

In Defense of OUR

When verdicts are reversed on appeal, he points out, it is usually because mistakes

By Federal Judge LOUIS E. GOODMAN

The Other Side of the Question

Collier's of December 9, 1950, carried an article which provoked widespread debate in legal circles. Written by Federal Judge Jerome Frank, it sharply criticized one of our world-renowned institutions, the jury system. Judge Frank declared jurors frequently do not listen attentively to evidence, that many of them are not qualified to decide cases which involve technical problems, that they are influenced by lawyers' behavior, that they send innocent men to jail.

Judge Frank proposed abolition of juries in civil cases, or their drastic reform, and reform of criminal juries. He would require a course in the functions of the jury and psychiatric examination of all candidates. In

certain cases, he would use juries selected because of special knowledge of the fields in which the litigants were engaged. Publication of the article brought a flood of letters to Collier's from judges and lawyers, many attacking Judge Frank's viewpoint. To present the other side of the controversy, Collier's invited Judge Louis E. Goodman, U.S. District Judge of the Northern California District, to write a reply. Born in California, he was educated at the University of California and practiced law from 1914 to 1942, when he was appointed to the bench. At his request his fee for writing the article is being given to the Damon Runyon Memorial Cancer Fund. —The Editors

NEW plague is upon us here in America. The "efficiency expert" wants experts to take the place of juries in our administration of justice. He wants motorists to decide accident cases, physicians to decide malpractice cases, accountants to decide tax cases, engineers to decide engineering cases, chemists to decide chemical cases, real-estate experts to decide lease cases, and so on.

One of the exponents of this dismal philosophy is no less eminent a figure than Federal Appellate Judge Jerome Frank of New York. In Collier's of December 9, 1950, in an article entitled 'Something's Wrong with Our Jury System', he asserts in effect that jurors are incompetent, moronic, corrupt and sleepy, that they are no longer an essential part of our democratic government, and should be abolished in most cases.

The appellate judge usually has the last word. This is a most fortuitous opportunity for a trial judge to reverse the process.

Critics of our jury system, like Judge Frank, cite or write books or scenarios about cases of mistake or misfeasances committed by jurors, and then conclude that juries are not competent and should be done away with. It is true that some highly placed judges have or have had this view. But I have not heard of a competent trial judge of experience who has expressed such a

belief. It is not too difficult to understand this difference of viewpoint. High appellate judges mostly see only the written record of appealed cases. These records are cold and inanimate. From them it is almost impossible to see the picture and the story of what happens in the trial courtroom. This view is confirmed by my own experience in sitting, by assignment, in many sessions of the Court of Appeals.

The actual practical functioning of trial jurors cannot be adequately learned from appellate records or legal articles, or hearsay or from plays or moving pictures. In my opinion, it takes long-continued contact with juries in the trial court to qualify a jury critic.

It must be remembered that juries sit in trial courts and not in appellate courts. Practically, what does a lawyer or trial judge learn about juries? A trial judge sits in most courtrooms within 10 feet of the jury. The lawyers sit almost as close. What happens in a courtroom in the selection and functioning of a jury?

The judge questions those who are not excused from serving, as do the lawyers in many courts, concerning their qualifications to serve in a particular case. Day in and day out, year in and year out, the trial judge hears the views jurors may have on social or economic problems, what they think about law-enforcement

officers or taxes or insurance companies, and even judges and lawyers. And so as time passes, the judge begins to get a firsthand knowledge and understanding of the people who make up the jury panels, their likes, their dislikes, their weaknesses, their strong points, their capacity to be fair.

The judge observes the impact, upon the 12 people who sit as jurors, of the testimony of witnesses, of the attitudes and habits of lawyers. He observes that some jurors are nervous or restless and others are calm and relaxed, that some are comfortable and others uncomfortable. He learns to perceive the effect of the atmosphere of the courtroom on the jurors. The judge learns that recesses should be declared often so the jurors may not become overtired.

Questions for the Trial Judge

Even after the case has been submitted to the jury and they have retired to deliberate, the judge's contact with the jury does not end. The jurors frequently call on the judge during their deliberations. They want to know about the exhibits. They want clarification of some instruction. They want advice on the materiality or immateriality of evidence or documents or exhibits. These queries in themselves are illuminating indices of the kind of people who are on the jury. Thirty-six years of continuous jury experience, as lawyer and trial judge, have taught me and other judges like me many things about the workings of trial juries.

I wonder whether critics like Judge Frank, either as lawyers or judges, have had this kind of experience.

I hope that my friends on appellate courts, like Judge Frank, will not consider me too impudent if I say that no one is truly qualified to speak in generalities about juries unless he has actually had day-by-day contact with juries.

The critics seem to be of the opinion that jurors are not experts or specialists and that an untrained mind has no business rendering decisions. If we take Judge Frank's argument seriously, we must accept his analogy that the mind of the juror is similar to the untrained mind of a layman who might be called upon to perform a complicated surgical operation. But this analogy is fallacious. It is predicated upon the false premise that 12 people taken at random from different walks of life have no sense at all.

We use about 1,200 jurors a year in our court. Perhaps well over a million citizens serve on juries in all the courts of the United States each

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JURY SYSTEM

are made on the bench, not by the jurors. He calls the system "a symbol of freedom"

year. If we accept Judge Frank's premise, we must assume that a million American citizens doing jury service each year have no sense at all. The fact that a layman cannot perform a surgical operation does not mean he cannot decide a question of fact, that he cannot use his common sense and decide who is telling the truth.

