The Jury: Defender Or Oppressor

By Michael E. Coughlin

Every year the American Bar Association rolls out its considerable public relations machine to pay homage to "Law Day." In unison judges, lawyers, police officers, politicians and others of their kind, call the public to worship "the rule of law and not of men."

A whole litany of benefits are said to spring from the American system of law: Law brings certainty to social life; it provides a set of common rules everyone can understand and follow; it punishes the malefactor; and it gives the law-abiding freedom to do whatever they want that is not illegal.

It sounds so alluring. "The rule of law and not of men." So wholesome. So safe. So American. No dictator here. No Gestapo. No police state. Just laws that are written by the people's legislatures and enforced by the people's judiciary. So reassuring.

So deadly.

Americans haven't always accepted this myth. Once there was a time when they possessed a deep-rooted distrust of the legal fraternity. They wouldn't let the legal community out of their sight. What's more, they wouldn't let the legal community out of their grasp. They knew too well what havoc the legal-types could play in the name of the law if left to their own ways.

They knew they had to control the legal system. They had to

have a method for returning ultimate power over the law and over the judiciary into their own hands. Early in the life of the American colonies the colonists found that way.

The key to their control was the jury system. The jury, as a panel of 12 randomly selected representatives of the community, exercised ultimate jurisdiction over the law through their willingness or refusal to enforce that law.

The jury had been transported to the colonies from England, and, as in England, colonial juries proved a thorn in the side of the king and his agents. The American jury, however, in time assumed even more power than did its English counterpart. Colonists took and refined the jury, expanded its powers and, ultimately, waged a revolution in part to protect that jury system.

Many since have forgotten the important role the jury played in early American history, but even more important for us today, many overlook the power the jury still has to protect and secure our freedoms.

If we are ever to rekindle interest in trial by jury, people once again must understand the pivotal role the jury can play in the judicial system. Much to the credit of libertarians, it's been libertarians more than any others who have defended the concept of an active, progressive jury system. Libertarians haven't been alone in this struggle. They've found allies in political conservatives, militant Blacks, anti-war activists and an array of others who realize that they need some way to protect themselves from the government and the "law."

But libertarians have stood alone among all these in the consistency with which they have integrated the jury system into their political philosophy. In the writings of 19th century libertarians we find some of the most profound analysis of the role juries can and should play in the workings of a free society.

Here we shall discuss the jury question, particularly as it was approached by libertarians in the 1800s. We shall focus on the monumental work on the jury which was written by Lysander Spooner and on the insights into trial by jury that were offered by a host of writers in **Liberty.** We'll conclude with a brief review of the issue as it exists today.

In the main, libertarians have seen the jury as a positive institution. It's been hailed by many of them as the "palladium of liberty," and these people have gone to great length to persuade the

public that it ought to use the jury system to protect itself from the state.

However, not all libertarians have agreed on this issue. Some among them have had quite an opposite reaction to the jury. For one of these, the jury was a form of "thug tyranny" that would breed chaos, pitting race against race and social class against social class, ultimately leading to repression.

This apparent Dr. Jeckel and Mr. Hyde relationship finds eloquent expression in the pages of **Liberty.** We hope to capture some of the flavor of this discussion, but before beginning let's note that this.is not an academic question, an issue meant to fascinate only the history buff.

It's not a matter of theoretical speculation that juries can affect state actions, it's a matter of historical fact. For instance:

• In 1670 an English jury led by the famed Edward Bushell refused to accept a judge's demands to find the accused guilty. For their obstinance the jurors themselves were imprisoned. Because the jurors had the courage to defy the court, they created a political issue which eventually was settled by England's high court when the judges there ruled that juries must be free to reach verdicts according to their own reason and conscience, and that they must not be punished for their verdicts, no matter how repugnant they are to the court.

• During the 19th century in England there were some 230 capital crimes, that is crimes which would result in capital punishment for the convicted. Because juries continually refused to convict many of the people charged with capital crimes, believing the punishment was far out of proportion to the crime itself, Parliament eventually was forced to reduce the number of capital crimes in England. Today you can count that number on one hand. Juries, not judges, not politicians, not lawyers, brought a much needed temperance to the law.

• In pre-revolutionary America, colonial juries balked at the King's attempts to force on the colonies laws and taxes which the colonists didn't want. They, too, often refused to convict and the King was forced into trying to side-step juries by taking certain cases out of the hands of colonial courts and placing them in his special Admiralty courts. A reading of the Declaration of Independence will confirm that the crown's attempts to tamper with the jury system was one of the reasons which brought about the

revolution.

