INTRODUCTION

A System That Works

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Sometime ago, I heard a lecture by a prominent law professor who did not believe in our adversary system of justice. The idea of a lay jury reaching a decision based on presentations by advocates was nonsense, he said. To him, it was preposterous to have six or twelve strangers choose among competing alternatives to make an important decision. That was not the first time I had heard criticism of the jury system. But the professor's provocative remarks set me to thinking.

In academia, the political arena and elsewhere, it is currently in vogue to attack the jury system. Some attacks, like the professor's, strike at the very premise of the system. Others criticize jury trials because of the perception that juries increase the burden on already-backlogged courts. Indeed, because of the strain on our legal system, attempts to cut back the right to trial by jury have gained currency in some quarters. Resort to arbitration, mediation, use of administrative law judges, and other types of alternate dispute resolution have evolved as "necessary" alternatives to civil jury trials. One result of this trend is that individuals with

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little bargaining power are being forced to choose something other than a jury trial to resolve their disputes.

I am troubled by this trend. I disagree with commentators who believe that the jury system does not work. I am concerned about the erosion of the precious jury trial in civil cases. And I am convinced that instead of cutting back, we should in some instances extend its use.

My own preference for juries—which results from more than 30 years on the federal bench—is made with full awareness of the contrary views of a number of our most gifted judges. Justice Holmes did not find juries especially inspired for the discovery of truth and often expressed the view that “the man who wants a jury has a bad case…. The use of it is to let a little popular prejudice into the administration of law.” I Holmes-Pollock Letters 74 (Howe ed. 1941). Judge Jerome Frank returned to these same themes years later: “The general-verdict jury trial, in practice, negates that which the dogma of precise legal predictability maintains to be the nature of law. A better instrument could scarcely be imagined for achieving uncertainty, capriciousness, lack of uniformity, disregard of former decisions—utter unpredictability.”

In response to these criticisms, I can say only that my own experience has been to the contrary. In my view, the jury almost always “gets it right.”

The jury trial was one of the principles upon which our fight for independence was based. In the late 1700s, the Crown favored trials before government-appointed judges. The colonists did not trust the fairness of these judges and wanted verdicts rendered by community members. The history is different in Canada and other Commonwealth nations, where allegiance to the Crown continued and there was little dissatisfaction with British rule and procedure.

Alexander Hamilton highlighted the need for a secure constitutional right to a jury trial when he said in the Federalist Papers:

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.

After the Constitution was promulgated, the reverence for trial by jury was enshrined in the Seventh Amendment.
In America, popular recognition of the value of trial by jury has never waned, despite instances of verdicts marked by corruption and bias, prejudice of varying kinds, and jury pools that were anything but representative of the community. Indeed, in the early days of the Republic, the privilege of jury service was limited to a few; in many states it was denied entirely to women and African-Americans. Nevertheless, and despite results based more on bias than on justice, the public steadfastly subscribed to the rich tradition of the right to trial by jury.

An Essential Part

From our nation’s birth, then, the jury system has been a vital part of our democratic political process. It provides that our disputes will be resolved by our peers, but it also provides a means for every American to participate in the process. The jury system is not an appendage to our system of justice, but rather is essential to it. As de Tocqueville said more than a hundred years ago:

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.

But history and tradition are not the only—or even the primary—reasons that I value our jury system. Most importantly, I believe that our current system does justice and appears to do justice; that is, our trials are, by and large, resolved fairly, and people believe that they are, by and large, resolved fairly. And that is what any system of justice should strive to achieve.

An ABA survey in February 1999 illustrates the high regard the American public has for the jury system. It found that 80 percent of those surveyed agreed or strongly agreed that the system of justice in the United States is the best in the world. Seventy-eight percent expressed the belief that the jury system is the fairest method of determining guilt or innocence, and more than two-thirds said that the jury was the most important component of our justice system. Justice Holmes was fond of saying that “the first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community . . .” The Common Law, 36 (Harvard University Press 1963). Thus, scholarly debate
and disagreement aside, the critical fact is that there is a continued and pervasive public confidence in trial by jury—a confidence that cannot and should not be ignored.

