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Juries in Jeopardy

"The institution affords one of the few barriers to the perverted use of courts."

By WILLIAM M. KUNSTLER

MAMARONECK, N. Y.—The recent acquittals of Angela Davis and the remaining Soledad Brothers in California, along with the hung juries in the Berrigan & Company, Bobby Seale, Huey Newton and Harlem Four cases, have focused public attention on the jury system. For many the inability of the prosecutors to convince any—or even most—of their respective panels that the defendants were guilty of the crimes with which they were charged has been regarded as a stunning vindication of our legal system. For others, including myself, these results only indicate that just verdicts are, under certain conditions, obtainable, but in all of the cited cases, as Ms. Davis has already put it, the only fair trial would have been no trial at all.

Whichever view one chooses to adopt, it is becoming painfully clear that the institution of the jury is now, precisely because of the outcome of these and similar cases, under serious and concentrated attack. If the judicial process is to continue to be used as a form of political repression by those who would see us become a closed society, then any escape hatch it may afford must be speedily secured. Accordingly, it may only be a matter of time before the traditional jury joins such other destroyed safeguards as the Eighth Amendment's guarantee of bail (cf. preventive detention) and the Fourth Amendment's assurance against unreasonable searches and seizures (cf. no-knock, stop-and-frisk and wiretapping laws).

The Sixth Amendment provides that all persons accused of crime must, if they desire, be tried "by an impartial jury. . . ." When the amendment was adopted, juries on these shores as in England consisted of twelve persons, and their verdicts, whether for acquittal or conviction, had to be unanimous. Moreover, counsel for the defendant had the absolute right to interrogate prospective jurors in order to uncover any facts which might give rise to a challenge for cause or enable the intelligent exercise of a peremptory challenge.

The inroads on these concepts began some years ago when defendants in Federal criminal proceedings lost their right to question prospective jurors. This was accomplished by a simple rule giving judges discretion as to whether to allow counsel to perform this time-honored function. Today, in virtually every Federal criminal trial, it is the judge and not the lawyers who conducts the examination of the prospective panel members. True, he may ask questions propounded by the attorneys if he so desires, but it is he who does the actual questioning.

Only last year, the New York Judicial Conference, consisting mainly of the Chief Judge of the Court of Appeals and the presiding justices of the four appellate divisions, adopted the same rule for this state. Fortunately, a new statute restored the right nine months later. But a powerful effort to repeal this legislation was just barely defeated earlier this year.

The only significant reason given by those who favor such change is that it shortens the length of criminal trials by materially abbreviating the jury selection process. While this may be true in some cases, it is equally true that it takes from the person accused of crime one of his most important rights—to determine whether he is getting the impartial jury promised by the Sixth Amendment. Only by detailed and time-consuming probing is it realistically possible to discover visceral feelings of bias or prejudice that may affect a juror's ability to be fair. In this process, no judge, no matter how articulate or inquisitive, can take the place of an advocate dedicated solely to the best interests of his or her client.

The result, and possible intention, of such changes will be to increase the number of convictions at the expense of rights as old as the Republic itself. Expediency rather than justice will have become the bellwether of our highly touted legal system and juries reduced to rubber stamps for prosecutors. Such a metamorphosis may well mark the closing of the judicial process as a means of salvation for the rising number of persons like Angela Davis, Father Berrigan or members of the Black Panther party who are accused of crime in order to silence them and intimidate those who might emulate their lead.

Attacks on the jury system are not unique. In England, for example, the jurors who acquitted William Penn were jailed for their efforts. One of the abuses recited in the Declaration of Independence was "depriving us in many cases of the benefits of trial by jury." But the institution, which places ordinary citizens temporarily in the most awesome and delicate of roles—to sit in judgment on their fellow men and women—affords one of the few barriers to the perverted use of the courts by those in power to inhibit, terrorize or destroy persons who, for one reason or another, have incurred their hatred, fear or mistrust. Only the jury system, even with all of its institutional defects, can serve this purpose.

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