- One of the early landmark free press cases in America took place in 1735. John Peter Zenger, a printer, had said some unwelcome things about the governor of New York and had been hauled into court on charges of libel. The judge directed the jury to take the law on the issue from the court, but the defense attorney argued to the contrary. The jury agreed with the defense and ignored the court's instructions in returning its not guilty verdict.

These examples could be multiplied manyfold, but they are sufficient to show that juries possess a very real power to protect and secure liberties. They can be a last line of defense between the people and the state.

But they can be this only when they truly represent the full community and only when they have sufficient power and the willingness to use that power to establish a system of genuine justice within the community. When do they represent the full community? What powers do juries need? What safeguards need to be built into the juries themselves to protect the community against any wrongdoing on their part? These questions and more were among the many that Lysander Spooner wrote about in fine detail in his monumental **Trial by Jury.**

Lysander Spooner, a Massachusetts lawyer and a prominent libertarian figure of the 19th century, was among the first American libertarians to raise warning flags about the attacks being made against the jury system. Writing in 1852, almost 30 years before **Liberty** started, Spooner penned what is perhaps his most important work of political philosophy, **Trial by Jury.** In this treatise he thoroughly studies the origin and development of trial by jury. He analyzes the functions and responsibilities of juries and shows how courts have attempted to restrict traditional jury powers.

At the time he wrote **Trial by Jury** some notable historical events were taking place that set the backdrop for his writing the book.

One of these was the slavery issue. Two years before issuing **Trial by Jury,** Spooner had written a **Defense, for Fugitive Slaves** in which he argued that juries were not bound to uphold the fugitive slave law. Northern juries frequently followed Spooner's advice, but the central government persisted in ignoring northern sentiment over the issue and in so doing helped bring the nation to a disastrous civil war.

Two other issues which must have weighed heavily in Spooner's decision to write the book involve, 1) a political battle which was being waged in his home state and, 2) a judicial struggle to dominate the jury, a struggle which had long-term implications for the development of the American court system.

In the early 1850s Massachusetts was debating whether it should call a constitutional convention. One of the issues which had led to this debate and, ultimately, to the calling of that convention in 1853, was a ruling by Massachusetts Chief Justice Shaw that juries were not free to decide issues of law, that is, they were not at liberty to determine whether they felt laws were just or should be enforced. The sole function of juries, he said, was to decide questions of fact, that is, did the accused do what he or she was charged with having done. Shaw's ruling flew in the face of earlier, well-established Massachusetts legal practice. The 1845 decision sparked a great deal of resentment among a broad range of people and groups.

Some in Massachusetts, however, were pleased with the ruling. Among Shaw's defenders were supporters of the state's liquor licensing statute, which had been the subject of the law suit on which Shaw had ruled.

The liquor statute's supporters knew they would have a next-to-impossible time getting the law enforced if juries were free to decide whether or not they would enforce the law.

As the issue heated up, a constitutional amendment was proposed which declared that juries were to decide both fact and law. Backers of the amendment tried to reassure those who wanted the liquor licensing statute that they had nothing to fear from the amendment. But the latter knew better. "This mountainous mischief of intemperance" could never be reached by legislation if the amendment passed.

Despite this opposition, the 1853 convention debated and adopted the proposed amendment. It was one of five amendments which went before Massachusetts voters. They were presented as a package, and as a package they were defeated. Opponents as well as amendment advocates admitted that if the jury amendment had been considered by itself it easily would have been approved. As it was, the Massachusetts legislature in 1855 passed a law which provided that juries were to decide fact and law. Again it was Jus-

tice Shaw who struck down this law, ending the issue with a judicial veto.

In addition to the public debate in Massachusetts surrounding the jury question, there was a growing national debate, at least in legal circles, over the role of juries. Although at the time of the American revolution ten of the eleven states for which we have records provided in law that juries were to determine both fact and law, and in spite of early Supreme Court rulings which acknowledged that juries possessed this right, certain judges decided that juries should be stripped of any power to settle questions of law. Most notable among them in Spooner's time were Supreme Court Justices Joseph Story and Benjamin Curtis.

If the power and prerogatives of the judiciary were to be secured, the functions of the jury had to be curtailed. If the state was to have a judicial system on which it could depend to enforce its edicts, then the jury system as it had developed in colonial America had to be destroyed. Mid-century decisions by Justices Story and Curtis were climaxed in 1895 when the Supreme Court handed down the infamous *Sparf and Hanson v United States* ruling which finally declared that the jury's right to decide law was at an end. Juries from thenceforth only were to decide issues of fact.

This decision sealed the judiciary's mastery of the courtroom and relegated the jury to the role of a second-class handmaiden of the judiciary.

