



# The Jury in Ancient America

An Historical Sketch Written in the Year of Grace 3687

TRANSLATED BY AMBROSE BIERCE

**O**F all the nations of antiquity the one that has been most studied in our day by those desiring to profit by the lessons of experience and avoid the errors of an imperfect civilization is the great American republic known as the Connected States. In the study of some others we are aided by a greater and more varied literature (for the ancient Americans were not, even according to the standards of the time, a literary people), but of none are the writings that have come down to us so rich in warning significance.

The ancient Americans were a composite people; their blood was a blend of all the strains known in their time. Their government, while they had one, being merely a loose and mutable expression of the desires and caprices of the majority—that is to say, of the ignorant, restless and reckless—gave the freest rein and play to all the primal instincts and elemental passions of the race. In so far and for so long as it had any restraining force, it was only the restraint of the present over the power of the past—that of a new habit over an old and insistent tendency ever seeking expression in large liberties and indulgences impatient of control. In the history of that unhappy people, therefore, we see unveiled

the workings of the human will in its most lawless state, without fear of authority or care of consequence. Nothing could be more instructive.

Of the American form of government, although itself the greatest of evils afflicting the victims of those that it entailed, but little needs to be said here; it has perished from the earth, a system discredited by an unbroken record of failure in all parts of the world, from the earliest historic times to its final extinction in its last stronghold, the Patagonian republic. Of living students of political history not one is known to have professed to see in it anything but a mischievous creation of theorists and visionaries—persons whom our gracious sovereign has deigned to brand for the world's contempt as “dupes of hope purveying to sons of greed.” The political philosopher of to-day is spared the trouble of pointing out the fallacies of republican government, as the mathematician is spared that of demonstrating the absurdity of the convergence of parallel lines; yet the ancient Americans not only clung to their error with a blind, unquestioning faith, even when groaning under its most insupportable burdens, but seem to have believed it of divine origin. It was thought by them to have been established by the god Washington, whose worship, with that of such *dii minores* as Guffer-son, Iaxon and Lancon (identical with the

Hebru Abrem), runs like a shining thread through all the warp and woof of the stuff that garmented their moral nakedness. Some stones, very curiously inscribed in many tongues, of what is believed to have been a temple of this deity, were found by the explorer Droyhors in the wilderness bordering the river Bhitt (supposed by him to be the ancient Potumuc) as lately as the year 3157, as the Americans, for some reason not now known, reckoned time. If their tutelary deity really invented representative government, they were not the first by many to whom he imparted the malign secret of its inauguration and denied that of its maintenance.

One of the most "sacred" rights of the ancient American was the trial of an accused person by "a jury of his peers." This, in America, was a right secured to him by a written constitution. It was almost universally believed to have had its origin in Magna Carta, a famous document which certain rebellious English noblemen had compelled their sovereign to sign under a threat of death. That celebrated "bill of rights" has not come down to us, but researches of the learned have made it certain that it contained no mention of trial by jury, which, indeed, was unknown to its authors. The words *judicium parium* meant to them something entirely different—the judgment of the entire community of freemen. The words and the practice they represented antedated Magna Carta by many centuries and were common to the Franks and other Germanic nations, amongst whom a trial "jury" consisted of persons having a knowledge of the matter to be determined—persons who in later times were called "witnesses" and rigorously excluded from the seats of judgment.

It is difficult to conceive a more clumsy and ineffective machinery for ascertaining truth and doing justice than a jury of twelve men of the average intelligence, even among ourselves. What, then, must this device have been among the half-civilized tribes of the Connected States of America? Nay, the case is worse than that, for it was the practice to prevent men of even the average intelligence from serving as jurors. Jurors had to be residents of the locality of the crime charged, and every crime was made a matter of public notoriety by the "newspapers" long before the accused was brought to trial; yet, as a

rule, he who had read or talked about the trial was held disqualified to serve. This in a country where, when a man who could read was not reading about local crimes, he was talking about them, or if doing neither was doing something worse.

To the twelve men so chosen the opposing lawyers addressed their disingenuous pleas and for their consideration the witnesses presented their carefully rehearsed testimony, most of it false. So unintelligent were these juries that a great part of the time in every trial was consumed in keeping from them certain kinds of evidence with which they could not be trusted; yet the lawyers were permitted to submit to them any kind of misleading argument that they pleased and fortify it with innuendoes without relevancy and logic without sense. Appeals to their passions, their sympathies, their prejudices, were regarded as legitimate influences and tolerated by the judges on the theory that each side's offenses would about offset those of the other. In a criminal case it was expected that the prosecutor would declare repeatedly and in the most solemn manner his belief in the guilt of the person accused, and that the attorney for the defense would affirm with equal gravity his conviction of his client's innocence. How could they impress the jury with a belief which they did not themselves venture to affirm? It is not recorded that any lawyer ever rebelled against the iron authority of these conditions and stood for truth and conscience. They were, indeed, the conditions of his existence as a lawyer, a fact which they easily persuaded themselves mitigated the baseness of their obedience to them, or justified it altogether.