Critics of the jury system argue that jury trials are more expensive and time-consuming than bench trials. I disagree. In my experience, and in the experience of many of my colleagues who are judges on active courts, bench trials can be more expensive and more protracted. Decisions often take longer, much to the chagrin of the parties and their lawyers.

A bench trial tends to sprawl. The proceedings are often interrupted for extended periods, and the unremitting press of judicial business provides a strong temptation to put off difficult questions until after written submissions. Those written submissions are time-consuming and expensive. And, given the relaxed standards of admissibility in a non-jury trial, the record invariably contains much irrelevant material that would have been excluded during a jury trial but must be culled during a judge’s post-trial evaluation.

Jury trials are clearly superior to bench trials in most respects. For example, in bench trials, credibility determinations are often made on a cold record review that may occur long after the conclusion of the trial; they are therefore often more difficult and inherently imprecise. They surely have no greater intrinsic validity than does a jury’s on-the-spot, carefully focused evaluation, under careful and detailed instructions from the court. Indeed, a jury panel made up of individuals from all walks of life—diverse in age, education, experience, trades, and professions—brings a unique and collective view to the task of assessing witness credibility. That is something that a judge, given his generally more insular background, cannot replicate. In deciding factual questions, there is therefore no reason to believe that a judge possesses a superior ability to determine credibility. In fact, the contrary is true.

Moreover, in most close cases there are questions of morality, allocation of resources, and community values in which the public should have input. In resolving difficult fact questions, the jury gives guidance to the court and to future litigants as to what the community regards as fair and just. It provides a regulatory function, serving as a mirror of the community’s view on important matters. For example, in product liability cases, the jurors hear expert testimony as to the alleged defect in a product, and then—in essence—approve or disapprove the product. That serves an
important public function. And the criticism that some designers of new products are hesitant to go forward with their ideas because they are afraid to face adverse jury verdicts is really a non-issue: if manufacturers or designers do not have confidence in a new product, then it should not be produced in the first place.

**Juris and Justice**

Juris are sometimes criticized for abusing their power and returning verdicts that are too generous. But such criticism is based on the publicity given to the few exceptions, not on the general rule. And fixing the problem means eliminating those aberrations, not changing the system itself. For example, poor lawyering or an inadequate explanation of the law—and not a runaway jury—is most likely to blame for a skewed jury verdict.

Think of it this way: Each year many thousands of jurors return verdicts, almost all of which are perfectly in keeping with the law and the ultimate justice of the case. And there are ample procedural devices to rectify excessive or biased jury verdicts, whether for compensatory or punitive damages. It is a curious argument indeed that we must do away with juries because we cannot trust their judgment, while at the same time refusing to recognize the rectifying power of the very judicial officers critics insist should supplant juries. In any event, the real question is not whether there have been jury abuses, for there surely have been, but rather whether the number, frequency, and pervasiveness of those abuses suggest that juries are unfit to perform the duties with which the founding fathers entrusted them. In my view, the answer is a resounding “no.”

Moreover, there is no reason to believe that judges would do better than juries in rendering verdicts. Now I have no doubt that most judges do their very best to achieve justice. But judges vary in personality, patience, sympathy, learning, and industry. In other words, they are human. One federal judge described his fellow judges as a “mixed bag.” He found them at times “punitive, patriotic, self-righteous, guilt-ridden, and more than customarily dyspeptic.” Perhaps a dramatic exaggeration, his observation nevertheless highlights the fact that judges may be prone to error and excess. And unlike a mistaken or biased juror who can be reined in by his fellows, a trial judge answers to an appellate court only after the verdict has been rendered.
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Critics sometimes charge that juries cannot handle trials involving complicated scientific or engineering issues. I disagree. Except in cases with the most esoteric scientific questions (which might well puzzle even the most skillful judge), I believe that jurors are able to understand the issues and reach a fair verdict if the case is properly and thoughtfully prepared. In fact, the exercise of simplifying a case for a layman ought to be part of the lawyer’s preparation regardless of who the fact finder will be.

