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J. C. McWhorter

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ABOLISH THE JURY

BY J. C. MCWHORTER.*

From every quarter of the country come well-grounded complaints of the slowness, uncertainty and excessive cost of the administration of the law, both civil and criminal. The criminal law especially, with its cumbersome machinery, is so far breaking down as a protector of society that it has become apparently impotent to stay the crime wave that seems to be sweeping over the whole country, and criminals are becoming more bold and defiant and courts less able to suppress them. Life is being made cheap, and the public mind is becoming so accustomed to lawlessness that it is acquiring that listless indifference which long and unconcerned familiarity begets. Unpunished crime is becoming a matter-of-course thing in the public mind.

A special committee of the American Bar Association, after a careful investigation, has reviewed at length this alarming condition, and suggested some very minor and, I respectfully submit, wholly inadequate remedies therefor. Other bar associations, as well as numerous other civic organizations, have made similar investigations, and all agree that the criminal laws of the country, both state and federal, are inadequately enforced, afford meager protection to society, and that this serious defect in our governmental processes should be speedily remedied. The same thing is loudly and persistently voiced by the press of the country, both secular and religious; but most of the remedies suggested are either impractical or wholly inadequate.

Practically all agree, however, that at least three things are needed in the administration of our criminal laws, if society is to be properly protected, viz.:

- (1) Procedure must be simplified and cheapened.
- (2) There must be more certainty and celerity in the apprehension, trial and conviction of offenders.
- (3) There must be more certainty of punishment.

* Member of the Upshur County Bar; former judge of the Twelfth Judicial Circuit.

I feel safe in asserting that while some of the suggested remedies will be helpful, none of them will meet these requirements and render the criminal law effective as a guardian of public safety. "Every unpunished crime," said Daniel Webster in his celebrated argument in the famous White Case, "takes something from the safety of every man, woman and child."

If we would evolve and apply a remedy for the excessive cost, the slowness and uncertainty in the administration of our criminal laws, it is only the part of wisdom to first determine the cause of this civic ailment.

In the first place our country is large and comparatively sparsely populated except in the congested urban centers. We have the natural wildernesses of the deserts and mountains and the artificial wildernesses of the cities, in which criminals can hide, to say nothing of the added facilities of escape afforded by automobiles. As country roads are being improved and automobiles becoming constantly more numerous, the ease of escape for criminals is being enormously facilitated.

State and county lines, purely artificial division lines by which the sovereign power of the people is divided more or less into impotent parts, have enabled criminals to play hide and seek with the officers of the law. Dodging from county to county and from state to state in automobiles, while the officers must be obstructed at every turn by the intervention of these artificial lines, criminals can sneer at the law and laugh at the helplessness of the public. I recently saw a case in court in which the defendant had been brought under extradition from California to West Virginia, at the cost of the latter state, to answer for a felony therein committed, and he was promptly indicted and arraigned for trial. About his guilt there was scarcely a question; but by the time the defendant was so brought to trial the chief witness for the state had removed to Missouri, and he declined to come to West Virginia as a witness, and that state, with all her sovereign power could not compel his attendance, and I saw the humiliating spectacle of a defendant, guilty beyond question, walking out of the court room without a trial, with head erect—a free man laughing at the senseless infirmities of the law. Such cases are occurring all over this great country. Think of such impotence in a sovereign state!

I would make every warrant and every subpoena issued by any court of nation, state or municipality effective in the hands of any conservator of the peace on every foot of soil over which the

United States is sovereign. This limitation upon the power and extent of writs is one evil that should in some way be removed to meet the ever increasing ease of escape of criminals.

Another preliminary step would be to give to the state the absolute right to try co-criminals, indicted together for a common offense growing out of their common act, *en masse*, without giving to each a separate trial upon his mere demand. Enormous costs could thus be avoided and the time of courts tremendously conserved. To give to each accused party a separate trial, with a separate jury, with precisely the same facts in each case, in which the accused, so far as the indictment shows, are equally involved in the identical act, often necessitates a change of venue by reason of the people becoming disqualified as jurors through acquiring information of the facts of the case due to the repeated and prolonged trials. This is extending to the accused a privilege that present day conditions do not justify.