The judges, as a rule, were no better, for before they could become judges they must have been advocates. Most of them depended for their office upon the favor of the people, which was fatal to the independence, the dignity and the impartiality to which they laid so solemn claim. In their decisions they favored, so far as they dared to, every interest, class or person powerful enough to help or hurt them in an election. Holding their high office by so precarious a tenure, they were under strong temptation to enrich themselves from the serviceable purses of wealthy litigants, and in disregard of justice to cultivate the favor

of the attorneys practicing before them, and before whom they might soon be compelled themselves to practice.

In the higher courts of the land, where juries were unknown and appointed judges held their seats for life, these awful conditions did not obtain, and there Justice might have been content to dwell, and there she actually did sometimes set her foot. Unfortunately, the great judges had the consciences of their education. They had crept to place through the slime of the lower courts and their robes of office bore the damnatory evidence. Unfortunately, too, the attorneys, the jury habit strong upon them, brought into the superior tribunals the moral characteristics and professional methods acquired in the lower. Instead of assisting the judges to ascertain the truth and the law, they cheated in argument and took liberties with fact, deceiving the court whenever they deemed it to the interest of their cause to do so, and as willingly won by a technicality or a trick as by the justice of their contention and their ability in supporting it. Altogether, the entire judicial system of the Connected States of America was inefficient, disreputable, corrupt.

The result might easily have been foreseen and doubtless was predicted by patriots whose admonitions have not come down to us. Denied protection of the law, neither property nor life was safe. Greed filled his coffers from the meager hoards of Thrift, private vengeance took the place of legal redress, mad multitudes rioted and slew with virtual immunity from punishment or blame, and all the land was red with crime. In the early years of the twentieth century the annual number of unpunished homicides was estimated by reputable statisticians at no fewer than ten thousand, in a population of less, it is now believed, than two hundred millions! If the chief and highest duty of government is protection of the citizen, these appalling figures are conclusive as to the kind of government this savage and reckless people preferred to have and the kind of machinery to which they entrusted the execution of their laws.

A singular phenomenon of the time was the immunity of criminal women. Among the ancient Americans woman held a place unique in the history of nations. If not actually worshiped as a deity, as some

historians have affirmed, she was at least regarded with feelings of veneration which the modern mind has a difficulty in comprehending. Some degree of compassion for her mental inferiority, some degree of forbearance toward her infirmities of temper, some degree of immunity for the offenses which these peculiarities entail—these are common to all peoples above the grade of barbarians. In ancient America these chivalrous sentiments found open and lawful expression only in relieving woman of the burden of participation in political and military service; the laws gave her no express exemption from responsibility for crime. When she murdered, she was arrested; when arrested, brought to trial—though the origin and meaning of those observances are not now known. Gunkle, whose researches into the jurisprudence of antiquity enable him to speak with commanding authority of many things, gives us here nothing better than the conjecture that the trial of women for murder, in the nineteenth century and a part of the twentieth, was a survival of an earlier custom of actually convicting and punishing them, but it seems extremely improbable that a people that once put its female assassins to death would ever have relinquished the obvious advantages of the practice while retaining with purposeless tenacity some of its costly preliminary forms. Whatever may have been the reason, the custom was observed with all the gravity of a serious intention. Gunkle professes knowledge of one or two instances (he does not name his authorities) where matters went as far as conviction and sentence, and adds that the mischievous sentimentalists who had always lent themselves to the solemn jest by protestations of great *vraisemblance* against "the judicial killing of women," became really alarmed and filled the land with their lamentations. Among the phenomena of brazen effrontery he classes the fact that some of these loud protagonists of the right of women to assassinate unpunished were themselves women! Howbeit, the sentences, if ever pronounced, were never executed, and during the second quarter of the twentieth century the meaningless custom of bringing female assassins to trial was abandoned. What the effect was of their exemption from this considerable inconvenience we have not the data to conjecture, unless we understand

as an allusion to it some otherwise obscure words of the famous Edward Bok, the only writer of the period whose work has survived. In his monumental essay on barbarous penology, entitled "Slapping the Wrist," he couples "woman's emancipation from the trammels of law" and "man's better prospect of death" in a way that some have construed as meaning that he regarded them as cause and effect. It must be said, however, that this interpretation finds no support in the general character of his writing, which is exceedingly humane, refined and womanly.

