

## BOOK REVIEW

*In the Hands of the People: The Trial Jury's Origins, Triumphs, Troubles, and Future in American Democracy*  
by William L. Dwyer<sup>†</sup>

Philip A. Talmadge\*

I recommend *In The Hands of the People* to every high school or college civics instructor as a basic text on America's jury system. Not only do I echo Judge Dwyer's celebration of jurors and America's jury system, but I also share his concerns about how the place of juries in our democratic system is deteriorating.

Judge Dwyer traces the history of the jury system in Anglo-American legal history from its earliest inception to its present status in the American justice system. Most American citizens have no conception of how the jury system came to be; extremely valuable, this book expounds upon why the jury system is such an important institution in protecting our civil liberties. To an extent, many Americans believe the jury system has always been with us, coming neatly packaged and understood at the time of the adoption of the United States Constitution.

Throughout history, Judge Dwyer notes, there have been numerous alternative mechanisms generally, and in Anglo-American history in particular, for resolving both civil and criminal disputes. The jury is a significant bulwark against abusive state power in criminal prosecutions and a powerful voice for common sense in the handling of civil disputes. Twelve randomly selected citizens are entrusted to decide the fate of individuals and great corporate enterprises alike.

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<sup>†</sup> This book review was written before Judge Dwyer's untimely death on February 12, 2002. I am an unabashed fan of Judge Dwyer's work as a lawyer, a judge, and an author. See, e.g., WILLIAM L. DWYER, *THE GOLDMARK CASE: AN AMERICAN LIBEL TRIAL* (1984). William Dwyer was an extraordinary attorney, judge, and author—a Renaissance man. He will be missed.

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Despite rhetoric about the jury system run amok, what most trial judges and trial lawyers understand is that juries are essentially conservative. Most defense lawyers in civil cases routinely demand juries. In most instances, juries convict criminal defendants who have committed serious crimes. But most good trial lawyers and trial judges also know that, if juries are enflamed by evidence of abuse of power or by deliberate inattention to life, liberty, or property by civil defendants, the wrath of juries can be fearful.

After exploring the history of the jury system in Great Britain and the United States, Judge Dwyer points out that the modern American jury has been severely criticized. Much of that criticism is unjustly directed at the institution of the jury rather than circumstances beyond the control of jurors themselves. Specifically, such problems as the representative nature of juries, the failure of large numbers of people to serve on juries, and the sense that juries are somehow inattentive to major civil and criminal matters are not intrinsic problems of jurors, but of the justice system itself.

To improve the jury process, Dwyer suggests solid, simple measures: (1) ensuring better pay for jurors; (2) limiting the duration of jury service; (3) allowing jurors to submit questions to the trial judge for witnesses; (4) allowing jurors to take notes; and (5) limiting the number of preemptory challenges to jurors. All of these are common sense measures that deserve public support.

Washington has taken some of these steps to improve its jury system. While serving in the legislature, I was one of the early proponents of expanding the list for jury service to include all licensed drivers, as well as registered voters. This combination of the drivers' license list with the jury list has vastly expanded the number of people from whom courts can draw for juries, making our juries far more representative of society in this state than is true in other jurisdictions.<sup>1</sup>

In my final year on the Washington Supreme Court, I dedicated my service to examining Washington's court system with an eye toward specific recommendations about how to improve the efficiency and effectiveness of Washington's courts. This effort included looking at how juries perform.

Judge Dwyer identifies a significant deterrent to jury service in Washington State: the lack of appropriate compensation for jurors. Washington State compensates jurors ten dollars per day.<sup>2</sup> This is outrageously low. The State should pay jurors no less than Washing-

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1. See, e.g., WASH. REV. CODE §§ 2.36.050-.065 (2000).

2. See WASH. REV. CODE § 2.36.150 (2000) (allows local jurisdictions to increase the rate of juror compensation to a maximum of twenty-five dollars, but no jurisdiction has done so).

ton's minimum wage for serving on a jury. Moreover, jury compensation is an issue of statewide concern, and the state general fund, rather than city or county budgets, should pay for this expense. At the same time, however, there should be a funding source for the increased costs associated with compensating jurors more. Funding sources such as increasing the fee for a jury demand<sup>3</sup> or slightly increasing the business and occupation taxes on the practice of law are viable alternatives.

