do better by the maimed and the orphaned or by those who may be held responsible for their misfortunes.

³¹ Runals, *Address to New York State Bar Ass'n.*, 28 N.Y. St. B. Bull. 329 (1956).

³² See Rucker, *Justice and the American Civil Jury*, 33 N.Y. St. B. Bull. 133, 135 (1961).

³³ Peck, *Do Juries Delay Justice?* 18 F.R.D. 455, 459 (1956).

³⁴ Rucker, *Justice and the American Civil Jury*, 33 N.Y. St. B. Bull. 133, 140 (1961).

WHAT OF THE ENGLISH EXPERIENCE?

One might suppose that we had stopped copying the British 188 years ago, but those who would do away with the civil jury never tire of pointing to its decline in England. It is true that the civil jury in England has fallen into substantial disuse. The immediate causes seem to have been the shortage of jurors during two World Wars, and the economic distress of the Depression.³⁵ The fact that the English, in their splendid tradition, are able to "muddle through" without much use of civil juries has little relevance to what a more prosperous and more populous nation should do. Though our system has its roots in England, our two countries have gone different ways in many areas since 1776. Are we really prepared, in the United States, to give our judges the robust power of comment on the evidence which is a hallmark of English justice? Are we ready to divide the legal profession into barristers and solicitors? Would we want the losing party to pay the attorneys' fees of his victorious adversary? Should our lawyers and judges wear wigs? We must decide what is best for us in the light of our resources, our experience, and our system of values, rather than supposing that what seemingly works for the other fellow would necessarily work for us.

CAN THE CIVIL JURY BE IMPROVED

To defend the civil jury is not to say that it is perfect, and could not benefit from improvements. Justice Brandeis spoke truly when he said: "New devices may be used to adapt the ancient institution to present needs and to make it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right."³⁶ There are a number of ways in which it is possible that we could improve the jury system. Everything on this planet must either evolve or perish.

One obvious improvement would be to provide jurors with better facilities. It is a fact that in many parts of the country jurors are made quite uncomfortable during their service because of our failure to provide them with adequate quarters and comforts. But, as Wigmore told us 35 years ago, this "is anything but inherent in the jury system. It is due to low ideals of decency in the community and slackness of court officials. Every courthouse ought to have a spacious set of rooms with every hotel comfort for the jurors. There is no need for treating them like down-and-out lodgers. When a community is ready to give the jurors ample quarters, equally comfortable with those of the judges, this defect will disappear."³⁷

There is no reason why, in the nature of things, a jury must consist of

³⁵ Devlin, *Trial by Jury*, 130-133 (1956).

³⁶ *Ex parte Peterson*, 253 U.S. 300, 310 (1920).

³⁷ Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUD. Soc'y 166, 168 (1929).

twelve. Judge Tamm has properly reminded us that "there is no special merit, no magic formula, no divine origin, no holy order in the number twelve. If the common law jury had consisted of twenty, fourteen or four jurors at the time of the adoption of our Constitution, we would have twenty, fourteen or four jurors, and we would loyally defend, as is our custom, that which is defensible only because of its origin and antiquity."³⁸ Many jurisdictions use juries of fewer than twelve in some or all proceedings, and the reports from such jurisdictions indicate that they are satisfied with the results.

We need to consider too, whether it is really necessary that the verdict in a civil case be unanimous. The requirement of unanimity has undoubted virtue. Yet 22 states provide for verdicts of non-unanimous juries in civil cases, and in seven other states, and in the federal courts, the parties can stipulate for a non-unanimous verdict. The experience in such states is worth studying.