It has been said that the writings of this great man are the only surviving work of his period, but of that we are not altogether sure. There exists a fragment of an anonymous essay on woman's legal responsibility which many Americologists think belongs to the beginning of the twentieth century. Certainly it could not have been written later than the middle of it, for at that time woman had been definitively released from responsibility to any law but that of her own will. The essay is an argument against even such imperfect exemption as she had in its author's time.

"It has been urged," he says, "that women, being less rational and more emotional than men, should not be held accountable in the same degree. To this it may be answered that punishment for crime is not intended to be retaliatory, but admonitory and deterrent. It is, therefore, peculiarly necessary to those not easily reached by other forms of warning and dissuasion. Control of the wayward is not to be sought in reduction of restraints, but in their multiplication. One who cannot be curbed by reason may be curbed by fear, a familiar truth which lies at the foundation of all penological systems. The argument for exemption of women is equally cogent for exemption of habitual criminals, for they too are abnormally inaccessible to reason, abnormally disposed to obedience to the suasion of their unregulated impulses and passions. To free them from the restraints of the fear of punishment would be a bold innovation which has as yet found no proponent outside their own class.

"Very recently this dangerous enlargement of the meaning of the phrase 'emancipation of woman' has been fortified with a strange advocacy by the female 'champions of their sex.' Their argument runs this

way: 'We are denied a voice in the making of the laws relating to infliction of the death penalty; it is unjust to hold us to an accountability to which we have not assented.' Of course this argument is as broad as the entire body of law; it amounts to nothing less than a demand for general immunity from all laws, for to none of them has woman's assent been asked or given. But let us consider this amazing claim with reference only to the proposal in the service and promotion of which it is now urged: exemption of women from the death penalty for murder. In the last analysis it is seen to be a simple demand for compensation. It says: 'You owe us a *solatium*. Since you deny us the right to vote, you should give us the right to assassinate. We do not appraise it at so high a valuation as the other franchise, but we do value it.'

"Apparently they do: without legal, but with virtual, immunity from punishment, the women of this country take an average of one thousand lives annually, nine in ten being the lives of men. Juries of men, incited and sustained by public opinion, have actually deprived every adult male American of the right to live. If the death of any man is desired by any woman for any reason, he is without protection. She has only to kill him and say that he wronged or insulted her. Certain almost incredible recent instances prove that no woman is too base to slay a man with impunity, no crime of that nature sufficiently rich in all the elements of depravity to compel a conviction of the assassin, or, if she is convicted and sentenced, her punishment by the public executioner."

In this interesting fragment, quoted by Bogul in his *History of an Extinct Civilization*, we learn something of the shame and peril of American citizenship under institutions which, not having run their fore-ordained course to the unhappy end, were still in some degree supportable. What these institutions became afterward is a familiar story. It is true that the law of trial by jury was repealed. It had broken down, but not until itself had broken down the whole nation's respect for all law, for all forms of authority, for order and private virtues. The people whose rude forefathers in another land it had served roughly to protect against their tyrants, it had lamentably failed to protect against

themselves, and when in madness they swept it away, it was not as one renouncing an error, but as one impatient of the truth which the error is still believed to contain. They flung it away, not as an ineffectual restraint, but as a restraint; not because it was no longer an instrument of justice for the determination of truth, but because they feared that it might again become such. In brief, trial by jury was abolished only when it had produced anarchy.

In concluding this brief and imperfect historical sketch I cannot forbear to relate, after the learned and ingenious Bunkux, the only known instance of a public irony expressing itself in the sculptor's noble art. In the ancient and famous city of Hohokus once stood a bronze statue of colossal size and impressive dignity. It was erected by public subscription to the memory of a man whose only distinction consisted in a single term of service as a juror in a famous murder trial, the details of which have not come down to us. It occupied the court and held public attention for many weeks, being most bitterly contested by both prosecution and defense. When at last it was given to the jury by the judge in the most celebrated charge that had ever been delivered from the bench, a ballot was taken at once. The jury stood eleven for ac-

quittal to one for conviction. And so it stood at every ballot of the more than fifty that were taken during the fortnight that the jury was locked up for deliberation. Moreover, the dissenting juror would not argue the matter; he would listen with patient attention while his eleven indignant opponents thundered their opinions into his ears, even when they supported them with threats of personal violence; but not a word would he say. At last a disagreement was formally entered, the jury discharged and the obstinate juror chased from the city by the maddened populace. Despairing of success in another trial and privately admitting his belief in the prisoner's innocence, the public prosecutor moved for his release, which the judge ordered with remarks plainly implying his own belief that the wrong man had been tried.

Years afterward the accused person died confessing his guilt, and a little later one of the jurors who had been sworn to try the case admitted that he had attended the trial on the first day only, having been personated during the rest of the proceedings by a twin brother, the obstinate member, who was a deaf-mute.

The statue of this eminent public servant was overthrown and destroyed by an earthquake in the year 2742.