

PART I

THE HISTORY OF TRIAL BY JURY

The right to trial by a jury of one's peers is a cornerstone of the individual freedoms guaranteed by the U.S. Constitution's Bill of Rights. In a criminal case, trial by jury places twelve citizens between the power of the government and the rights of the accused. The government cannot take away someone's right to life, liberty, or property until it has convinced those twelve citizens of that person's guilt beyond a reasonable doubt. In a civil (or non-criminal) case, the jury represents the community's conscience and common sense in resolving disputes.

Trial by jury is also a vital part of our democracy. Besides voting, nothing is so active and participatory in nature. Thomas Jefferson described trial by jury as "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."

As the French statesman Alexis de Tocqueville noted in his travels through nineteenth-century America, not only does the institution of the jury help improve the law, it helps improve the jurors too. It educates them about law and legal process and helps them understand their duties as citizens. In de Tocqueville's words, jury service "rubs off that private selfishness which is the rust of society."

The story of the jury, from its ancient origins to its role in our justice system today, reflects the historical movement toward popular self-governance. It also illustrates the gradual expansion of individual rights to all members of American society.

The "Self-Informing" Jury of the Middle Ages

The American jury system has its origins in medieval England. The Anglo-Saxon kings who ruled England from the 6th to the 11th centuries and the Normans who conquered England in 1066 used various legal procedures that provided possible models for the jury. But the jury owes a special



"We find that all of us, as a society, are to blame, but only the defendant is guilty."

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Juries are often described as "the conscience of the community."

debt to the legal innovations of King Henry II, who ruled from 1154-1189.

Henry created several new legal actions to resolve disputes over land and inheritances. These actions were known as assizes. Twelve "free and lawful men" of the neighborhood were assembled to state, under oath, their knowledge of who was the true property owner or heir. These panels of twelve freemen established the basis from which the modern civil jury would grow. Unlike a modern jury, however, these panels were self-informing. This means that they were expected to come to court with preexisting knowledge of the facts.

Henry also created new procedures in criminal trials that are still visible in our modern system. In the Assize of Clarendon, enacted in 1166, Henry introduced what became known as the presenting jury, which we know today as the

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Grand and Petit Juries

In French, “grand” means large and “petit” means small. Grand juries traditionally have had more members than “petit,” or trial, juries.

Magna Carta

In 1215, England’s King John signed the Magna Carta. Magna Carta’s article 39 provided “No freemen shall be taken or imprisoned... except by the lawful judgment of his peers or by the law of the land.” In hindsight, “right to trial by a jury of his peers” was read into the phrase “lawful judgment of his peers.” The original purpose of Magna Carta, however, was to reassert the rights of powerful English noblemen against the king, not to grant new liberties to the English people at large.

grand jury. The Assize of Clarendon required that panels of “lawful men” report under oath whether they knew of anyone who was suspected of a crime in their community. The accused would then be put to trial by the ordeal of water. A clergyman would bless the water and the accused would be thrown in. An accused who floated had been rejected by the blessed water and was declared guilty.

In 1215, leaders of the medieval church banned the participation of clerics in trial by ordeal. Without the clergy’s involvement, trial by ordeal—which assumed that God intervened to protect the innocent—lost its validity. At this point, England turned to the panels of “free and lawful men” it was already using in the assizes and in the presentment of criminal suspects. These panels, the forerunner of modern criminal juries, would now also determine innocence or guilt in criminal cases.

Over the following centuries, the role of the jury shifted. By the fifteenth century, the idea of a “self-informing” jury was giving way to a jury that heard evidence presented at trial. These jurors were still not required to be “neutral” in the modern sense. They remained free to base their verdict on their own personal knowledge of the alleged crime as well as

the evidence they heard in court. Courts upheld this right well into the seventeenth century.

The Jury as Protector of Individual Liberty

Early English juries came to be seen as a protector of the accused against the very harsh criminal laws of the day. For hundreds of years, the sentence for most convicted felons in England was death. Records of trials that date from the Middle Ages into the eighteenth century show jurors acquitting many accused felons. These records have convinced historians that early juries were often reluctant to enforce

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harsh criminal laws. Juries would convict serious offenders and sentence them to hang, but they would often acquit other offenders or convict them of a lesser crime that carried a less severe penalty, such as branding or whipping.



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Although medieval juries were self-informing, juries today base their verdict on evidence presented at trial.

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Punishing Jurors

Through the seventeenth century, English juries could be punished for delivering an “untrue” verdict under the action for a writ of attainat. A panel of 24 jurors would examine the original jury’s suspect verdict. If the original jury’s verdict was overturned, the jurors could be imprisoned and lose their lands and goods. *Bushell’s Case* effectively ended the action for writ of attainat, but it was not formally abolished until 1825.



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Colonial officials burn articles published by John Peter Zenger in New York.