Charles Shively, in his introduction to Trial By Jury in the Collected Works of Lysander Spooner, rightly says of the work: "Certainly, in the area of law . . . Spooner provides one of the most striking political-legal ways in which anarchists can combine discipline and freedom with the least possible restraint."[1]

Spooner opens his great work with a statement of the proper role juries are to play in the courtroom.

". . . it is not only the right and duty of juries to judge what are the facts, what is the law, and what was the moral intent of the accused; but that it is also their right, and their primary and paramount duty, to judge of the justice of the law, and to hold all laws invalid, that are, in their opinion, unjust or oppressive, and all persons guiltless in violating, or resisting the execution of, such laws.

"Unless such be the right and duty of jurors, it is plain that,

instead of juries being . . . a barrier against the tyranny and oppression of the government - they are really mere tools in its hands, for carrying into execution any injustice and oppression it may desire to have executed."[2]

Spooner continues, " "The trial by jury,' then, is a 'trial by the country' — that is, by the people — as distinguished from a trial by the government."[3] "In its results it probably comes as near to a trial by the whole country, as any trial that it is practicable to have, without too great inconvenience and expense."[4]

Further on he notes, " . . . the very pith of the trial by jury, as a safeguard to liberty, consists in the jurors being taken indiscriminately from the whole people, and in their right to hold invalid all laws which they think unjust."[5]

Why, in a democracy where the legislature represents the people do the people need juries to protect themselves from laws? Why when legislators can be recalled through voting and new representatives installed, is there a need for juries?

Spooner responds. "Suffrage is equally powerless and unreliable. It can be exercised only periodically; and the tyranny must at least be borne until the time for suffrage comes. Besides, when the suffrage is exercised, it gives no guaranty for the repeal of existing laws that are oppressive, and no security against the enactment of new ones that are equally so. The second body of legislators are liable and likely to be just as tyrannical as the first. If it be said that the second body may be chosen for their integrity, the answer is, that the first were chosen for that very reason, and yet proved tyrants. The second will be exposed to the same temptations as the first, and will be just as likely to prove tyrannical."[6]

Through the jury "the people, at all times, hold their liberties in their own hands, and never surrender them, even for a moment, into the hands of the government."[7]

With a quick perception that characterizes so much of Spooner's writings, he notes: "Those who deny the right of a jury to protect an individual in resisting an unjust law of the government, deny him all *legal* defense whatsoever against oppression. The right of revolution, which tyrants, in mockery, accord to mankind, is no *legal* right *under* a government; it is only a *natural* right to overturn a government."[8]

The only alternative citizens have without a jury, then, is

armed or forcible resistance to tyranny. In a free society, there ought to be a peaceful alternative, Spooner argues.

"Since, then, this forcible resistance to the injustice of the government is the only possible means of preserving liberty, it is indispensable to all *legal* liberty that this *resistance* should be *legalized.* It is perfectly self-evident that where there is no *legal* right to resist the oppression of the government, there can be no *legal* liberty. And here it is all-important to notice, that, *practically speaking,* there can be no *legal* right to resist the oppressions of the government, unless there be some legal tribunal, other than the government, and wholly independent of, and *above,* the government, to judge between the government and those who resist its oppressions; in other words, to judge what laws of the government are to be obeyed, and what may be resisted and held for nought. The only tribunal known to our laws, for this purpose, is a jury."[9]

In sum, then, the hands of the judiciary and the legislature must be bound and every group of 12 citizens who enter the jury box can do that binding. For Justices Story and Curtis and others of like persuasion, this power was unacceptable.

But for Spooner, it was the beauty of the system.

Why shouldn't every law be subject to review by the citizens? When authority springs from the people, why shouldn't it also return to them through a system of citizen enforcement of the laws? Why shouldn't citizens have a practical, direct, effective way of defending their freedoms and property and that of their neighbors from any undue invasions of the state?

Juries by no means are a prerequisite to a libertarian judicial system, but they are practical and they can work. They've proven that. They have the added advantage of a wide-spread popularity among a broad base of people. It's only a matter of degree to take people from understanding better the concepts behind the jury's right to determine law and fact, to help them to understand other elements of libertarian philosophy.

Thus the jury can help bridge the enormous abyss between the current statist society and a future libertarian society. One of the advantages a properly organized jury offers, no matter when or where it exists is that it has its own built-in safeguards which protect it from the kinds of pressure and decay that have affected all *government* judicial systems. These internal mechanisms which

make juries immune from this rot include:

- A jury exists for a limited time only, then disappears forever
- The scope of its deliberations affect only specific cases
- A jury does not establish precedent because every case is different and must rest on its own merits
- A jury's powers are limited
- The requirement that all verdicts be unanimous protects minorities from the abuse of majorities
- A jury does not need to be subservient to the legal community or to other minions of the state
- A jury has no vested power interests to protect
- A jury views justice from a layman's perspective

Spooner did not attempt to whitewash the jury system of his time. Quite the contrary. In a section of his work, which he titles, "Juries of the present day illegal," Spooner condemns the methods then used to select jurors for state and federal courts. He notes quite rightly that the methods used to select juries are designed to insure that people favorable to the government are empanneled.