Judge Frank makes the bald statement that in "many" civil trials the jury decides for one side or the other on the flip of a coin. I am curious as to how and where such evidence was obtained. In 36 years, no such case has come to my attention. Judges and lawyers to whom I have talked have had no such knowledge. I have read or heard of such cases, though no proof has to my knowledge been offered, and there may well have been such instances, but the sweeping statement that this happens in "many" cases does not appear to be justified without having the kind of evidence upon which both trial and appellate judges should act.

Judge Frank also says that juries "frequently" pay no heed to what the judge tells them to do. I believe that this does happen in a few cases, but I venture to be skeptical as to whether or not there is any basis in fact for the flat statement that juries frequently follow such a course.

Of course, as Judge Frank says, it sometimes happens that juries have convicted innocent people. Books like *Convicting the Innocent* make good popular reading. They have great human interest. *Causes célèbres* result in great crusades. The dramas involved reach the playhouse and the screen. But such cases do not prove we are engaged in the daily enterprise of convicting innocent people.

Bad Decisions Can Be Corrected

All this sort of argument, and the citing of picturesque instances, proves is that human beings make mistakes. In equally important issues of life and death and in civil and property-right matters, judges make mistakes. If the trial judge makes a mistake, the appellate judges can correct the mistake and reverse the judgment. Sometimes, if the question is important enough, the Supreme Court may intercede and make its own decision.

It must not be overlooked that the verdict of the jury is not final. It may be reviewed by the trial judge; it can be set aside by him. In like manner it can be reviewed and set aside by the higher court. This is part and parcel of the system of checks and balances which is inherent in our constitutional form of government. It

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WAGON WEYMOUTH

Judge Louis E. Goodman

applies to jurors just as much as it applies to the executive, administrative or legislative departments. No judge of integrity or conscience will let an unjust verdict stand.

The mistakes the jurors may make are in no different category than mistakes that may be made by the legislators, executives or administrators or professional men or organizations which, equally with juries, may vitally affect the life and security of the individual citizen.

Thousands of criminal jury cases are tried every year in the United States. Since they are decided by human beings, we should expect some mistakes.

Judge Frank makes the comment, "I've often seen jurors actually sleep when some important witness was testifying." That means, I take it, that it was almost a regular event in whatever cases Judge Frank participated, in a trial court, for a juror to fall asleep while important witnesses were testifying. I have never seen this occur. I have observed, on rare occasions, some juror fall asleep during the course of a long routine presentation or because of a hot, humid courtroom atmosphere.

Again, I wonder whether this statement is based upon actual investigation or whether it was made for dramatic value. I seem to remember that on one or two occasions, when I was practicing, an appellate judge nodded and ap-

peared to be in the arms of Morpheus during a long and extended argument. It would hardly follow from this that the institution of appellate judges should be abolished.

The critics, like Judge Frank, say that only experts in a particular field can do justice.

Is there any reasonable certainty of accomplishing justice by having experts rather than juries pass judgment in the ordinary civil disputes? My experience leads me to the conclusion that we would get much less justice.

M.D.s Disagreed on X-Ray Plate

I have seen experts disputing with one another on the witness stand in innumerable cases. In one case, an X-ray plate was submitted in evidence. There was a line on it. One expert doctor said emphatically it was a fracture. On the other side, a doctor said with equal emphasis that it was a blemish in the film. Picture the chaos if such experts, each with perhaps a different background, experience and viewpoint, were to pass judgment! At least a jury has the opportunity of determining which doctor's testimony is the more credible.

Medical experts are influenced by partisanship, just as are litigants. Not so long ago a physician appeared in several cases on behalf of employees who had been injured in railroad accidents. His testimony was always most favorable to the employees. Some six months later, I was astonished to find this same physician testifying on behalf of a railroad and on this occasion his testimony was most unfavorable to the employees.

I recall a case in which the government was condemning some land which the owner claimed to be very valuable because of alleged oil and gas deposits. An expert testified the property had a fabulous value. In my opinion he was grossly and fraudulently overvaluing the property, and I so told the jury. Individual members of the jury told me later that they had the same opinion. Is it wise to allow experts, who may have preconceived notions, by reason of prior associations and affiliations, to pass final judgment?

In one case, the court was called upon to determine the value of legal services rendered by an attorney for a client who had sued a corporation. Another attorney, whose background was that of counsel for big corporations, testified as an expert and he greatly minimized the value of the legal services rendered. Would he have given the same kind (Continued on page 45)



U.S. AIR FORCE PHOTO

American Sabres whisk past Japan's Mount Fuji, en route to a Korean base. Limited in range, U.S. planes operate close to front



ACME

Back from battle over the Yalu River, a formation of F-86s peels off to land while ground crews get others ready for combat. Korean air battles all occur near Communists' "privileged sanctuary" across Yalu



ACME

Talking shop. L. to r., Navy Lt. Cmdr. Paul Pugh, who flies with Air Force, has downed two MIGs; Lt. Col. Glenn T. Eagleston; Col. John Meyer; Lt. Col. Bruce Hinton; Capt. J. O. Roberts; Lt. J. M. Odiorne

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