The Bill of Rights guarantees to the accused a speedy trial. But in nine cases out of ten a speedy trial is precisely the thing the accused does not want. Delays inure, as an almost invariable rule, to the benefit of the accused; hence the usual demands by the defendants for continuances upon all manner of pretexts and upon all kinds of fabricated testimony, and the almost invariable demand for severances under joint indictments. Delays enable witnesses to get beyond the state's jurisdiction, or permit facts to fade from defective or unwilling memories, or venal witnesses to be tampered with, or conviction to be thwarted through the death of important witnesses, or the waning of public interest or in a dozen other ways. Criminals rarely clamor for speedy trials, especially if they know the state is ready for trial, but they and their attorneys are usually vociferous in their protests against being "railroaded to prison" when the state presses for trial.

I would also give the state the right, at the discretion of the court, to put the defendant upon the witness stand and examine him. Or, if we should not go that far, I would at least remove the ban upon the state against commenting upon the failure or refusal of the defendant to testify. Of all parties, the defendant is most able to enlighten the court with respect to his participation or non-participation in the offense. Why should his suppression or non-disclosure of facts be winked at and not even commented upon at the trial? This rule of procedure grew out of the practice in barbarous days of torturing the accused to force confession.

The reason for this rule no longer exists in this country, and the rule should pass away with the reason.

But aside from all these minor matters, the great obstructing incubus upon the administration of American law, both civil and eriminal, is the jury system. A careful and thoughtful consideration of the whole subject will disclose this much worshipped, ever praised and exalted jury system to be the arch obstructor of justice in all the American courts.

It is the jury system that entails the bulk of the costs to both states and litigants. It is the jury system that necessitates so many costly changes of venue. It is the jury system with its numerous hung juries that causes so many mistrials.

It is the jury system through which, in the giving of instructions and introduction of testimony, so many errors creep into trials, necessitating appeals and new trials, with their attendant expense and delays.

It is the jury system that causes so many interminable delays and accompanying useless expense in selecting satisfactory juries before trials actually begin. Some times weeks, and even months, are required for the *voir dire* examination of hundreds of talesmen before a jury can be secured, then often followed by utter failure with its attendant change of venue on account of the agitation accompanying such search for a competent jury. Cases like the Ponzi Case, in Suffolk county, Massachusetts, which cost that state and county, according to press reports, over \$4400.00; the Thaw Case of New York, with its sickening, morbid and demoralizing publicity, and scandalous use of money, both public and private; the Herrin Cases of Illinois; the Schmidt and other graft Cases of California; and the recent "Treason Cases" of West Virginia, costing that state scores of thousands of dollars, are only a few of such instances. They are of almost daily occurrence in our courts.

It is the jury system that consumes time at the public expense in gallery playing and sensational and theatrical exhibitions before the jury, whereby the public interest and the dignity of the law are swallowed up in a morbid, partizan or emotional personal interest in the parties immediatley concerned.

It is the jury system that makes possible the administration of mob law in the courts, either on behalf of the state, as in the Leo Frank Case in Georgia, or on behalf of the defendant, as in the Nutt Case in Pennsylvania.

It is the jury system that pads our trial dockets with unmeritorious cases that would never be in court but for the expectation and hope of unscrupulous litigants and their scarcely more scrupulous attorneys to win unjust verdicts by emotional appeals to the passions and prejudices of juries; and that makes possible the subsistence in the legal profession of that class of shyster lawyers known in the cities as "ambulance chasers."

It is the jury system that inspires the criminal with contempt for the law and its slow and bungling processes, and buoys him with hopes of escape through the easy sympathy of our warm-hearted American juries.

In short, one has only to sit in our courts and observe their work to see that nearly all the delays, obstructions, useless costs, failures of justice, and general weakness in our whole system of law administration, are related intimately with the jury system.

I know that this is a sweeping indictment, and that the American people are reluctant to give a hearing to any proposition looking toward the abolition of the jury. This is but natural. Institutions with which we have grown up and under which our government has developed are hard to change. They become parts of us. It is hard to look an old friend of the human race, like the jury system, in the face and say to it: "You have lived out the days of your usefulness; you can no longer work in harmony with the requirements of the time, and you must now retire and make way for a more modern and virile servant."

This clinging to old institutions and formulas is natural, as above stated, and is often a source of safety against wild, untried, Bolshevik schemes that would override all established order. Nevertheless, as painful and fearsome as the operation may appear to be, the human race is compelled from time to time, in response to the irresistible forces of progress, to cast off old and impeding methods and institutions, as a locust does its useless shell, and to adopt new ones, better fitted to meet the requirements of an advanced order of things. The whole history of human civilization is a simple record of just such processes. The adoption of the jury system, centuries ago, was one of those advanced steps in the development of Anglo-Saxon liberty which the social conditions of that age required. The rejection of that system at this time, under new and entirely changed political and social conditions, is another such step.

