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### Book Review

Samuel Sonenfield

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THE JURY — TOOL OF KINGS, PALLADIUM OF LIBERTY,  
by Lloyd E. Moore, New York,  
The W. H. Anderson Co., 1973. 186 pp. \$8.95.

The hungry judges soon the sentence sign,  
And wretches hang that jurymen may dine.

Pope, *The Rape of the Lock*, Canto, III.

The jury, passing on the prisoner's life,  
May in the sworn twelve, have a thief or two  
Guiltier than him they try.

Shakespeare, *Measure for Measure*, Act II, Sc. I.

There must be few in our profession who have not, with mixed emotions, impatiently awaited that *deus ex machina* of Anglo-American law to return from the room wherein it is reaching a true saying upon the fate of their clients. Who among us has not completed his argument upon the facts to the jury, regretting some things left unsaid (and, perhaps, some said but in retrospect better left unsaid), trusting in his heart that he had surely convinced "Number Two and Number Six," only to find that the only jurors who did not sign the verdict for his client were precisely those two, who all during the trial had smiled benignly at every point made by him?

The Anglo-American jury both fascinates and baffles laymen and lawyers alike. Just as many other mechanisms of our legal system, it has no exact counterpart in other legal systems. Pope and Shakespeare are at least skeptical of it, if the foregoing quotations truly represent their thinking. Both were shrewd observers and trenchant critics.

Another caustic critic, Mark Twain, once said of our jury:  
The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury. It is a shame that we must continue to use a worthless system because it *was* good a thousand years ago.

Mr. Moore disagrees, and he has written a short but fascinating little book to express both his disagreement and his reasons therefor. Its title evidences both what is plausibly one of the reasons for the development of this peculiar institution and what is emphatically Mr. Moore's justification for its continued preservation as a vital safeguard of liberty and justice.

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There is a great deal of wide-ranging scholarship in Moore's work. While his sources are not original, in the sense that he has culled much from the work of others in original sources, there is no doubt that he has read widely, absorbed much and set it all down succinctly, with historical perspective, often entertainingly. He is seldom dull, even when he is piling up reference after reference. Other writers on the subject may be more prolix. Except when he comes to an ultimate summing up of his reasons why we should preserve the common law jury of twelve, in his final chapter, he follows one fact, usually historical, with another, with carefully footnoted references to his authoritative sources. Only in that last chapter does he allow emotion and visceral reaction to rise to the surface. And one must certainly grant that he is in that chapter as persuasive as he must have often been to the 150 juries before which he has argued in Southern Ohio. Even those who may disagree with his conclusions might very well agree that Mr. Moore would be an advocate whom they would welcome on their side in a close fact case before one of those very juries of "twelve good citizens of the vicinage."

Mr. Moore shows his lawyer-like qualities in the way in which he has put together his book. One would like to read one of his court briefs. First comes the history of the case: examples of lay fact finders (or judges) among Greeks, Romans, and Scandinavians; Charlemagne and the Franks; the English and their various efforts (ordeal, wager, battle) to devise a system which would assure truth among conflicting claims. Then that period in which the Norman kings were using the institution to their particular fiscal and other inquisitorial purposes. We know today how well they built a nation, harsh though their methods often were.

He traces then the evolution of this institution into a body of laymen whose principal function it became to render a judgment, whether between ruler and subject or between two subjects. Tudors, Stuarts, and Hanovers all contributed in the slow but steady evolution.

There were halts and false starts along the way. Pope's wry comment about hungry judges and jurors refers, of course, to the erstwhile practice of denying a jury bread, water, heat, or candle until they had come to a verdict. William Roughead, that master chronicler of evil-doers and the just desserts meted out to most, but not all, of them gives us an example in that volume of *Notable British Trials* (every lawyer ought to read some, if not all of them) which deals with the trial of Catherine Nairn Ogilvy for the murder of her husband.

On Monday, 12th August [1765] the trial began in earnest.

At seven o'clock in the morning a jury was empanelled and

the examination of witnesses commenced. It was the practice at those times that after a jury was once charged with a pannel [Scots for 'accused'], the court could not be adjourned until the jury was enclosed; *i.e.*, till they withdrew to consider their verdict. The hardships entailed upon all concerned where the case was of any length are obvious. Thus, in the present trial, the proceedings up to that stage lasted for *forty-three consecutive hours* [italics in original], the exhausted jury not being enclosed until two o'clock in the morning of Wednesday, 14th August.<sup>1</sup>

That jury did not return a verdict (of guilty) until four o'clock in the afternoon of August 14th. What they did on the way to the jury enclosure, or in it, we are not told. One may only guess.

