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Bryan Schwartz would like to see more people tried by a jury of their peers

IN England, birthplace of our jury system, there is renewed debate over its future. Some bureaucrats have proposed cutbacks in the citizen's right to demand a jury trial. They argue that judges can often try cases more quickly and cheaply. Critics respond that juries are a fundamental safeguard of civil liberties. The critics are right. In Canada, we should be expanding the rights of accused people to a verdict of their peers.

Juries can be good at determining the facts of a case. Twelve people, drawing on their different experiences, can sometimes make a sounder judgment than a single judge. Occasionally, "common sense" is wrong; for example, scientific studies have shown that untrained people tend to overestimate the reliability of eyewitness testimony. But the solution here is not to get rid of juries. It is for judges to provide jurors with appropriate information and warnings.

Juries can also contribute common sense on moral issues. Cases often turn on a value judgment: for instance, "was this defendant subjected to more provocation than a reasonable person would tolerate?" Here again, 12 people, reaching a consensus through debate, may arrive at a more sensible result than a solitary judge.

Juries can also judge the law. Sometimes, a jury will decide "Sure, he did it, but this law is so harsh and out-of-date that we'll acquit him anyway." If 12 members of the public, chosen at random, unanimously agree that the law should get stuffed, they are probably right.

Under the U.S. Constitution, anyone charged with a crime can demand a jury trial. By contrast, section 11 of our Charter guarantees the right only if you are facing a very long jail sentence - at least five years. But if they wanted to, our courts could use another section of the Charter to expand our rights to jury trials. Section 7 says you can be sent to jail only in accordance with the "principles of fundamental justice." These arguments could be made:

Our traditions of civil liberty: The courts have said that we can look to our legal traditions to understand "fundamental fairness." Juries have long had a role in protecting our basic freedoms. For example, we owe our freedom of speech in part to several brave English juries who acquitted John Lilliburne, the 17th-century political pamphleteer. Why shouldn't a modern Canadian have the same means of challenging state oppression?

Pro-state bias: A citizen can demand a jury trial only if charged with an "indictable" offence. If you are charged with a "summary conviction" offence, you have no right to a jury trial. With many crimes, the prosecutor has the free choice of calling the offence "indictable" or as a "summary conviction." By

choosing the latter, the prosecutor can effectively deny a citizen any access to a jury. Isn't that fundamentally unfair?

PERHAPS our judges would balk at using the Charter to expand our rights to jury trials. Our legislatures should be actively protecting our civil liberties rather than waiting for direction from judges. Elected leaders could expand the role of the juries simply by amending our criminal and regulatory statutes.

The case for juries is strong whenever a controversial value judgment must be made. It can be especially compelling when we suspect the government is trying to protect its own interests, rather than those of the public. A person accused of leaking a budget document or of contempt of court should be able to say, "I want this case decided by people outside the circle of established power."

A specific area where juries should have a greater role is obscenity cases. Our courts have grabbed most of the power in this area. The Supreme Court has felt free to rewrite our obscenity laws from time to time; it has openly doubted that Parliament is up to the task. The Supreme Court has also said that violating "community standards" of tolerance is part of the test for obscenity. But if so, shouldn't an accused person always have the right to consult 12 ordinary members of the community?

A few months ago, a Globe and Mail editorial called for Canadians to develop grass-roots support for wide-open free expression. Well, the legal system ought to give Canadians a fighting chance. Currently, free-speech cases are being decided by bureaucrats at human-rights tribunals, customs officers and provincial-court judges. Let's see what would happen if ordinary Canadians, sitting as jury members, were given a greater voice.

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