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## Book Review of Civil Justice and the Jury

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## CIVIL JUSTICE AND THE JURY

By CHARLES W. JOINER. Englewood Cliffs, N. J.: Prentice-Hall, Inc., 1962, xviii, 238 pp. \$6.95.

According to his introduction, Professor Joiner in *Civil Justice and the Jury* purports to help laymen understand and think about issues involving the trial jury—"issues with which they may soon have to grapple." Actually the import of the book is to serve as a brief for the retention—and improvement—of the civil trial jury as it today exists in United States' jurisprudence. A foreword by Chief Justice Earl Warren and a preface by Edson L. Haines, Chairman of the Continuing Education Committee, International Academy of Trial Lawyers, set the pace for the brief in pointing up the jury as an important and vital part of the function of law in resolving disputes in that it is one of the few remaining governmental activities in which the community, through jurors, participates. As will be seen, Professor Joiner admirably carries out this theme in succeeding chapters.

*Civil Justice and the Jury* is divided into two parts: the first is composed of six chapters which explain the jury as a judicial and social institution; the second is a collection of various writings from the pens of Blackstone, Alexis de Tocqueville, Choate, Holdsworth, Devlin, Sunderland, Blume and Kalven, among others, most of which are in praise of the jury as a judicial institution.

It is the first part of the book which will, perhaps, prove to be of primary interest to lawyers and law students. The first chapter, entitled "The Jury: A Judicial and Social Institution," is an expertly done summary of the ideas surrounding the theme that as a device for the resolution of disputes in a democracy the jury is an institution without parallel. One finds it exceedingly difficult to argue with the fact that nowhere does the average citizen participate so intimately in governmental affairs as when he undertakes to serve on a jury. In a day when the government is growing farther and farther away from the citizen, jury service is indeed the one area where the citizen can effectively and conclusively have his say. If this argument is convincing to laymen who read the book, and if the conviction

gained from the reading encourages the citizen not to avoid jury service when he is called, the book will be a success from this viewpoint alone. Further, it is well that this "democracy-in-action" idea is called to the attention of law teachers, law students and lawyers who often become so mired in the technicalities of juries, as they relate to procedure and trial practice courses, that the function of the institution is overlooked.

As an argument for the retention and improvement of the trial jury, the book adopts an affirmative approach. No direct attack is made on the views of Judge Jerome Frank, Raymond Moley or others in agreement with them. Rather there is one short chapter, called "A Critique of the Jury System," in which the principal criticisms of the jury are mentioned and then almost summarily dismissed. These are: arbitrariness, court congestion, expense, technical evidence and excessive errors. Many readers will find Joiner's method of handling these criticisms unsatisfactory. For example, one theme here recurring (as well as in other portions of the book) is that jury trial is the best form of trial because it is better than trial by judge alone. This is supposed to be true because judges, in hearing over and over again the same type of case, are apt to become prejudiced and because judges are so aloof and cloistered that they have lost the common touch. In all fairness it must be mentioned that Professor Joiner fails to support these assertions with any concrete evidence. In fact selections from the writings of Blume and Kalven in the second part of the book point rather dramatically to the fact that there is little, if any, difference in verdicts rendered by judges alone or by juries. And this appears to be so both as regards for whom the verdict is rendered as well as to the amount rendered when the verdict is for the plaintiff.

In addition to being supposedly superior to trial by courts alone, juries are hailed as being instruments of mercy in that they often disregard bad laws in rendering verdicts. Not only has this idea been overworked (not solely in *Civil Justice and the Jury*, but in other writings as well), it is not as an attractive a concept as it seems. In the first place it is not the function of the jury to overlook any law. Its true function is to find facts. Thus it is not admirable for juries to disregard laws they are

sworn to uphold. Doing so is a malfunction of the jury system and doubtless results in much of the criticism heard concerning the incompetence of juries. Even if it is recognized that the jury "applies" the law in the rendering of general verdicts, it is hardly an admirable function for a group of twelve or less from a small section of a state to take it upon themselves to repeal what all of the state's people, through their duly elected representatives, or through the adoption of custom and mores into the common law, have wished the law to be. True it is that mercy should temper justice. But whose mercy? What kind of mercy? The mercy of a jury in Wayne County, Michigan, is not the same mercy of a New York City jury; the mercy of a rural Oklahoma jury is not the same mercy of an Oklahoma City jury. Hence "mercy" may prove to be a source of non-uniformity which will take from the law one of its most important functions—equal treatment for all in similar situations. Of course this is not to say that mercy has no place in the administration of justice. It is to say that when mercy is needed appellate courts, legislatures, Governors and Presidents are more capable of rendering consistent, balanced mercy than are juries.