Several cases in the seventeenth and eighteenth centuries helped build the jury’s reputation as a protector of individual liberty. Part III of this dialogue discusses *Bushell’s Case*, which established the right of English juries to deliver a verdict free from judicial coercion. In the American colonies, the jury also demonstrated its resistance to what it perceived as unjust British laws. In 1735, a New York jury acquitted publisher John Peter Zenger, who was put on trial for printing articles critical of an unpopular colonial governor. The Zenger case is often cited as an early expression of the colonists’ commitment to a free press.

Perhaps most significant, however, were attempts by the British crown to deny American colonists their right to trial by jury. These efforts were most vigorous with respect to the much-hated British Navigation Acts. These acts tried to secure British control over trade with the American colonies by requiring, for example, that goods going to and from the colonies be carried on British ships.

Colonists viewed the Navigation Acts as harmful to their economy, and colonial juries would often refuse to convict individuals charged with violating these laws. In response, the British set up special courts that did not use trial by jury. This became one of the major complaints of the colonists against the British as America moved toward revolution. In the Declaration of Independence, we see this complaint appear as a charge against the British king “for depriving us in many cases, of the benefits of trial by jury.”

The Jury in the New Republic

The jury had served as a rallying point for American colonists against unpopular British laws. But there was some dispute over what its role should be in the new American republic. This was especially true with respect to civil juries. Juries in the new state courts had shown a tendency to favor local litigants. Some feared that this favoritism could threaten commerce between the states and with foreign nations.

The U.S. Constitution, as it was sent to the states for ratification in 1787, preserved the right to trial by jury in criminal cases, but there was no mention of civil cases. This did not mean that Congress could not provide for trial by jury in federal cases. Indeed, supporters of the Constitution urged that Congress was likely to provide for the use of civil juries in most instances. But nothing in the Constitution required Congress to do so.

JUSTICE UNDER THE

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Grand Juries

The Fifth Amendment right to be indicted by a grand jury is one of the few provisions in the Bill of Rights that has not been incorporated into the states through the Fourteenth Amendment. This means that this right applies only to the federal government. Most states, however, use some form of grand jury for criminal indictments.

The Constitution's failure to guarantee trial by jury in civil cases became a major issue for those who opposed ratification of the Constitution. The leaders of this opposition were known as the Anti-Federalists (supporters of the Constitution were called Federalists). The Constitution was eventually ratified. But ratification came with demands from the states for amendments that would protect individual rights, including trial by jury in both criminal and civil cases. With the Sixth and Seventh Amendments, this right became part of the Constitution's guarantees. And the Fifth Amendment guaranteed that no one could be tried for a "capital or otherwise infamous crime" (i.e., a felony) unless indicted by a grand jury.

A Cross Section of the Community

Initially, service on juries was limited to white men who owned enough property to qualify for service. The right to serve on a jury was gradually extended to minorities and women, a process that lasted well into the twentieth century.

When the Fourteenth Amendment to the Constitution was ratified in 1868, it promised equal protection of the laws to all United States citizens. Within a few years, the Supreme Court ruled that equal protection applied to trial by jury. In *Strauder v. West Virginia* (1880), the Court held that a West Virginia law restricting jury service to white men violated the equal protection rights of black men, and that service on a jury could not be restricted by race.

The *Strauder* decision was quickly limited by another decision that came out the same year. In *Virginia v. Rives* (1880), the Court held that a right to be considered for jury service was not the same as a right to serve on a jury. As long as the state law did not deny blacks the right to be considered for service, the defendant would have to prove that blacks had

been wrongfully excluded from service on a particular jury. As a practical matter, this meant that blacks were routinely excluded from actual service on juries. The systematic exclusion of blacks from juries in many parts of the United States did not begin to weaken until the civil rights struggles of the 1960s and beyond.

Women also faced a long struggle for their right to serve on a jury. Although women in the United States gained the right to vote in 1920, it was not until 1975 that their ability to serve on juries on equal terms with men was finally secured.

Today, we understand that our right to trial by jury includes a right to have a jury chosen from a representative cross section of our community. The jury, over its centuries of use, has adapted to new political structures and new understandings of individual rights. As our society continues to change, so do the issues that confront this ancient and vital part of our democratic tradition.

Questions:

- The medieval English jury arose in an agrarian society with a relatively weak structure of government. People lived mostly in small villages. There was nothing equivalent to a modern-day police force charged with investigating crimes and collecting evidence. Given these circumstances, why would a self-informing jury make sense? Why do you think that, today, we insist that juries base their verdict only on the evidence presented in court?
- There is a longstanding tradition, going back to the earliest days of the jury, that jury deliberations on a verdict should be private and confidential. How does this tradition support the independence of the jury within our justice system? Do you think that jurors should be able to discuss their deliberations after they have delivered their verdict? Would you put any restrictions on a juror's ability to discuss deliberations (for example, prohibiting discussion of the views of other jurors)?
- The jury gained its reputation as a "bulwark of liberty" in England and in the American colonies for standing up to laws imposed by an English monarch and Parliament that were not popularly elected. In the United States, popularly elected legislators enact our laws and popularly elected officials enforce them. Do you think the jury still plays an important role as the protector of our liberties? Why or why not?