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Wielding Ockham's Knitting Needles

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NEIL FULTON†

A TRIAL BY JURY. By *D. Graham Burnett.* Alfred A. Knopf. 2001. Pp. 192. $21.00 (hard cover).

The jury trial is central to the American legal tradition. It is guaranteed by both our State[1] and Federal[2] Constitutions, mythologized in our popular culture,[3] and one of the central opportunities for citizens to participate in our democracy.[4] Despite their centrality to a profession based on openness, logic, and consistency, juries operate in a largely secret, inexplicable, and unpredictable fashion. Princeton historian D. Graham Burnett's *A Trial by Jury* chronicles the experience of one New York City jury and opens a valuable window into the jury process.

Like a throng of other New Yorkers, Burnett walked into the Centre Street courthouse, with no idea about the character of the process he was becoming involved in on that January day. After running the gauntlet of juror orientation,[5] Burnett was herded into Part 24 for his first view of criminal defendant Monte Milcray. His description of the judge's announcement that Milcray was charged with murder captures the unique electricity of a felony trial: "We were now in a room with two gravitational centers: the judge and the defendant. This curious feeling was strongest at that moment, but it never entirely vanished. An accused person, standing in a court of law, has, somehow, tremendous weight."[6] The electric atmosphere of Milcray's trial was intensified by the fact that its sensational facts were worthy of a television drama.

Milcray was charged with the murder of Randolph "Antigua" Cufee: a cross-dressing homosexual prostitute. The facts of the case presented Burnett and his fellow jurors with the grisly forensics of a death from 25 stab wounds that Milcray claimed to have inflicted in self-defense when Cufee tried to rape him. The jury had to open-mindedly assess a world of homosexual prostitution,[7] cross-dressing,[8] and conflicting testimony about whether Milcray was truly gay or engaged in a single homosexual incident. Introducing this largely foreign culture to the courtroom proved uniquely

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1. S.D. CONST., art. VI, §5 and §6.
2. U.S. CONST. amend. VI; U.S CONST. amend. VII.
3. *See, e.g., Twelve Angry Men,* (1957), MGM Studios.
4. *See, e.g.,* AKHIL REED AMAR, THE BILL OF RIGHTS, Chapter 4, (1998).
5. BURNETT at 17-21.
6. *Id.* at 22.
7. *Id.* at 59.
8. *Id.* at 53-54.

difficult.[9]

Although the facts of the trial are intriguing, the jurors are the stars of the book, and they take center stage in the jury room. Burnett's jurors experience many of the systemic and psychological quirks of asking twelve randomly assembled individuals to make a life or death decision.

The jury immediately, and not surprisingly, fixed on a disagreement regarding the jury instructions. Despite having received instructions only shortly before, the jury was immediately in disarray about how to address the issue of self-defense.[10] Burnett's description of drafting a written question to the Court and receiving the Court's cryptic response demonstrates how foreign and exclusive jury service must feel to those uninitiated in the law. After framing the question in a way acceptable to everyone, Burnett and his compatriots were informed that they could not receive a copy of the jury instructions,[11] and were only offered the option of having the same instructions read to them again. The resulting confusion in the jury room should make lawyers sit up in bed at night with a cold sweat: "This, of course, had answered exactly none of our questions. We went back immediately to the issue of what question we ought to be addressing first . . . different people were confused to different degrees."[12]

The complex interplay of juror personalities is ultimately the driving force surrounding the decision. Whether it is a force for good or bad is an insoluble question that I turned over in my own mind several times as I read Burnett's book. The jurors went through "unjustified prejudice" regarding their personalities and predilections,[13] prejudices for or against defendants,[14] confused and conflicting recollections of the evidence, and their intransigence, personality quirks, and (in one memorable case) possible out and out psychosis.[15]

While *A Trial by Jury* is not least a fast and fascinating read, for those of us involved with jury trials for a living, it is also an important work of didactic reporting. Throughout the book we can see areas of trial practice in which we can take pride and for which we should aspire to greater

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9. *Id.* "When Paris is Burning comes to the grave forum of a murder trial, the result is chewy and puzzling. The campiness takes on unexpected power, forcing surprising juxtapositions and genuinely subversive moments, all the things that the denizens of cultural-studies departments promise." *Id.* at 56.

10. *Id.* at p. 88 (emphasis in original). "Wacky new misunderstandings would emerge down the road, but right away tension arose around a single question: Did we have to reach a unanimous verdict on *one* of the possible criminal charges *before* we could even consider the question of self-defense?" *Id.*

11. Demonstrating a superiority of practice in South Dakota where a copy of the instruction packet is ordinarily provided to jurors for their use during deliberations.

12. *Id.* at 91.

13. Burnett's prejudice is most pronounced and most incorrect about Dean, a physically large blue collar worker, military veteran, born again former rodeo contestant who Burnett assumes, ". . . would take the lead in pushing for a guilty verdict, if not a lynching." Dean instead proves to be the most eloquent spokesman for a finding of self-defense.

14. Burnett himself indicates, "an ingrained bias in favor of defendants." *Id.* at 91.

15. Burnett's jury plows through these difficulties and the trauma of being sequestered for an extended period to reach a not guilty verdict: a fact that Burnett gives away in the opening pages of the book and which is incidental rather than central to the book.

things. Through Burnett's eyes we see that judges dictate the tenor of the courtroom for good or bad. When the judge comes to the defense of a witness who requested shelter from attorney badgering, Burnett notices: "[t]his was the judge who had browbeaten everyone who had spoken to him throughout the trial, who had been impolite at every opportunity."[16] Those of us in the system know that judges are not simply referees of our procedural and legal games, but are actually the living symbol of justice most readily visible to outsiders.

This book challenges the bench to make jury service more understandable and enjoyable for jurors. Judges have the power to make jury duty a process to strengthen the commitment of individual jurors to our legal process. Judges can facilitate this by making jurors more fully involved in their service. Burnett's observations suggest allowing jurors to ask questions, clarifying jury instructions, and providing better explanations of the technical aspects of trials as means for judges to do that.

Lawyers and the law itself come in for equal criticism. Our gamesmanship in "withdrawing" objectionable tone of voice,[17] the obscure nature of our professional language and practices,[18] and the blithe way in which the law slices a "Gordian knot of philosophy," like another person's state of mind[19] are all justly and deftly criticized by Burnett. If Burnett makes the jury trial process more comprehensible to one juror or makes one lawyer, judge, or court officer simplify the process for jurors, he has done a great service to the law.

The value of Burnett's book ultimately lies in the quantity of questions it raises in the brevity of its pages. We see, through Burnett's words, the difficulty jurors have in wielding "Ockham's knitting needles"[20] to try and assemble the "truth" from bits of incomplete information presented by advocates subject to the limits of the rules of procedure and evidence. We are also reminded that the law's validity rests on its approximation of justice,[21] and that we can only achieve an approximation with any regularity. As Burnett's fellow juror succinctly notes: "Justice belongs to God; men have only the law. Justice is perfect, but the law can only be careful."[22]

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16. *Id.* at 57.
17. *Id.* at 55.
18. *Id.* at 29, 56.
19. *Id.* at 81.
20. *Id.* at 61.
21. *Id.* at 129.
22. *Id.* at 138.