An old maxim, or adage, has it that when the reason for a law

ceases to exist, the law ceases with it. If we go back to the foundation of our government to search for the reasons impelling the establishment of the jury system as a part of the basic law of the land, they are easily found. The background is all there in the history of legal jurisprudence in Europe, and especially in England. It was from the tyranny of government the Colonists fled to the New World, and against the tyranny of government that they rebelled. Government, as they saw it, was expressed by the atrocious barbarism of monarchy in its oppression of the people through tyrannical laws ruthlessly enforced by courts and other tribunals created as the servile tools of a royalty that claimed it could do no wrong and asserted its irrevocable commission from heaven to rule, supported by a graduated order of ignorant nobility as unconscionable as their kings, and backed by established churches equally as cruel, ruthless and oppressive in their greed for temporal power. European monarchy, as a political institution, was a child of the Dark Ages. It came as a thief in the night, and has been a burglar in the temple of liberty ever since.

The Colonists understood and feared this whole vast, monstrous thing, and sought to safeguard themselves against it. Hence, in the framing of their Constitution and Bill of Rights, they only acted upon the experience of the English people whose history they knew. There they had seen the "brutal ferocity of Jeffreys and Scroggs, the timidity of Guilford, and the base venality of such men as Saunders and Wright"—men whose names and memories will ever be odious in human history. They, therefore, sought, not only to secure the best judiciary possible, but to protect the people against the "malice and wrath of tyrannical officials," whether as presidents, governors, legislators, or judges, by fixing as an established principle the right of trial by jury. They looked with suspicion and fear upon all governmental powers, and feared government as a burnt child fears the fire. There were those among them who even feared the establishment of a monarchy on the American Continent and the subjugation of the people here to the very tyranny of government from which they had fled and against which they had successfully rebelled. Our fathers saw that in the old country criminal laws were enacted primarily to bolster up and support the institution of monarchy, and were enforced with an atrocious barbarity for that purpose. The accused, especially political prisoners, were subjected to such tortures as only fiends inspired of hell could contrive. The protection of the people from criminals was no concern of the government except

as it contributed to the power of the Crown. There was **no such thing as government in the hands of the people. Justice, such as it was, was not administered in the interest of the subjects, but in the interest of the Crown and its supporting nobility which fictitiously claimed to represent the people. The development of the criminal law and its administration represented a constant fight to protect the Crown from the people, or the people from the Crown. The Crown was interested in the people only as so many units of force whose bodies belonged to the king for his own use or abuse—in time of war, as soldiers to die for the king; in time of peace, as toilers to live and produce revenue for the king.**

Now, it was against this whole monstrously false thing and for the protection of the people against its cruel oppression, that the jury system was incorporated in the English Magna Charta, and later written into the American Constitution along with all the other guaranties contained in our Bill of Rights.

Thus it was that our jury system became intimately associated, in our Bill of Rights, with all those other great canons of human liberty, viz: that no *ex post facto* law shall be enacted; that an accused shall not be tried twice for the same offense; that **cruel and unusual punishments shall not be inflicted; that an accused shall be plainly advised of the charge against him and given a speedy trial, etc.**

Of course the people, under such conditions, and with that history before them, have hesitated and feared, and still **hesitate and fear, to tear the jury system from such associates and cast it into the discard.**

But the conditions which created the jury system for the protection of the people from the tyranny of the Crown or government no longer exist in this country, if they ever did. We have no monarchy to fear, no malicious government of selfishness to fight. So thoroughly is the spirit of liberty intermixed with our very natures, and so exalted is the American conception of justice, that if our whole Bill of Rights should suddenly fade from our various constitutions, State and Federal, it would be almost impossible to find a legislator with temerity to introduce in any legislative body a bill to destroy one of these sacred rights, much less the ability to secure its enactment. These principles of liberty are so thoroughly a part of the American mind and spirit and sense of justice as to render them safe whether written into constitutions or not. Indeed, the clear conscience of modern nations rejects

brutality in all criminal investigations, and spurns all unjust and oppressive laws. Especially is this true of America.

The old maxim, *salus populi suprema lex*, has taken on an added meaning. Safety of the people from the oppressions of tyrannical government in this country must ever be of concern; but the safety of the people from the aggressions of criminals is also becoming a matter of most vital concern. Through the jury system and the safeguards of technical procedure, we have extended to the criminal the very protection which the people originally intended to retain for themselves, until today the criminal is protected from the people, not the people from the criminal.