"There has, probably, never been a legal jury, nor a legal trial by jury, in a single court of the United States, since the adoption of the constitution,"[10] he argued.

The only valid trial by jury is that which is provided for by the common law; "and not merely for any trial by jury that the government itself may chance to invent, and call by that name. It is the *thing,* and not merely the *name,* that is guaranteed."[11]

With a wisdom so many political scientists seem ignorant of, Spooner observes, "If the real trial by jury had been preserved in the courts of the United States — that is, if we had had legal juries, and the jurors had known their rights — it is hardly probable that one tenth of the past legislation of Congress would ever have been enacted, or, at least, that, if enacted, it could have been enforced."[12]

Spooner made his case against the perversions of trial by jury as strong as he could. He brooked no compromise with the forces then battling to strip even more powers away from the jury. The system should be whole and he would defend nothing short of that.

The tragedy of it is that if we only had as much of the common

law trial by jury as Spooner did in his time, we would have infinitely more than we have today.

At the time Spooner argued for a progressive jury system, his ideas weren't nearly as radical as they might seem today. In many ways he was in the mainstream of both popular and legal opinion. His position, while genuinely revolutionary, also was conservative. But as much as Spooner tried to save the traditional American jury system, the courts got the upper hand and effectively choked off attempts to preserve a strong jury. As the years passed, it was the rare jury that would hear lawyers attempt to argue the law before them, and it was even a rarer courtroom in which such arguments would be permitted. Understandably, jurors became accustomed to their now-limited role in the courtroom.

As the tradition of the strong jury was forgotten, so also was Spooner's **Trial by Jury.**

But the ideas Spooner expressed were to be resurrected again in 1882 in the 16th issue of **Liberty.** The early jury system was a "splendid institution, the principal safeguard against oppression,"[13] wrote Benjamin R. Tucker. "But," he lamented, "nothing tending to secure the individuals rights against invasion can be saved within the State."[13]

Herein he set the tone for many of the observations he and others would make in future issues of **Liberty:** The jury was one institution which could protect freedom and mete out justice, but it was an institution which had been stripped of much of its power and was being channeled into service as just another arm of the state's judiciary system instead of a citizens' check on the judiciary and on the state itself.

This was merely the first of many references in **Liberty** that Tucker would make to trial by jury. Victor Yarros, one of **Liberty**'s editors, also contributed heavily to **Liberty** on the jury issue. Before discussing the contributions these two made to this issue, it would be useful to review some of the many observations others offered on this question, some of them, as indicated earlier, were extremely critical.

Several of the references to jury trial were reprints of letters and stories that had appeared in the popular press. Some of these involved run-ins libertarians had with judges when they had been called to serve on juries, only to be excused because of their strong

opinions on the proper role of jurors. In 1906, for instance, Daniel Kiefer reported that he'd been excused from jury service when he told the judge that he felt he had a right to decide what the law should be.

In the same year Samuel Milliken of Philadelphia reported that he, too, had been excused from jury service for a similar reason. In explaining his position in the Philadelphia **Record,** he wrote that the jury "might accept or not, as it chose, the judge's instructions as to the law."[14]

Added Milliken: "The country was not supposed to have a slavish and superstitious respect for either the king's law or the king's judges . . . The jury is not an aid to or servant of the judge, but a co-equal part of the administration of justice."[15]

Someday, predicted Milliken, "a courageous juryman will tell an impudent judge to mind his own business, and to let the jury mind theirs. We should have an abiding and reverent respect for natural law, but this respect should not extend to statute law, unless that law is in line with the eternal equities. And judges should be treated with respect... when they prove worthy of respect."[16]

Recognizing a renewed public interest in jury reform toward the close of the 19th century, F. D. Tandy praised the insight Spooner had into the jury system. In concluding his article, Tandy wrote, "Frequently the question of jury reform is agitated in the capitalistic press. It seems as if some change will be made in the near future. Nearly all the reforms that are advocated are reactionary, giving greater power to judges and other employees of the State. Surely it is now time to make a stand for progressive reform. Perhaps this might even be made the next step towards freedom, for the demands do not seem so radical to the ordinary mind, and yet the effects are far-reaching."[17]

Not every contributor to **Liberty** was quite so charmed about the impact trial by jury would have. Several challenged the proposed jury system. "Basis," writing early in **Liberty**'s pages, thought that it was foolhardy to trust juries with deciding complicated "insanity" cases, such as the Guiteau case. In such matters "are we to hang a man in this country on the mere opinion of twelve ordinary men?"[18] In criminal insanity cases, he said, he would rather have a decision come from "a court of experts with a presiding judge."[19]

Stephen Byington, writing in 1904, characterized juries as too clumsy to handle affairs on a business basis. He prediced that defensive associations would use professional judges to hear disputes. Juries, he argued, would generate tremendous uncertainty among people.