A few years ago, I presided over the Love Canal litigation—a bench trial that lasted 72 days. I am sympathetic to the argument that a trial of this length creates such a heavy burden that no juror should be forced to sit through it. But given the excellent presentations of complex scientific and engineering evidence by all counsel in that case, I have no doubt that a jury could have decided the issues fairly if given the opportunity. More recently, following a trial involving computer-driven robots, the jurors made it clear to me that they understood the questions presented. Their verdict was both fair and reasonable.

Thus far, I have been addressing the value of juries across the board in civil litigation. But there are certain types of cases in which the jury’s value is even greater. In highly publicized cases of some controversy, for example, it is often easier for jurors to make a difficult but correct decision than it is for a judge. Even the most careful and conscientious judge with lifetime tenure can subconsciously be influenced by public pressure. An anonymous jury does not have that pressure.

Likewise, it is vitally important that we preserve jury trials in a broad range of civil rights cases. Many litigants in these cases are uneducated, poor, or elderly. They usually have a gripe against some powerful part of organized society—the government, a corporation, a union, or the like. Many believe that they cannot get a fair deal through the establishment. These individuals often look upon judges as being in league with organized society; they are suspicious of the court system. Whether this perception is valid is beside the point. Justice requires that a person get a fair hearing and just result, but ideal justice requires that the litigant believe that justice has been done. Trial by jury is often the only way to achieve that goal in such cases.

The same is true of tort claims against the government, and I suggest that the right to a jury trial be extended to these cases. When the government is itself a party, the fact finder should not
be part of that government. Indeed, it seems especially important that the community be given a voice in deciding such cases. In my view, justice would be better served; just as important, the individual's perception of justice would be heightened. Juries are available in condemnation, tax refund, and other cases involving the government. Why should tort claims be any different? Whatever the historical validity of the charge that juries do not represent the community at large, today that charge has lost most, if not all, of its force. Years ago, jury pools were drawn from a narrow and elite segment of society, and those who chose not to serve were excused on the flimsiest of excuses. Today, even federal judges are not exempt from service. I was called for service myself but was excused. A distinguished federal judge in Chicago actually served on a jury, as have many lawyers. Undoubtedly, they all profited enormously from the experience. Undoubtedly, the system profited as well.

The distinguished economist Lester Thurow published an article in The Atlantic Monthly comparing economic and entrepreneurial practices in the United States with those in other countries. His explanation of our economic success is that, unlike other nations, we have always encouraged individual innovation and invention backed by a strong legal system. In Russia, genius and creativity flourish but then wither because there is no strong legal system to protect the rights of entrepreneurs and businesses. In nations like Japan, strong legal systems protect individual rights, but there is little room for an individual to make an impact. The United States has the right combination of innovation and order to advance and use knowledge. There must be balance; neither too much order nor too much innovation will work.

A Balanced System

Thurow's explanation of our success in the financial world is only roughly parallel to the value of our judicial system, but I believe that we can learn a great deal from a comparison between them. Our judicial system balances the order of the court with the individuality and innovation of the jurors. Like our financial system, it is a reflection of our society; in a sense, it is democracy in action. Our courts reflect who we are. For that reason, we must always strive for as much public participation in the court system as possible.
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If I ever had doubts about the wisdom of those who drafted the Seventh Amendment, those doubts vanished long ago, and my views about their prescience have been amply confirmed by my experience at the bar and on the bench. Preservation of the right to trial by jury is, in my view, essential to the deep and abiding conviction that regardless of social status or education, there is an institution of government to which even the most disadvantaged of our people can look for honest and empathic redress.

At a time when the public is becoming more cynical of the legislative and executive branches because of blatant political posturing, ineffectiveness, and personal and financial scandals, courts and juries have generally maintained a positive reputation with the public. That reputation must not be allowed to wane. Protecting jury trials—and the participation of all Americans in the legal process—is a key step toward attaining that goal.