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Judicial Control Over Questionable Jury Verdicts: Historical Underpinnings of an Age-Old Practice

PUBLIC CONFIDENCE IN our jury system has waned in the recent past. High-profile jury verdicts in the McDonald's spilled coffee case (an award of $2.9 million in punitive damages, reduced by the court to $480,000),[1] the BMW "failure to disclose repainted new car" case (an award of $4 million in punitive damages, reduced by the court to $56,000),[2] the Phillip Morris tobacco case (a $28 billion award, reduced by the court to $28 million),[3] and the O.J. Simpson cases (inconsistent criminal and civil verdicts)[4] have not improved the public's perception of our justice system.

Throughout history, trial by jury has occasionally resulted in perceived injustices. As the Supreme Court noted in *Duncan v. Louisiana*, "the virtues and defects of the jury system have been hotly debated for a long time, and hotly debated today, without significant change in the lines of argument."[5] Indeed, more than a century ago, one author noted that "still in these days of progress and experiment ... it is quite the fashion to speak of jury trial as something that has outlived its usefulness ... considering the kind of jury trials we sometimes have in the United States, it must be admitted that this criticism is not without foundation."[6] Nonetheless, the history of our jury system, as well as the courts' power to curb perceived abuses, reveals that we indeed have one of the fairest judicial systems in the world.

Origins of the Jury Trial

Although the promulgation of Rule 50 of the Federal Rules of Civil Procedure in 1937 formalized the federal courts' power to direct a verdict, judicial control over juries existed long before enactment of Rule 50. The historical origin of the jury trial provides meaningful insight into the importance of the judiciary's control over jury verdicts. Trial by jury originated in ancient Athens, was brought to England by the Normans in 1066, and began to replace trial by ordeal[7] during the reign of King Henry II (1154–1189).[8] King John also bestowed this right in Chapter 39 of the Magna Carta in 1215, which provides that "No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land" (although some historians now question whether the reference to one's "peers" refers to a jury[9]).

In medieval England, jurors performed a function that was different from the one that present-day juries perform. Members of the early juries were selected not because of their ignorance about the dispute at hand but because of their knowledge of it. They were not impartial arbiters of the facts but, rather, individuals from the "vicinage" — meaning from the neighborhood or county — who possessed knowledge about the parties and the matters in dispute.[10]

In his successful bid to keep the vicinage requirement out of the Seventh Amendment, James Madison queried his compatriots: "It was objected yesterday that there was no provision for a jury from the 'vicinage.' If it could have been done with safety, it would not have been opposed. It might so happen that a trial would be impracticable in the county. Suppose a rebellion in a whole district, would it not be impossible to get a jury?"[11] While Article III of the U.S. Constitution did provide for a venue, it did not impose the explicit residence of the juror that is associated with the concept of vicinage.[12] Later, jurors became factfinders by visiting their neighbors' homes to ascertain the facts.[13] As Sir Edward Coke correctly observed, it indeed "was trial by jury, not by witnesses."[14] Thereafter, in an effort to ensure the reliability of witness testimony, during trials fact witnesses were required to testify under oath at trial, and hearsay rules were adopted.[15]

Putting the Jury on Trial

"At first, the jury was no more regarded as 'rational' than the ordeals which it replaced, and just as one did not question the judgments of God as shown by the ordeal, so the verdict of a jury was equally inscrutable. It is but slowly that the jury was rationalized and regarded as a judicial body."[16]

In early England, questionable jury verdicts were challenged by the process of "attaint," wherein a 24-

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man jury, usually consisting of knights or other prominent citizens, would be convened to put the first jury on trial for perjury.[17] If the verdict was found to be false, the jurors would be punished by imprisonment, confiscation of goods, the brunt of a declaration that "they themselves forever thence forward be esteemed in the eye of the law infamous," or some combination of these punishments. For example, the London jury that acquitted Sir Nicholas Throckmorton of high treason, even though his guilt had been proved beyond the slightest question, was called into the Court of Star Chamber in October of 1544. The Star Chamber (so called because of the stars painted on the ceiling of the chamber in which proceedings were held) consisted of the king's advisory body, which had powers to torture and imprison accused jurors and often used these powers as political weapons. Eight of the jurors were fined and remanded to prison to "dwell there until further order[s] were taken for their punishment." The other four jurors were released after confessing that they had not considered the truth of the matter.

