

CANARY IN THE COAL MINE: THE IMPORTANCE OF THE TRIAL JURY

Dedication

Hon. Barbara Jacobs Rothstein & Fredric C. Tausend***

If the two of us, a trial judge and a trial lawyer, were somehow able to ask Judge William L. Dwyer what he would have us do to pay tribute to his life and to continue his unfinished work, his response would likely be the following: “Do all that you can to strengthen our society’s commitment to the jury trial, especially the oft-challenged civil trial, and to advance the indispensable role the American trial jury has played, and must continue to play, in the preservation of liberty and the pursuit of justice in this land.”

Bill Dwyer had a passion for reading, analytical and creative thinking, and expressing his thoughts in clear, cogent, and convincing English. This is beautifully exemplified in his writing, especially in his book, *In the Hands of the People*.¹ The subtitle—*The Trial Jury’s Origins, Triumphs, Troubles and Future in American Democracy*—

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1. WILLIAM L. DWYER, *IN THE HANDS OF THE PEOPLE: THE TRIAL JURY’S ORIGINS, TRIUMPHS, TROUBLES, AND FUTURE IN AMERICAN DEMOCRACY* (2002).

indicates the scope of the work; the thirty-three pages of endnotes sketch “the vast landscape glimpsed in this book.” Bill was justifiably proud of those notes and he beamed whenever he was told that someone had actually read them. Do yourself a favor—read the book notes and all before, after, or while you peruse this Symposium of the *Seattle University Law Review*.

Trial Judge (TJ): Bill truly believed in the title of his book, “In the Hands of the People.” When the publisher sent him a copy of the proposed dust jacket cover, then an austere illustration of the marble Doric columns characteristic of many American courthouses, Bill rejected it emphatically, insisting instead on a portion of Thomas Hart Benton’s painting entitled, *Trial by Jury*, depicting the jury box during trial by a jury of men and women, black and white, old and young, listening intently to the evidence.

Trial Lawyer (TL): Bill’s hard-headed optimism about the future never failed. On more than one occasion when he was discussing his draft with the several judges, lawyers, professors, and professional writers whom he asked to review the prepublication manuscript, some of us would focus on the adequacy of the trial jury as we know it today to address the challenges our nation faces in the twenty-first century, the many thoughtful critics of the civil jury in particular, and the campaign to follow England in abolishing the jury trial in almost all civil trials. Whenever we expressed pessimism about the jury’s future, Bill would interrupt our doubts with his special brand of good cheer, “Yes, it’s a difficult and sometimes discouraging story, but don’t worry, it has a happy ending.”

TJ: Bill’s experience as a federal judge only reinforced his faith in the jury as the ultimate arbiter of disputes. Whenever any judge expressed doubts about a jury’s ability to comprehend a particular knotty set of facts or jury instructions, Bill would always say, “wait and see, they’ll do the right thing.” Invariably, he was right. He saw jurors as citizens who earnestly and seriously worked at arriving at the right verdict.

TL: Bill was always available to me, and no doubt to other trial lawyers, as a kind of twelve-step recovery program when we were upset by a particular jury that caused us to question the whole process. For me, these moments usually came when the jury was out for several days, or even over a week, especially when the trial judge called the

lawyers to read and discuss the latest jury question. Bill would inevitably cause my despair first to subside and then to vanish with a fifteen to twenty-minute phone call. His good humor and great sense kept me on target whether my clients won, lost, or broke even.

Both: Chapter VI, *The Rules of the Game*, tells the gripping story of the Salem Witch trials and then addresses what happened in America in the 1950's during the Red Scare and the heyday of what we now refer to eponymously as "McCarthyism." Written before September 11, 2001, Judge Dwyer's prophetic words are exactly what we need to keep in mind during the war on terrorism. Judge Dwyer reminds us of the importance of constitutional protections and procedural safeguards of our cherished liberty:

Now that the Red Scare and the Cold War are both over, could we again relapse into procedural lawlessness? To recognize that we could is the first step to preventing that from happening. "Liberty lies in the hearts of men and woman," said Judge Learned Hand. "When it dies there, no constitution, no law, no court can save it." But laws and courts can shelter the flame when it flickers in a wind of fear and hatred. The rules of the game—the rules of evidence and the protections afforded to criminal defendants—are not technicalities; they are bylaws of freedom.²

And as Judge Dwyer knew, the most dependable guardian of our liberties continues to be the trial jury. In the conclusion to his Chapter, *Is the Jury Up to the Job?*, Judge Dwyer trenchantly observes that, "I cannot help thinking that for us [in America] the jury is the canary in the mine shaft; if it goes, if our people lose their inherited right to do justice in court, other democratic institutions will lose breath too. We don't need to let that happen."³

In recognition of the crucial role that the trial jury can play in these turbulent times, this Symposium of the *Seattle University Law Review* is dedicated to Judge William L. Dwyer and his vision of the jury as the guardian of our liberties.

2. *Id.* at 109–110.

3. *Id.* at 153.