Washington State continues to have the unenviable rate of about twenty percent of the persons summoned to jury duty actually appearing.<sup>4</sup> While increasing compensation would significantly boost jury service, if public officials periodically honored jurors for jury service, and the State occasionally sanctioned people who refuse jury service, such actions might highlight the importance of jury service in our society.

When I was called to jury service while I was a member of the Washington Supreme Court in 1998, I learned firsthand how jury service can be a problem for many citizens. We need to honor and regard jurors for their service. We should do everything that we can to make jury service a pleasant and significant experience for jurors. We should avoid everything that makes jury service mind-numbing. With this thought in mind, we should allow jurors to take notes as the trial proceeds and to ask questions of witnesses through the judge.

As Judge Dwyer points out in his book, jurors are a vital to the trial process. First, lawyers should not subject jurors to endless voir dire, inquiring into every aspect of their lives and thought processes. Second, state and local court rules should impose time limitations on voir dire.<sup>5</sup> Third, the one trial per juror rule is a good way to encourage jury service without making it an onerous experience for most jurors. Last, jurors should not be required to serve more than once per year at any level of courts.

As a final matter, there is one area where I disagree with Judge Dwyer about the role of juries in American society. Juries are vital. We should not limit the discretion of juries in fact finding or in determining damages. This is a constitutional imperative in Washington.<sup>6</sup> However, there are issues not appropriately within the province

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3. See WASH. REV. CODE § 36.18.016(3) (Supp. 2001) (allows for a jury demand fee of \$125 for jury of six, \$250 for jury of twelve).

4. The Office of the Administrator of the Courts informed the author that a variety of reasons explain why people do not respond to the jury call: (1) the summons was undeliverable; (2) the person does not respond or fails to show; (3) the person is unqualified; or (4) the person is excused or otherwise told not to appear.

5. WASH. CIV. RULE 47; WASH. CRIM. RULE 6.4(b) (these rules invest substantial discretion in trial judges regarding voir dire); see also WASH. REV. CODE § 4.44.120 (2000).

6. See *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711 (1989).

of the jury. These are not issues beyond the decision making power of juries because, as Judge Dwyer correctly suggests, juries produce appropriate verdicts even in complex cases.<sup>7</sup>

I am more concerned with the use of the legal system itself to resolve problems not suited to judicial resolution. Increasingly, people turn to the legal system as opposed to the political system to resolve political issues. A single jury in a single jurisdiction, for example, can decide that foster care should be more readily funded in the entire state of Washington.<sup>8</sup> But the real question is: should this type of issue be entrusted to the legal system itself?<sup>9</sup> It is not that the jury is incapable of deciding the issue, it is that the legal system itself should not be the place where such decisions are made.<sup>10</sup>

The judiciary should work with the legislature to examine those matters handled in the courts that should not be resolved there. For example, most probate issues, name changes, and truancy enforcement might not belong in the courts. The jury system and the legal system for that matter should focus on the most vital issues for decision making.

*In the Hands of the People* is an extremely valuable tool for those who are committed to the jury system in modern American society. It is a "must read" for high school and college students attempting to understand the American justice system. It is an excellent book to remind law students, lawyers, and judges of our roots and of why the justice system and the jury are so fundamentally important in our constitutional structure.

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7. As Judge Dwyer notes, greater use of court experts, rather than partisan experts, could aid jurors in complex civil and criminal cases. This would greatly aid juries in coming to proper conclusions even in factually difficult cases.

8. In Whatcom County, Washington, a jury ruled that the State provided insufficient funds to the foster care system for abused and neglected children. See Alex Fryer, *Jurors Rule DSHS Violated Rights of Kids*, SEATTLE TIMES, Dec. 5, 2001, available at <http://archives.seattletimes.nwsourc.com/cgi-bin/texis.cgi/web/vortex/display?slug=fostercare05m&date=20011205>.

9. It is very easy to take a single issue in isolation from all other issues and present a case for a jury to say that more funding should occur. However, that jury does not have the benefit of the entire array of issues that face the political process when budget makers get together to write a budget. Certainly, many would argue for additional funding for K-12 education, higher education, natural resources, or human services. If a jury were allowed in each instance to decide whether the budget for each of these needed programs was sufficient, they might answer no. However, only a single entity writing the entire budget can determine the level of funding that is available and how to prioritize the various good programs within that level of available funding.

10. See Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U.L. REV. 695 (1999).