In December, 1907, in the second to the last issue of **Liberty,** Byington was even more forceful in this critique. ". . . under certain circumstances . . . juries are so certain to give a biased verdict that trials are little else than a waste of time,"[20] he wrote.

Convictions in a society where there was a strong jury system would be rare, he said and argued that this would mean the society would have to be so peaceable that it didn't need courts. If it wasn't, there would be a rapid return to vendetta. ". . . if we are going to take into our juries such men as will make conviction generally improbable, we had better all be non-resistants at once,"[21] he wrote.

It could lead to ever more wide-spread problems, he warned. ". . . if you have two hostile races or classes, each of whom will in general refuse to convict one of its members of an assault on one of the other party, you get a race or class war."[22]

For instance, can one suppose that a prohibitionist on a jury would convict an armed band of people who broke up a saloon, destroyed the liquor stock and used guns to protect themselves if violent resistance was made?

". . . the real defect of the jury system," Byington wrote, is "that it accomplishes too effectively the purpose it was meant to accomplish, the purpose of preventing the legal punishment of anybody whom the people do not unanimously want punished."[23]

Byington closed with his analysis that judges were less likely than juries to fall prey to weaknesses. We can trust today's judges because they are different than earlier judges, he said. ". .. in our part of the world at least, tyranny *over* the people is nearly dead."[24] Rather, the danger comes from the people. ". . . the characteristic and dangerous tyranny of our day is tyranny *in* the people, . . . the tyranny of unanimous and determined minorities, degenerating into thug tyranny."[25] What better prop could such juries wish for than a requirement of unanimity?

". . . is it not absurd to advocate a measure for guarding against the obsolete tyranny at the expense of strengthening the living and vigorous tyranny?"[26]

Wrote Byington, ". . . this is the sort of anarchy that is famous for leading to stern reaction."[27]

Interestingly, Byington suggests that this mob of citizenry while perfectly incapable of being just, could be trusted to select just judges. ". . . it is usual — for those who never show fairness themselves to appreciate an upright judge and delight in having him . . . The favor men have for a just judge is so general as to be the surest safeguard yet known for fairness in the administration of justice."[28]

In sum, society would probably be much better off with a system of judges rather than juries, he said. "... I for one would much rather trust the fairness of an opponent's judge than of an opponent's jury."[29]

The single most important contributor to Liberty outside of Tucker himself on the jury issue undoubtedly was Victor Yarros.

He opened his remarks on this issue in 1891 in response to some comments made by George Schilling. Juries, Yarros writes, should not be considered *more* just and intelligent than the rest of the populace, but they should be considered *as* just and intelligent.

"A trial by the whole body of citizens being out of the question, the choice is between trial by jury and government by majority, between obedience to laws enacted by the majority, or the representatives of the majority, and obedience to laws approved by a jury representing the whole body of citizens. If Mr. Schilling can point out a more perfect way of insuring 'government by consent,' we are ready to accord it the most favorable consideration."[30] ". . . jury-rule . . . promises to secure government by consent and to be the best instrumentality for the enforcement of equal liberty."[31] It is merely a means to the end of securing equal liberty.

"My friend's fear of fixity is groundless. If Spooner proves anything, he proves that trial by jury is the best safeguard against fixity or rigidity. There can be no fixity in any objectionable sense where the spirit of the law is consulted rather than the letter, where the aim and endeavor is to do justice to all parties rather than to uphold the authority and dignity of the law."[32]

Responding to agitation in New York for jury reform, Yarros acknowledged that "Trial by jury, as we know it, is a farce and a mockery."[33] But most of the proposed reforms would make the situation even worse than it is, he said.

"It is unfortunate that most of those who discuss jury reform know nothing regarding the true philosophy of the institution."[34]

In August of 1895 he writes of the *Sparf and Hanson vs the United States* case. ". . . the system of trial by jury is a device to escape, not only the old and tyrannical form of government of a few men, but the newer tyranny of alleged government of laws twisted and strained by a few men to suit supposed necessities of the time. . . . Where the jury is really the government, the individual enjoys greater freedom and secures more complete justice than under any other form of government."[35]

Trial by jury, he says, could accurately be described as "a government of justice,"[36] which is far superior to a government of law.