What have we really to fear from discarding the jury in both civil and criminal procedure and substituting two judges as the triers of facts, with the power in them to call in a third judge in important cases?

It is difficult to imagine a more illogical and unbusiness-like way of trying cases than by a jury of twelve men selected as they are. One of the profoundest lawyers of this state a short time since, in discussing with me this question, illustrated the folly of our jury system in this manner. He said: "If my watch is out of repair, I seek the services of a jeweler; if I am sick, I call a physician; if my automobile gets out of repair, I employ a mechanic; if I want a house built, I look for a carpenter; but if I have a complicated case to be tried, involving a careful, dispassionate weighing and balancing of testimony, requiring keen observation, analytical discrimination, logical deductions, and the thoughtful application of the principles of law to the facts, I am compelled to seek the aid of twelve men wholly inexperienced and unaccustomed to such delicate and exacting work, utterly unlearned in the law, herd them together like a bunch of cattle, have their passions and prejudices appealed to, then look to them for correct decisions. The whole thing is ludicrous, illogical, impractical, and thwarts justice."

This is a clean-cut statement of the whole case.

Dr. Meiklejohn of Amherst, recently declared that "Democracy, as we have it, is a program for fallible mortals, and it must work fallibly." This is certainly true, and justice, at best, will always be fallibly administered even through the best of judges. But why add to this fallibility by the employment of twelve wholly inexperienced and untrained men, under all kinds of technical rules and restrictions, most often under conditions of bewildering con-

fusion, to try to do in their bungling way the work which even the most skilful judges, experienced and especially trained, can do only imperfectly?

Of course this is all met, or supposed to be, by the statement that it is safer to trust twelve men, "good and truly tried," than two or three judges. Why so? Who does not know that in practically every jury case one or two of the strongest men really guide, control or influence the rest of the jury and in fact render the verdict? After all the jury's verdict is most often the finding of one or two strong or thoughtful men concurred in by the other members of the jury because they have no well-defined opinion of their own. I do not say this in disparagement of the intelligence of the average jury. It is simply the way of all unskilled and untrained men in every walk of life.

Mr. Herbert Hoover, in his late book¹ most forcefully says:

"Acts and ideas that lead to progress are born out of the womb of the individual mind, not out of the mind of the crowd. The crowd only feels. It has no mind of its own which can plan. The crowd is credulous, it destroys, it consumes, it hates and it dreams—but it never builds. It is one of the most profound and important of exact psychological truths that man in the mass does not think, but only feels. The mob functions only in a world of emotions. The demagogue feeds on mob emotions, and his leadership is the leadership of emotions, not the leadership of intellect or progress."

This is a terse and fearless, statement of a tremendous fact little thought of by the average man. And this principle has its hindering application in jury trials. It is this very emotional make-up of the average jury, intensified by their numbers and close association, that is so often played upon to win unrighteous verdicts. The books written upon the art of winning cases before juries merely present the arts of a political demagogue in "handling a jury." Read the great speeches of the great lawyers, presented by the books as models of jury-winning speech, and note how skillfully they play upon the very mob emotions spoken of by Mr. Hoover. Then read the great speeches of great lawyers, in many instances the same great lawyers, made before courts without juries and note the difference. The first class of speeches is leveled at the emotions of twelve men; the other at the intellect and

¹ AMERICAN INDIVIDUALISM.

sedate judgment of reasoning and thoughtful judges. And yet both classes of speeches are supposed to aim at the same object—*the attainment of justice!*

In this age every department of business, to be successful, must be directed by specially trained men. Specialization is the product of our rushing, busy age. There is no escape from it, and should be none. This business principle is being applied in every department of human activity except in jury trials, and there we lag behind. A judge with his experience in office added to his experience as a lawyer becomes more or less expert in the art of weighing testimony, and an adept in detecting perjury and dissimulation and craft. Crookedness can not pass him undetected as readily as it can a non-expert jury. Criminal lawyers can't play upon his emotions and blind him to the cold facts, as they can with juries. If the judges were required to hear and pass upon the testimony of witnesses without the intervention of juries, litigants and witnesses would soon understand that they are testifying before men whose learning, training and experience enables them to discern perjury and deception with almost unerring accuracy. Under such conditions the judges would soon learn and understandingly apply the psychological principles of what Hugo Munsterberg is pleased to call a "new special science dealing with the reliability of witnesses and their memories."²