Many other similar examples exist in the abundant literature on English and Scottish *causes celebres*.

Moore gives some insight into this and many other wondrous practices, now things of the past. Such sequestration was not, at least entirely, to coerce the jury into a guilty verdict. There were other good and sufficient reasons:

In one case, an enterprising solicitor . . . paid the bill for wine which a jury, while deliberating in a tavern, had ordered before returning a privy verdict. After the privy verdict in his client's favor was given to the judge, the solicitor again treated the jury at the tavern. The bill for both the wine and the rest of the celebration was not paid until after the verdict was given to the judge.

Moore assures us, however, that "the verdict was good."

The rise of the jury in the Colonies is carefully but succinctly traced, as are the great hopes which were held for its solution to our jural ills. The author concedes that at least as far as many observers were concerned, these hopes were not borne out. Hence such comments as Mark Twain's. Our English brethren have practically abolished it, except in libel cases (quasi-criminal in nature), and serious crimes. One is tempted to ask what Carson, Clark, Russell, Curtis-Bennett, Sullivan, and Isaacs would say if they could speak to us from that Great Courtroom in the sky. It is under attack in our country. Our Supreme Court, while upholding that there is a constitutional right, binding on the states as well, to a jury trial in a criminal case "where the charge is serious," as in *Duncan v. Louisiana*,<sup>2</sup> and in cases of serious contempts, as in *Bloom*

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<sup>1</sup> W. ROUGHEAD, NOTABLE BRITISH TRIALS 32 (1926).

<sup>2</sup> 391 U.S. 145 (1968), *rehearing denied*, 392 U.S. 947 (1968).

*v. Illinois*,<sup>3</sup> has said that there is no magic, but only mysticism in a jury of twelve, *Williams v. Florida*.<sup>4</sup> For apostles one must have twelve. For jurors, fewer will suffice.

It is when he comes to his summing up that lawyer Moore is at his best, and his best is good, indeed. He makes an eloquent plea for the retention *and use* of the twelve-member jury in civil and criminal cases. His thesis: it is worth the cost. Juries are a safeguard against arbitrary judges who have already made up their minds, who have a bias against certain types of cases or defendants, or who — lawyerlike — tend to categorize and to oversimplify. A better consensus comes out of twelve than out of eight or six. Minority accused, or parties, will get fair treatment only if at least a representative of their group is on a jury, and it is harder to exclude a member of such a group from a panel of twelve than it is from a smaller panel. Juries render a decision in a shorter span of time. A judge sitting as trier of the fact cannot be prodded into the same expeditious decision, and often renders his finding long after trial, leading at least the unsuccessful party to conclude that the old fool had forgotten most of the evidence in the interval.

Juries do not make a trial slower than it would be before a judge alone. They have no axe to grind. Disagreements are no more frequent among juries than in multi-judge panels, and certainly *Johnson v. Louisiana*,<sup>5</sup> with a majority opinion, two concurring opinions, and four dissenting opinions, cannot be matched by any jury recorded in history.

There is no doubt that the system occasionally fails. It fails both ways. Juries convict when they should not, and occasionally set free some rogue who "ought" to kick his heels in the air at the end of a stout rope. Witness the jury which convicted Jessie M'Lachlan of murder in Glasgow in September of 1862, the jury which acquitted John Donald Merrett of matricide in 1926, and that which convicted Oscar Slater of murder in 1909, to name but a few. All today are acknowledged miscarriages of justice. One could very slightly parody the famous lines of W. S. Gilbert, "and many a burglar they've restored to his friends and his relations." But we come inevitably to the two critical questions: is a single judge, sitting alone, any more reliable a sifter of true and false; and — in the great scheme of human affairs, where lies perfection?

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<sup>3</sup> 391 U.S. 194 (1968).

<sup>4</sup> 399 U.S. 78 (1970).

<sup>5</sup> 406 U.S. 356 (1972).

Mr. Moore's book will probably not help any lawyer win a lawsuit. It is not that kind of book, nor did its author write it for that purpose. It is undoubtedly the product of much thought and research. It is packed with interesting historical facts and vignettes. Its concluding argument is cogent. One envies the author's work in putting it together; it is hard to put down.

One adverse observation: the proofreading is deplorable.