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The barbarity of this practice finally led to its demise. The power of courts to punish jurors for corrupt or incorrect verdicts was repudiated in the 1670 matter of *Bushell Case*,[18] jurors who had acquitted William Penn of unlawful assembly were acquitted. However, as noted by Holdsworth, it was still obvious that "some regular method of controlling the verdicts of juries was essential to the proper working of the jury system."[19]

Judicial Control Emerges

As juries came to have nearly "indisputable authority," judges began to exercise greater control over these panels.[20] The first known assumption of power by a judge to set aside a jury verdict and grant a new trial without any statutory authority was in the 1655 English case of *Wood v. Gunston*, in which, in the judge's opinion, the amount of the verdict was excessive.[21] When the Colonists came to America, they brought the jury trial with them. The Colonists considered a jury trial to be their "inherent right," and they deeply resented any interference by the Crown. A jury trial was considered essential for true freedom and ordered liberty — a tool used to protect individuals against anarchy and tyranny.[22] The First Congress of the American Colonies (the Stamp Act Congress) adopted resolutions on Oct. 19, 1765, declaring that "[t]rial by jury is the inherent and invaluable right of every British subject in these colonies."[23]

When the First Continental Congress convened in 1774, it strenuously objected to trials before judges who were dependent on the Crown, declaring that "the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."[24] This sentiment is understandable, of course, because "[p]ut simply, the right to be tried by a jury of one's peers finally exacted from the king would be meaningless if the king's judges could call the turn."[25]

When our country's founders signed the Declaration of Independence in 1776, they solemnly objected to the king's making "Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries," and to the king's "depriving us in many cases, of the benefits of Trial by Jury." By the time Hamilton scribed The Federalist in 1787, the practice of "attaint" had all but disappeared; as Hamilton noted, judicial control of the jury function rested solely in the court's power to order a new trial.[26] When the U.S. Constitution was signed on Sept. 7, 1787, the document did not include a right to trial by jury. Of course, this right was finally afforded by the framers of the Fifth, Sixth, and Seventh Amendments, contained in the Bill of Rights in 1791, which applies to the states — all of which now have their own state constitutional right to trial by jury — via the due process clause of the Fourteenth Amendment.

Even as late as 1835, however, the court's ability to interfere with a jury verdict was still severely limited.[27] Our Supreme Court finally sanctified the directed verdict in the 1850 case of *Parks v. Ross*.[28] The Court reasoned that a directed verdict would serve the same purpose as the "demurrer to the evidence" and that, because there was "no evidence whatever" on the critical issue, the directed verdict mechanism should be approved.[29]

During the Civil War (1860–65), the standard for a directed verdict changed slightly, providing that if the evidence "*tended* to prove the position" of the party, the case should be decided by the jury.[30] However, even upon general acceptance of the "directed verdict" device, the rule requiring "substantial evidence" to get the case before a jury did not replace the "any evidence" rule until 1871, when the Supreme Court announced that merely "some" evidence was not enough to present the case to the jury.[31]

The "Directed Verdict" Comes of Age

Although it was commonplace in 18th-century England for the courts to actually direct the jury on what verdict should be rendered, this practice was essentially abolished in the United States with the passage of the Seventh Amendment's guarantee of trial by jury. It was not until the Supreme Court's 1937 adoption of Rule 50 that the power of judges to direct verdicts was codified as part of our legal system. As Justice John M. Harlan noted in *Duncan v. Louisiana*, "[u]ntrained jurors are presumably less adept at reaching accurate conclusions of fact than judges, particularly if the issues are many or complex."[32]

Rule 50 provides a mechanism for the judge to direct a verdict before the case is submitted to the jury or to disregard the jury's verdict if the claimant's case is not supported by the evidence. Rule 50 remained unchanged for 26 years, from 1937 until 1963, when subdivisions (c) and (d) were added to clarify the procedural options available upon the court's granting or denial of the motion.[33] The rules related to directed verdicts again remained unchanged for 28 years (except for the elimination of gender-specific "his/him" language in 1987). Significant revisions were made in 1991, including the replacement of the terms "directed verdict" and "judgment notwithstanding the verdict" with the single phrase "judgment as a matter of law" to more accurately describe the procedure involved and the true relationship between the judge and the jury.

Controversy regarding the propriety of courts' disregarding of jury verdicts continued until 1943, when the U.S. Supreme Court upheld the constitutionality of Rule 50 (despite a vigorous dissent by Justice Black).[34] It is now clear that the "right of trial by jury" guaranteed by the Seventh Amendment does not necessarily include a right to a jury's *verdict*.[35]

Today, the jury's power to decide the fate of individuals, from the famous to the infamous, and of businesses, from the corner store to the behemoth corporation, is tempered by the court's overriding of Rule 50 power to correct fundamentally unjust verdicts. This balance has enabled one of the most successful mechanisms invented for the public good — the jury trial — to survive the test of time. **TFL**

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Endnotes

[1] *Tort Reform's Promise, Peril*, WASH. POST, Sept. 14, 1995, at A1.