When he finished pulling apart the contradictions and folly inherent in the *Sparf and Hanson* decision, Yarros again returned to the theme that by then was most familiar to him. What was needed was "a reversion to the true ideal of a court of common sense and conscience, — of a jury that has nothing imposed on it, and that is empowered to do justice regardless of cast-iron rules and fixed statutes."[37] Two weeks later he suggested a thorough judicial reform which would restore "the power of the jury to veto laws and modify them in accordance with circumstances."[38]

Yarros was so convinced of the merit of Spooner's **Trial by Jury** that he took upon himself the task of condensing and rearranging the book so that it could easily be absorbed and digested by the layman.

This work bore fruit on June 8, 1889, when "Free Political Institutions" first appeared in serial form in **Liberty.** For eight consecutive issues **Liberty** carried this condensed and highly edited version of Spooner's treatise.

Yarros announced in his introduction to the serialization that he had rearranged the work in the hope of presenting it as a work of political philosophy more than an historical essay on the jury, as it had been organized when Spooner issued it.

Tucker explained that Yarros saw "Free Political Institutions" as "a splendid instrument for the popularization of Anarchistic ideas of liberty . . . as well as a deadly weapon against those who ignorantly or dishonestly seek to perpetuate our present system of governmental tyranny by pretending that it is based on our voluntary consent."[39]

"Free Political Institutions" was well received by **Liberty** readers. George W. Searle, a Boston lawyer, wrote of the great pleasure he had in seeing it. "Your success has been complete and perfect. All that is essential of the larger work is preserved, and it is presented in a form and within the moderate compas useful to the general reader. . . . Without altering a single systematic treatise on the fundamental principles of free political institutions: their nature, essence, and maintenance."[40]

Tucker described "Free Political Institutions" as "the best instrument for Anarchistic propaganda. Those who wish to acquire a clear conception of political freedom should study this book and digest well its fundamental doctrines."[41]

Certainly, Spooner was one of Tucker's early teachers and the influence of Spooner's ideas on the young man can be seen again and again in Tucker's writing. This certainly is true in regards to the jury issue.

Tucker early distinguished between trial by jury as it should be and trial by jury as it was commonly practiced in his time. Eight years after first writing about the issue in **Liberty,** Tucker observed, "What with the ignorance and servility of the average juror, the impudence and ignorance of the average judge, and the insolence and pernicious zeal of the government attorneys, the administration ofjustice is becoming a delusion and a snare."[42]

In a rare moment, Tucker even had kind words to say about Henry George when the latter, as a jury foreman, refused to return a verdict the judge ordered against a party. George insisted on opposing the judge and was dismissed for the remainder of the term. "The rebellion of jurymen against the high-handed usurpations of judges is as rare as righteous, as unusual as useful. Others should follow Mr. George's example."[43]

While most of Tucker's attention was directed at petit juries, those which actually try cases, he did comment on occasion on grand juries, those which decide whether there is evidence to suggest that someone ought to be tried for a crime.

"It is well known that grand juries have been even more completely stripped of usefulness than petit juries by courts and prosecuting officers . .. The only way to terminate the abuses is to refuse to serve. . . . when tried for contempt, state the reasons for their course. That would be excellent propaganda by deed."[44]

In 1894 a report in the New York **Sun** indicated that a judge

had instructed a jury to return a certain verdict which the jury didn't want to return. Tucker was in a rage. "The compelling of men to serve on juries, at an expense to themselves and to the tax-payers, for no other purpose than to afford the bench an opportunity to place the responsibility for its own injustice on their shoulders would be a ludicrous farce were it not a terrible tragedy."[45]

In 1897 Tucker was called up for jury service, but promptly got in line behind a host of others who claimed legal exemption from jury service. When it was his turn to appear before the judge, he announced that his convictions would keep him from accepting instructions from the court on points of law as absolutely binding. Judge Frederick Smyth asked Tucker, "You think you know more than the court about the law?" Unshaken by his eminence, Tucker replied, "I must judge for myself."[46] Naturally, he was excused.

In the year prior to the one in which Tucker was called up for jury duty, New York passed a special jury law which established Special Jury Commissioners for the state's largest counties. These commissioners were to be appointed by justices of the appellate division of the state supreme court and were to select special jurors for those counties.