One other criticism demands to be made. In Chapter II, "Development of the Civil Jury," mention is made of the fact that in assessing the value of the civil jury reliance should be had on current attitudes, criticisms and values rather than those of hundreds of years ago. With this approach there is no argument. In fact it might have gone further in an attempt to focus on the jury as a judicial and social institution since World War II. Surely our affluent society, our expanding population, our improved transportation systems, and our ever more penetrating news media provide relevant considerations. Yet it is surprising to find nothing of the sort. On the contrary, Blackstone's eulogy of the jury, over 100 years of age, is given. Alexis de Toqueville's work was published in 1863. Joseph Choate's address was given in 1898. It is true, of course, that these writings are balanced, timewise, by selections from Devlin in 1956, from Edelstein in 1956, from Martin in 1959, and from Vanderbilt in 1956, to mention only a few. Notwithstanding, one gets the impression rather clearly that the latter-day writers have not really added anything to what was said in the last century. It is only when one gets to the excerpts

from Kalven that any modern-day attitudes are exposed and they appear still to be pretty much in inconclusive statistical form.

The purpose of the foregoing criticisms is not to suggest that Professor Joiner is blinded by glittering generalities about trial by jury. Nothing, as a matter of fact, could be further from the truth. It is in Chapter V, "Methods of Strengthening the Jury," where the idea perhaps most clearly emerges that the concept of the trial jury as an institution is ideal, but that, like any ideal, it needs to be refreshed and fortified. Here is found in thirteen pages a thoughtful, closely-knit and very clear explanation of what needs to be done in order to preserve the trial jury and with it all of the inherently democratic values it possesses. And, again, while not directly attacking any of the opponents of the jury system, current criticisms are recognized. Here, though, there is no mere summary dismissal. Rather, the positive is accentuated by constructive suggestion designed to make trial juries even more effective than they are now. These suggestions are: better original selection, screening and use of jurors is needed; more use of the pre-trial conference would be fruitful in that it would reduce the number and complexity of issues for jury trial; less than unanimous verdicts should be permitted, there being as much of a community reaction from ten as from twelve people; the number of jurors could be reduced; instructions to the jury should be put into "laymen's" language; use of special verdicts should be liberalized; lawyers and judges should be better trained; rules of evidence should be liberalized; demonstrative evidence should find wider use in jury trials; and issues could be tried separately (what is the use of consuming time on evidence of damages when the verdict is going to be for the defendant?).

While the foregoing might sound like a call for the revamping of our entire judicial system, it recognizes the fact that the jury is indeed an integral part of the entire trial process. It is certainly useless to complain of the quality of jurors when trial judges give instructions that even appellate judges find confusing. It is useless to criticize juries as outmoded when lawyers and judges constantly quarrel over what evidence may be heard. And it is time it were realized that while unanimity may be desirable, it is not exactly a fact of life.

Professor Joiner's suggestions are even more appealing when it is remembered that our jury system differs little from the system used when common law pleading was in vogue. We have improved dramatically the pleading and procedure aspects of trial work by adoption of code and rules systems. It is consistent and logical that this improvement of the administration of justice be carried through to the entire trial process. It would be foolish and inconsistent not to do so.

In summary, *Civil Justice and the Jury* is thought-provoking and realistic. It should give the layman an accurate picture of what trial by jury is all about and encourage him to participate in its functioning. It will provide an excellent summary for law students and lawyers of fact and argument in support of retention and improvement of not only a time-honored institution, but one which plays a current and functionally valuable role in the administration of the rule of law.

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