[2] *BMW of North America Inc. v. Gore*, 517 U.S. 559 (1996).

[3] *Tobacco Smoker Agrees to Accept Reduced Damage Award*, L.A. TIMES, Dec. 25, 2002.

[4] Gale Holland, *Jurors Detail the Thinking That Went into Their Ruling*, USA TODAY, Feb. 11, 1997, at A1.

[5] 391 U.S. 145, 186–87 (1968).

[6] Deady, *Trial by Jury*, 17 AM. L. REV. 398, 399–400 (1883).

[7] Trial by ordeal (usually by water or fire) was a quasi-judicial practice involving the determination of guilt or innocence by subjecting the accused to a painful task. Completion of the task without injury or the quick healing of any injuries incurred reflected the individual's innocence. Ordeal by water often resulted in the accused being bound and thrown into a river. An innocent person would sink, whereas a guilty person would float. Ordeal by fire often involved walking nine paces with a red-hot iron bar held in both hands, thus the origin of the phrase "the whole nine yards." The extent of any injuries would reflect the extent of any guilt. Trial by ordeal was officially abolished in England in 1220, during the reign of Henry III. Vestiges of this ritual continued, however, until the persecution of those accused of practicing witchcraft ran its course during the late 17th century. *Trial by Ordeal*, at www.nationmaster.com/encyclopedia/trial-by-ordeal (April 22, 2004).

[8] J.B. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249 (1892).

[9] *Williams v. Florida*, 399 U.S. 78, 88 n.27 (1970).

[10] 1 Holdsworth, A HISTORY OF ENGLISH LAW 317 (3d ed. 1922).

[11] 3 M. Farrand, RECORDS OF THE FEDERAL CONVENTION 332 (1911).

[12] *Williams v. Florida*, 399 U.S. 78, 93 n.35 (1970).

[13] C. McCormick, HANDBOOK OF THE LAW OF EVIDENCE § 244 (E. Clery 2d ed. 1972).

[14] Plucknett, A CONCISE HISTORY OF THE COMMON LAW 386 (5th ed. 1956).

[15] *United States v. Detrich*, 865 F.2d 17, 20 (2nd Cir. 1988).

[16] *United States v. Maybury*, 274 F.2d 899, 902–903 (2nd Cir. 1960).

[17] Plucknett, note 14, at 131 (5th ed. 1956).

[18] 124 Eng. Rep. 1006 (C.P. 1670).

[19] Holdsworth, note 10, at 225, 346.

[20] Plucknett, note 14, at 120–24.

[21] 82 Eng. Rep. 864, 867 (1655).

[22] *United States v. Dougherty*, 473 F.2d 1113, 1137 (C.A.D.C. 1972).

[23] R. Perry, ed., SOURCES OF OUR LIBERTIES 270 (1959).

[24] *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968).

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[25]*United States v. Hyde*, 448 F.2d 815, 853 (5th Cir. 1971) (Rives, J., dissenting) (citing *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670)).

[26]*Galloway v. United States*, 319 U.S. 372, 399–400 (1943) (Black, J., dissenting).

[27]*Greenleaf v. Birth*, 9 Pet. 292, 299, 9 L. Ed. 132 (1835) ("[w]here there is no evidence tending to prove a particular fact, the court(s) are bound so to instruct the jury, when requested; but they cannot legally give any instruction which shall take from the jury the right of weighing the evidence in determining what effect it shall have").

[28]11 How. 362, 13 L. Ed. 730 (1850).

[29]*Id.* at 374.

[30]*Drakely v. Gregg*, 8 Wall. 242, 268, 19 L. Ed. 409 (1868).

[31]*Schuylkill and Dauphin Improvement Co. v. Munson*, 14 Wall. 442, 447–48, 20 L. Ed. 867 (1871).

[32]391 U.S. 145, 188–89 (1968).

[33]MOORE'S FEDERAL PRACTICE § 50 App. 01–27 (3d ed. 2003).

[34]*Galloway v. United States*, 319 U.S. 372 (1943).

[35]W. Blume, *Origin and Development of the Directed Verdict*, 48 MICH. L. REV. 555, 574 (1950).