Tucker was infuriated by the law and on June 25,1897, under the auspices of the Central Labor Union, Typographical Union #6 and other labor organizations, he delivered a fiery speech condemning the law at a mass meeting held in Cooper Union. He published this speech in **Liberty** in July and August, 1897, and in the following year issued it as a pamphlet titled **A Blow At Trial By Jury.**

The "ulterior purposes" behind the new law were laid bare as Tucker announced that the law deserved a new title, one which more fully described the impact the law would have on the legal system. That new title, the speaker said, was: "An act providing for the enforcement of those laws of the State of New York which, having found their way into the statute-books only through the insidious machinations of a clique or a cabal or a boss or an interest or a handful of fanatics, are so unpopular with the citizens of the State of New York that a conviction of the violation of them can seldom, if ever, be secured from a jury fairly and impartially impaneled from the mass of sober-minded people."[47]

The law would allow on special juries only those people who had

no scruples against the death penalty and those who had no prejudice against any law of the state which would preclude them from finding a defendant guilty of a violation of the law. These special jurors would hear cases if a justice of the appellate division determined that the "due, efficient, and impartial administration of justice requires it,"[48] Tucker said.

The effect of the law, Tucker explained, would be to take "any man submissive enough to aid in enforcing" unpopular laws and place him in a jury where "the laws that sustain the privileged classes in their privileges, and the laws that strip the masses of their rights in order to make them an easy prey for the exploiter"[49] can be enforced.

Tucker assured his listeners that he didn't come to Cooper Union to condemn the motives of those who passed the special jury law. "The main question to-night is not what motive inspired the law, but what it will be possible for men of bad motive to do with the law when once it has been placed in their hands as an instrument."[50]

He reminded the audience how much this law had in common with the fugitive slave law of close to a half century earlier. "In 1851, in the United States district court for the district of Massachusetts, Peleg Sprague, the United States district judge, in empanelling three (there) several juries for the trials of Scott, Hayden, and Morris, charged with having aided in the rescue of a fugitive slave from the custody of the United States deputy marshall, caused the following question to be propounded to all the jurors separately, and those who answered unfavorably for the purpose of the government were excluded from the panel:

> Do you hold any opinions upon the subject of the fugitive slave law, so called, which will induce you to refuse to convict a person indicted under it, if the facts set forth in the indictment, and constituting the offence, are proved against him, and the court direct you that the law is constitutional?

"The reason of this question was that the 'fugitive slave law, so-called;' was so obnoxious to a large portion of the people as to render a conviction under it hopeless, if the jurors were taken indiscriminately from among the people."[51]

Proper trial by jury is designed less for the "punishment of the guilty than the safety of the innocent,"[52] Tucker argued.

But he continued, "I hear someone ask, 'is it not rather absurd

to put the enforcement of a law in the hands of a jury composed in whole or in part of men prejudiced against the law?'

"Well, it does seem a bit irrational, until we inquire what the purpose of statute law is, or ought to be. If the purpose of statute law is the attainment of a rigid, inflexible, stiff-backed, cast-iron justice, then perhaps the special jury system is an excellent method of achieving it. But 1 declare to you that no such justice is wanted in any civilized community. We want a justice, not rigid, but elastic; we want a justice, not stern, but tempered with mercy, sympathy, and common sense; we want a justice, not blind, but with eyes sharp enough to detect causes, conditions, and circumstances; we want a justice, not superficial, but profound."[53]

He then noted, "It is prejudice against the law that oftenest saves society. . . . prejudice against the law serves in practice as a most valuable corrective of the folly of law-givers and the cruelty of courts."[54]

Tucker urged the audience to resort to passive resistance to the jury law after the manner of the Irish who resisted the British oppression in their homeland.

In closing Tucker offered a series of resolutions which condemned the law. The resolutions were passed unanimously at the meeting.

The jury issue continued to inspire some spirited debate even after the demise of Liberty in the early 20th century, but for the most part it was an issue that gradually found itself submerged beneath a host of other pressing political/economic issues. The struggle over jury "reform", however, wasn't at an end.

As battered as the courts left trial by jury in the late 19th century, the judiciary still was far from satisfied with its work. More needed to be done to restrict what powers did remain of the jury. So, throughout the 20th century judges continued the tradition of their predecessors in making more secure the powers, prerogatives and privileges of the judicial elite.

The courts gradually sanctioned three variations on trial by jury. They are: Special verdicts, directed verdicts and judgments not withstanding the verdict.

Special verdicts are used occasionally in place of general verdicts. A general verdict is one in which the jury applies the law to the facts of the case to reach a conclusion about the disposition of the entire case. With a special verdict, on the other hand, a judge

asks the jury questions about the facts of the case, then the judge applies the rules of law to the jury's answers to hand down a judicial verdict.

Directed verdicts are granted at the close of the presentation of evidence. With such a verdict the judge declares the evidence to be insufficient to create a jury issue. In effect, the case is taken away from the jury.

