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The anishing Jury

By William M. Kunstler

For at least a generation, the onslaught on the American jury system has continued unabated. The Sixth Amendment's guarantee of the right to trial by jury "in all criminal prosecutions" has now eroded to the point where only those accused of more serious crimes can count on a traditional panel of twelve persons. In misdemeanor cases, defendants are entitled only to a jury of six and, if the potential maximum punishment is less than six months, to none at all.

In early 1972, the United States Supreme Court approved nonunanimous verdicts in state criminal trials. In so doing, it ignored its own unbroken precedents that, as Justice Potter Stewart put it in opposing such a drastic constitutional change, "universally understood that a unanimous verdict is an essential element of a Sixth Amendment trial."

Thus far, three states—Texas, Louisiana and Oregon—have enacted legislation permitting jurors to find criminal defendants guilty if a statutory majority of nine or ten votes for conviction.

Throughout the Federal court system, the centuries-old right of defense attorneys to interrogate prospective jurors has been destroyed by judicial fiat. The rationale of this usurpation of what many consider to be one of the lawyer's most important functions in a criminal prosecution is that theoretically impartial trial judges can do the job faster, and thus more economically, than opposing counsel.

Many states have followed suit and it may well be only a matter of a few short years before all have similar policies.

Four years ago, the Administrative Board of the Judicial Conference attempted to adopt the Federal rule for New York.

This body, which is composed of the chief judge of the Court of Appeals and the presiding justices of the four appellate divisions, sets policy for the entire state court system. However, the Legislature, by an extremely narrow vote, refused to permit such a change in existing law.

Nothing daunted, the board has just promulgated a new rule that, while less drastic than its ill-fated 1971 venture, is the first step toward ending meaningful lawyer participation in the jury-selection process.

Now, the trial judge will initiate the examination of prospective jurors and, while he or she must still permit the respective attorneys to ask some questions, the court can drastically restrict their nature and latitude.

According to Richard J. Bartlett, the statewide administrative judge, "the new procedure for jury selection should substantially reduce the time spent in that process and should result in our ability to complete significantly more trials."

The promise of shorter, and less expensive, trials would, of course, appeal to the electorate at any time; today it must seem utterly irresistible. But the price of such economy will be the continuation of the rapidly accelerating process of judicial erosion of the concept of trial by jury as it was envisaged by the Framers of the Constitution.

As Justice Thurgood Marshall bluntly stated in a 1973 case in which a majority of the Supreme Court sanctioned six-person juries in Federal civil cases, "Today, the erosion process reaches bedrock . . . my Brethren mount a frontal assault on the very nature of the civil jury as that concept has been understood for some seven hundred years."

But there is much more to the problem than merely shortsighted judges bent on dismembering the Bill of Rights. The escalating attacks on the jury system are the direct result of the failure of Federal prosecutors to win such celebrated political trials as those of the Wounded Knee leadership, Philip Berrigan and his co-defendants, the Chicago 7, and Daniel Ellsberg.

Last March, Attorney General Edward H. Levi released the results of a half-year Justice Department study of why the Government was losing all of its celebrated political trials.

"These cases were lost," the report concluded, "because they were tried before juries at least partially composed of people willing to be convinced of Government misconduct, or willing to believe the exculpatory motives alleged by the defense."

The obvious solution to those who deal in pragmatics rather than principles is to get rid of the jury system or as much of it as can be destroyed without a significant public outcry.

In the words, again, of Justice Marshall, "rights which are so vulnerable to the pressures of the moment are not really protected by the Constitution at all."

If the implications of this frightening truism are lost upon the American people, then all of the individual safeguards specifically enumerated in the Bill of Rights may soon suffer the same fate as that of trial by jury.

Only a thorough national understanding of what Hugo Black once referred to as "the accordion-like qualities of this philosophy" can reverse this dangerous trend.

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