

The Jury in America

Triumph and Decline

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The Writer of the following Observations not being a lawyer by profession, some apology may seem necessary, for his attempting to write upon a subject, which may be thought more peculiarly the province of the professors of the law. But it is a subject, as he conceives, of great importance to the general interests of liberty, a subject in which every Englishman is concerned, and . . . which should be generally understood by men of all ranks, and especially by those who are liable to serve on juries.

—Joseph Towers, *An Inquiry on the Rights and Duty of Juries, in Trials for Libels; Together with Remarks on the Origin and Nature of the Law of Libels*

Ruler and ruled have different excellences; but the fact remains that the good citizen must possess the knowledge and the capacity requisite for ruling as well as for being ruled, and the excellence of a citizen may be defined as consisting in “a knowledge of rule over free men from both points of view.”

—Aristotle, *Politics*

To love democracy well, it is necessary to love it moderately.

—Pierre Manent, *Tocqueville and the Nature of Democracy*

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Introduction

The Paradoxical Jury

Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men.

—G. K. Chesterton

The fundamental democratic paradox is well known and easily stated. In a democracy, governing—a task requiring wisdom, the rarest of human gifts—is open, in principle, to all applicants and, in practice, to many who are not the least bit wise. The resolution of this paradox is written in the ongoing history of democratic governments and, in its broadest sense, is beyond the scope of this book.

This book focuses instead on one especially interesting and important example of the democratic paradox at work: the jury system, that peculiar Anglo-American legal institution in which some of the weightiest questions facing society are decided by (usually) twelve people plucked from the civic mass. The jury's verdict may send a defendant home, to prison, or to death row, or the jury may transfer money—sometimes lots of it—from one litigant to another. Jurors may do these things well or badly, but their decisions are usually final, and in criminal cases a jury's acquittal is always final. That such a system has lasted so long is often the subject of wonder (and sometimes scorn) among foreign observers of American law, but sometimes (and not only recently) among natives as well.¹

As this quick summary suggests, understanding the jury is a way to understand democracy itself, with all its triumphs and failures. And yet, at its inception, the jury was not a democratic institution at all; it was simply a way for the English

1. Although *Anglo-American* might be a better term to use in the context of a historical discussion of juries, the jury is used much less often in Great Britain than it once was. The Canadian, Australian, and New Zealand experiences parallel the British, which leaves the United States as the last country where the jury trial is routinely available in both civil and criminal cases, both the serious and the trivial. The vast majority of jury trials worldwide, therefore, take place in the United States.

monarch to acquire vital information that only local subjects possessed. Its gradual evolution from a "tool of kings" to a "champion of the people's rights" is part of the long and tangled story of how republican ideas and institutions emerged in Great Britain and its colonies. In Britain's North American colonies, the jury was, in the beginning, a highly serviceable instrument of self-government, with many more functions than simply rendering verdicts. As colonial and then state governments became more differentiated, the jury's duties retreated steadily and became mostly judicial, and as state governments became more democratic, with easier suffrage and citizenship requirements, the American jury became what it was when Tocqueville saw it: "the majority vested with the right to pronounce decrees."²

It had also acquired by Tocqueville's time an additional purpose: educator of democratic citizens. Tocqueville's is the most famous argument along these lines, but, as demonstrated below, he was not alone in seeing both the need for such education and the possibility that jury service might be an important way to provide it. And here the jury comes very close to revealing the democratic paradox in crystalline form: only the wise are capable of judging rightly, but only those who have experience at judging can learn the wisdom that judging requires. Tocqueville was prepared to accept one of the logical conclusions of this paradox, at least in the case of civil trials: that although the jury system might not be good for litigants, it is very good for jurors, and therefore for society at large.³

The jury that Tocqueville envisioned was far more democratic in its composition than the juries of colonial or revolutionary America and, of course, far more democratic than the panels that struggled against the Stuart monarchy or served the Angevin kings. The jury would become even more democratic as the barriers to jury service set by property qualifications, gender, and (illegally after emancipation) race were reduced and then eliminated. In the aftermath of the Jacksonian era, the belief that jury service might educate citizens retreated before questions about the competence of democratic juries chosen from jury pools much less "gentrified" than those in England and the colonies. These questions were followed by even greater doubts about the competence of most Americans to perform the difficult duties imposed by modern citizenship. Lawyers and judges, once universally understood to be the teachers and senior partners of jurors, often came to be seen, and to see themselves, as the jury's adversaries. Bench, bar, and jury engaged in a three-cornered struggle for control of the courtroom and, increasingly, over the question of who could make decisions about the meaning and requirements of the law, an old problem dating back to the battle over seditious libel verdicts in England.

2. Alexis de Tocqueville, *Democracy in America*, trans. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000), 241.

3. *Ibid.*, 285.

But the debate over whether juries could “find” or “determine” the law was gradually overtaken by one about whether juries could even understand the law, especially as the civil law became more complicated with the dawn of modern business. During the two generations between the Civil War and the Great Depression, doubts about the wisdom of jury trials in civil cases and in difficult or emotionally charged criminal trials grew apace. These doubts paralleled the broad Progressive enthusiasm for public administration, administrative centralization, and the power of professional expertise to resolve disputes “scientifically”—part of a larger movement to increase the weight of expertise in public decision making and to reduce the importance of popular participation. The result was a revolution in the federal courts, and especially in civil jurisprudence, that was accompanied by a gradual diminution in the importance of the jury system in both civil and criminal trials.

By the middle of the twentieth century, juries were still very much with us (thanks to their protected constitutional status), but they were far less important to the system of criminal and civil justice than in the previous century, and support for the jury was softer than ever before. To reformers of the post-World War II era, juries seemed hopelessly amateurish at best, and narrow-minded, bigoted, and ignorant at worst. The jury represented tyranny of the majority in its most virulent form, a view often echoed in popular fiction and in reports of sensational trials gone bad. In the popular stage play and film *Twelve Angry Men*, jurors are eager to vote for a conviction and get on with their lives, and they are stopped only by the heroic intervention of one brave man, “Juror No. 8.” The most visible and grotesque miscarriages of justice took place in those southern courtrooms where justice was so often subordinated to the needs of white supremacy. This phenomenon too made its way into the popular culture—although in *To Kill a Mockingbird*, the heroic Atticus Finch fails in his bid to extract a just verdict from a jury of small-town southern bigots. The contemporary jury has had to bear the weight of these historic and popular suspicions, along with a variety of “postmodern” doubts about the possibility of “objective” deliberation or of a “truth” accessible to human judgment. Perhaps not coincidentally, the latest phase of the jury’s long history evokes fear that the jury is “vanishing,” especially in federal courts, as the number of both civil and criminal jury trials has dropped to levels below those of the 1960s. Jury trials are now a smaller percentage of case dispositions than at any time in our history.

Many fear for the jury, yet many others seek to extend and deepen the experience of citizenship in modern states. The paradoxical meeting of these two separate concerns brings us closer to the problem Tocqueville sought to understand: How can the amateurish and destructive instincts of a democratic regime be educated to a higher sense of responsibility? Is it really possible for ordinary citizens, untrained in the law and picked at random from the crowd, to exercise the wisdom required of rulers? If so, how? Under what conditions and circumstances

does the jury system best serve the noblest ends of a republican regime? What are the obstacles to its proper functioning, and how can these obstacles be overcome?

These are some of the questions explored in the long discussion that follows. But first it is necessary to examine some of the earlier transformations of the jury system, to learn what it was at the beginning, what it became, and why. Following Aristotle's useful advice, let us begin at the beginning.