A judgment not withstanding the verdict authorizes a judge to overturn a jury's verdict and to enter a judgment contrary to the verdict.

In addition to worming these bastardized judicial practices into the courtroom, the courts launched an abrupt and violent attack on trial by jury in the early 1970s. These attacks came at the hands of the Supreme Court in four separate decisions.

In *Williams v Florida* in 1970 the court ruled that state criminal juries of six were sufficient, even when the sentence is as severe as life imprisonment. A later decision, *CoIgrove vBattin,* declared that six-person civil juries are adequate in the federal court system. In *Johnson v Louisiana* and *Apodaca v Oregon* the court ruled that majority verdicts are adequate for conviction in state criminal trials. Only by a single vote did the justices avoid declaring that majority verdicts were acceptable in federal criminal trials. All of these decisions make it much easier for the state to get convinc-tions.

Mauled as the jury was in the 1970s, it's probably safe to bet that the courts still aren't done with their dismemberment of the jury system. They'll be back again and again if they have their way, until nothing remains that resembles the historic common law jury.

But until then, not all is lost. We still have some powers left as citizens to use the jury to protect our liberties. These powers are limited, but they do exist. And so long as they exist, we ought to use them.

In most cases, even today, general verdicts are the rule. When returning such verdicts jurors often decide a great deal more than the facts of a case as they mix in their own sense of justice and community standards to decide whether a person is guilty or not guilty of some wrongdoing. That's as it should be.

People ought to be encouraged to refuse to convict if they be-lieve the accused has done nothing wrong, even if the accused clearly has done something "illegal." The public ought to be en-

couraged to approach jury service with a sense of concern for the freedom and rights of the accused.

With such a determination to see to it that the judicial system once again deals in justice and not merely the law, isn't it quite possible that unpopular laws then no longer will be enforced? In time, as people begin to develop a sense of community justice rooted in the safeguards the jury provides, we could gradually see government invasions into our liberties stopped. As a sense of distrust for government laws increases and a feeling of empowerment in the people develops, we will have begun to enjoy the fruits of a strong, active and aggressive jury system.

Each time, then, that a jury steps between the state and a citizen to protect that citizen from unjust prosecution, we will be that much closer to reclaiming the freedoms that are ours. We will have found and put to effective use yet another tool in our struggle for freedom. We will have recognized, as did the libertarians of the 1800s, that the jury can be a bulwark of a free society.

Footnotes

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4. Ibid, p. 7.
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7. Ibid, p. 15.
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9. Ibid, p. 16-17.
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11. Ibid, p. 142.
12. Ibid, p. 156.
13. Liberty, Vol. 1, No. 16, Saturday, March 4, 1882. p. 1.
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15. Ibid, p. 58-59.
16. Ibid, p. 59.
17. Liberty, Vol. X, No. 2, Whole Number 288, June 2, 1894, p. 3.
18. Liberty, Vol. 1, No. 19, Saturday, April 15, 1882. p. 3.
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20. Liberty, Vol. XVI, No. 6, Whole Number 402, December, 1907, p. 50.
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31. Ibid.
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33. Liberty, Vol. XI, No. 2, Whole Number 314, June 1, 1895, p. 2.
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35. Liberty, Vol. XI, No. 7, Whole Number 319, August 10,1895. p. 2.
36. Ibid.
37. Liberty, Vol. XI, No. 9, Whole Number 321, September 7, 1895, p. 3.
38. Liberty, Vol.XI.No. 10, Whole Number 322, September 21, 1895, p. 3.
39. Liberty, Vol. VI, No. 14, Whole Number 144, Saturday, March 16, 1889, p. 1.
40. Liberty, Vol. VII, No. 14. Whole Number 170, Saturday, November 1, 1890, p. 3.
41. Liberty, Vol. VII, No. 11, Whole Number 167, Saturday, September 13, 1890, p. 1.
42. Ibid.
43. Liberty, Vol. VIII, No. 52, Whole Number 234. Saturday, August 20, 1892, p. 1.
44. Liberty, Vol. XI, No. 8, Whole Number 320, August 24, 1895, p. 1.
45. Liberty, Vol. X, No. 2, Whole Number 288, June 2, 1894, p. 5.
46. Liberty, Vol. XIII. No. 7, Whole Number 357, December, 1897, p. 4.
47. Liberty, Vol. XIII, No. 4. Whole Number 354, July, 1897, p. 3.
48. Ibid.
49. Ibid.
50. Ibid, p. 4.
51. Liberty, Vol. XIII, No. 5, Whole Number 355, August, 1897, p. 3.
52. Ibid, p. 4.
53. Ibid.
54. Ibid.