There is much room for improvement in selection of jurors, the grounds on which jurors may be excused, and, notably, in the examination of jurors on voir dire. An experienced federal judge has told us that "no litigant is entitled to a jury of his liking. He is only entitled to an impartial jury. Many times in the examination of jurors, it is apparent that counsel, by the very nature of the questions asked, are not bent upon obtaining an impartial jury, but rather twelve men and women whom they believe will be more favorable to their side of litigation than to their adversaries."³⁹ What trial lawyer must not plead "guilty" to this charge? So long as the rules of the game permit us to use voir dire to hunt for jurors favorable to our cause, and to indoctrinate those jurors in advance with our theory of the case, we would be derelict if we failed to take advantage of such opportunities. But the rules need not give us such leeway. In 1958 Illinois adopted a rule providing that the court shall conduct the initial inquiry on voir dire, and that the parties shall be given a reasonable opportunity to supplement the questions put by the court, but that the parties shall not inquire directly or indirectly about matters of law or instructions.⁴⁰ A veteran Illinois trial lawyer says that "as a result of this rule, the examination of juries on voir dire has tended to become brisk and pointed without detracting from the atmosphere of serious purpose that is essential to a fairly conducted trial."⁴¹

The possibilities for improvement in instructions to juries are very great. "It is a court house canard that a jury charge is intended more for

³⁸ Tamm, *A Proposal for Five-Member Civil Juries in the Federal Courts*, 50 A.B.A.J. 162, 168 (1964).

³⁹ Nordbye, *Comments on Selected Provisions of the New Minnesota Rules*, 36 MINN. L. REV. 672, 681-682 (1952).

⁴⁰ ILL. SUP. CT. RULE 24-1.

⁴¹ McKenzie, *The Selection of Jurors and Other Matters—A reply to Professor Newman*, 46 A.B.A.J. 70 (1960).

appellate eyes than for jury ears."⁴² This need not be so. Great judges in the past have been able to instruct juries in a colloquial, conversational tone, using terms which the jurors understand, and the result is that the charge is a helpful guide to the jury. With effort, this can be done today. This is not the occasion to argue for any particular reform, or set of reforms, in the jury system. Each proposed change must be carefully studied and weighed on its individual merits. It is enough to recognize that there appear to be areas in which useful reform is possible, and that we would do better to argue the merits of particular suggested reforms than to waste time debating whether to junk the system entirely.

WHO IS DEMANDING ABOLITION OF THE CIVIL JURY?

We now have solid information on this point, and need no longer rely on speculation. The Chicago Jury Project surveyed the public attitude toward jury trial. It found that 70% of the public favored jury trial, while only 9% favored trial by a judge alone. Among those who had had jury service within the past year, 77% favored jury trial, while those favoring bench trial rose to 15%.⁴³ In 1957 a study made by the Appellate Division, First Department, found that 66% of those who had served as jurors found it either a worthwhile experience or a pleasant duty.⁴⁴ Dr. Gallup has turned his attention to this question. Of those with an opinion, 78% of the people would prefer trial to a jury rather than trial by a judge if they had been hurt in an automobile accident. It is interesting, since the reformers propose to leave the criminal jury alone, that only 59% of those with opinion would prefer a jury trial if they were accused of committing a not-too-serious crime.⁴⁵ The evidence seems clear that the public is enamored of jury trial.

It is certainly not the trial lawyers who are calling for abolition of the civil jury. Indeed it is trial lawyers who are leading the fight to preserve it.⁴⁶ The men who are actually in the courtroom who see the jury at work, believe in the system. In one poll of lawyers less than 7% favored abolishing the jury in personal injury cases.⁴⁷ A questionnaire was directed to the Fellows of this Academy, men from both sides of the counsel table who represent clients in court day in and day out. Asked, "Do you believe that civil juries are a valuable part of the decision-making process in civil cases?" our members answered "Yes". And they gave a unanimous "no"

⁴² *Hogan v. New York Times Co.*, 211 F. Supp. 99, 103 (D. Conn. 1962).

⁴³ Klaven, *Report on Jury Project*, quoted in Joiner, *op. cit. supra* note 17,

⁴⁴ Flynn, *Public Preference for the Jury*, 30 N.Y. St. B. Bull. 103 (1960).

at 204.

⁴⁵ *Ibid.*

⁴⁶ Rucker, *Justice and the American Civil Jury*, 33 N.Y. St. B. Bull. 133 (1961).