The public mind is being directed to the utter failure of the jury system in the expeditious administration of the law. "As operated in our courts," says a modern authority on political science, "the jury system often puts a bar upon intelligence and honesty, and a premium upon ignorance, stupidity and perjury, and the judge is hampered in his instructions and charges to the jury."³

"No more persistent barrier to the achievement of a just result could be conceived by a malignant enemy of mankind than the civil jury system as administered," says another. "We point to the jury system," he continues, "with superstitious pride, while we erect alongside of it another system, that of equity, in which the worshipped jury plays no calculable part. Yet with a straight face, and with a legal mind apparently all unconscious of inconsistencies, we praise both systems as having equal claim to our admiration."⁴

² Hugo Munsterberg, *ON THE WITNESS STAND*, p. 45.

³ Haines, *PRINCIPLES AND PROBLEMS OF GOVERNMENT*, p. 370.

⁴ C. A. Boston, *33 Annals of Academy of Political Science*, p. 114.

The inconsistencies here pointed out are simply grotesque, and yet, as the author says, we actually maintain a straight face while we praise both systems. We assert that it is unsafe to abolish the jury and go to the judges with all cases, but this fear does not appear in actual practice except in causes in which crookedness, chicanery, passion or prejudice, are the actual things to be relied upon to win or defeat a cause. It is well known to all lawyers in actual practice that when a case based upon truth and simple justice is presented the wise lawyer searches diligently for some door to the equity court where he can get to the judge with both law and facts and escape the jury. On the other hand, it is equally well known that every shyster lawyer appearing for a shyster client, relying upon trickery, perjury, fraud, passion or prejudice to win his case, assiduously seeks the jury and avoids the court. The man with a just cause trusts and seeks the court. The man with an unjust cause trusts and seeks the jury.

This is the deliberate verdict of mankind upon the respective merits of judges and juries as triers of fact based upon common experience. No truer test can be found. As a result, equity jurisdiction is constantly expanding, not because equity courts are greedily reaching out after jurisdiction, but because litigants with righteous causes are beating at the doors. In these courts of equity where the judges find the facts and apply the law, we find little complaint on account of delays, excessive expense or injustice. Of course judges will make mistakes, and here and there a crook or political shyster will get on the bench; but, notwithstanding this, the verdict of common experience in these days of democracy is that the judge is far safer, if your cause is based on merit, and that the jury is far safer if your cause is based on arrant rascality.

And this is why criminals, reeking with guilt, fly to the bosom of juries as a haven of refuge. This speaks volumes in praise of the integrity and fairness of our judges as a whole, notwithstanding the crude, partizan methods usually employed in their selection. I believe that the judges in every state should be appointed by the governors, and that the governors should be required to appoint on appellate courts only such men as are recommended by the state bar associations of their respective states, and for circuit, district or county courts, only such men as are recommended by the local bar associations of those respective political divisions. And any governor who would appoint to the judiciary a political henchman as a reward for party service should be damned and doomed politically and for all time.

I have read much in support and praise of the jury system. Perhaps the most powerful argument in its support is the celebrated address of Judge Jeremiah Black before the United States Supreme Court in the Milligan Case.⁵

And yet all the fears expressed by that eminent lawyer of the danger of turning loose on the people the powers of a malignant government through courts without the protection of juries were wholly unfounded in fact. They were mere fiction. But the grim joke of the whole thing was that it was to the judges on the bench not to a jury, to whom he applied and from whom he obtained the relief from the oppression of which he complained.

I believe in the integrity and ability of our American judges. The American courts in the persons of the judges on the bench, not the juries in the box, have been the bulwark of American liberty. Time and again when passions were aroused and feeling ran high, and sectionalism lifted its hideous mien in the executive and legislative departments, it was the judges, not juries, that saved the people's rights. The liberties of the American people have always been safe in the hands of the American judiciary, and I perceive no reason to doubt that such safety will continue.

What we now need is such swift, certain and inexpensive administration of the law as will insure the safety of society, and the protection of property rights, and inspire all people with that reverence and respect for law which alone makes secure free government among men. The law must be so enforced that if men will not obey the law through love of it and its protection, they will obey it through fear of it and its penalties. But our experience of over a century has demonstrated that the courts can no longer so enforce the law while carrying the dead albatros of the jury system about their necks.

⁵ *Ex parte Milligan*, 4 Wallace 2, (U. S. 1866).