⁴⁷ *Trial by Jury*, 11 U. CINC. L. REV. 119, 250 (1937).

to the inquiry whether they would favor elimination of the civil jury.⁴⁸ It would seem that, having lived with this institution through most of their professional lives, the judgment of trial lawyers as to the value of the jury to the individual litigant is about as reliable as any which could be found in this area of controversy.

But it is said that the trial bar suffers from the innate conservatism of the legal profession, that the lawyer who has mastered the art of jury trial does not want to surrender his special competence, and that the law is confusing the familiar with the necessary. What then is the view of the trial judges? They, too, see the jury in action, and lack the selfish motive in its preservation which perhaps may be attributed to the lawyer. If there is a trial judge who favors abolition of the civil jury, he has failed to add his view to the mountainous literature on the subject. Trial judges who have spoken, such as Judge Edelstein and Judge Palmer, who have already been quoted, are strong advocates of the jury system. The late Judge Walter B. Jones, a state court judge in Montgomery, Alabama, and an avid supporter of judicial reform, wrote: "I have now been on the trial bench continuously for forty years and during that period of time have tried literally thousands and thousands of jury cases and the more I see of the jury system, the more convinced I am that it is one of the most worthwhile institutions we have."⁴⁹

It is undoubtedly true that some appellate judges take a different view. But it is ironic that the movement to abolish the civil jury should come at a time when our highest court is laboring mightily to preserve and extend the civil jury. In recent years the Supreme Court of the United States has broadened the class of cases and issues in which jury trial exists as of right,⁵⁰ it has held that the federal policy favoring jury trial applies in diversity cases though the state would deny a jury,⁵¹ and in a well-known line of cases, it has reduced, perhaps to the vanishing point, the situations in which judgment may be entered as a matter of law on the theory that the evidence failed to create an issue for the jury.⁵²

Some appellate judges, some law professors, and some lawyers who rarely, if ever, venture outside their office door, favor abolition of the civil jury. Most appellate judges, the vast majority of the public, and all trial lawyers and trial judges favor its retention.

The recent study by Judge Walter R. Hart establishes that at least

⁴⁸ JOINER, CIVIL JUSTICE AND THE JURY, 92 (1962).

⁴⁹ Jones, *Letter to the Editor*, 43 J. AM. JUD. SOC'Y ACT (1959).

⁵⁰ *Beacon Theatres v. Westover*, 359 U.S. 500 (1959); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Simler v. Conner*, 372 U.S. 221 (1963); *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963).

⁵¹ *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958).

⁵² E.g., *Lavender v. Kurn*, 327 U.S. 645 (1946); *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957) *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959).

in the State of New York the vast majority of judges, state senators and representatives and insurance companies favor retention of the civil jury. His study also shows that thirty-one of the chief justices of the fifty states were unalterably opposed to the abolition of the civil juries; only seven expressed unqualified opinions that jury trials should be abolished; and five of the chief justices had no opinion on the issue.

Well, gentlemen, maybe the public is incompetent and blue ribbon panels of judges could do better than jurors, and aristocracy is better than democracy, but we have staked our national well-being on a different premise. The exercise of the franchise involves problems more complex and infinitely more significant than the fact-determination called for from the jury box.⁵³ The very existence of this planet may depend on the wisdom and discrimination of the average man when he goes to the polls to choose our national leaders. If he is capable to perform this weighty function, surely he is capable to decide who should pay damages in an intersection collision.

A violent critic has said that the jury system "is hypersensitive to the prejudices and fads of the time but ignorant of the time-proven concepts of justice which have evolved beyond the transient passions of society."⁵⁴ I say the shoe is on the other foot. Trial by the people, trial by the common conscience of the community as expressed by twelve representative members of the community, is one of those time-proven concepts of justice which have evolved beyond the transient passions of society. It must not be sacrificed to the prejudices and fads of the times.

⁵³ Edelstein, *A kind Word for the Civil Jury*, 17 *NACCA L. J.* 302, 311 (1956).

⁵⁴ Note, *A Condemnation of the Jury System and a Possible Alternative*, 21 *U. PITT. L. REV.* 52, 56 (1959).