**Trial By Jury: An American History**

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The English were among the first to adopt the institution of trial by an impartial jury of one's peers, and English colonists in America recognized this right, along with due process of law and representative government, as central to their definition of republican liberty. As David J. Bodenhamer explains:

*A local jury chosen from one's peers, or equals, guarded against vindictive and overbearing judges and distant government. Jurors from the neighborhood came to their task with knowledge about the events on trial and about the reputation of the accused and accuser. Their general verdict—a simple reply of guilty or non guilty to a charge of wrongdoing—was the people's most effective weapon against tyranny. The jury, quite simply, was the best available method of assuring justice and protecting liberty. [David J. Bodenhamer, Our Rights (New York: Oxford University Press, 2007), p. 164.]*

During the 18th century, New York colonists demonstrated the importance of this right in the trial of John Peter Zenger, rejecting the judge's instructions to find Zenger guilty of libel on the grounds that what he had published had been true. In the period leading up to the American Revolution, patriots protested against the provision in the Sugar Act (1764) that denied individuals charged with violating the trade laws the right to trial by a local jury. Smugglers were, instead, transported to England for trial by the vice admiralty courts; judges of these courts decided the guilt or innocence of the accused and were paid a portion of the fines imposed on those found guilty. Similarly, the Stamp Act (1765) assigned judges the responsibility of deciding cases without the benefit of jury. Disregard by the British government for the rights of colonists impelled the First Continental Congress to cite violations of the right to a fair trial among the Resolves published in 1774. Two years later, when Thomas Jefferson came to draft the Declaration of Independence, he denounced the King and Parliament "For depriving us in many cases, of the benefits of trial by jury" and "For transporting us beyond the seas to be tried for pretended offenses".

The constitutions drafted by the newly established states included carefully crafted provisions to ensure fair trials. Pennsylvania's Constitution, adopted on August 16, 1776, included the following:

*[I]n the prosecutions for criminal offenses, a man hath a right to be heard by himself and his council, to demand the cause and nature of his accusation, to be confronted with witnesses, to call for evidence in his favour, and a speedy public trial, by an impartial jury of the country, without the unanimous consent of which jury he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any man be justly deprived of his liberty except by the laws of the land, or the judgment of his peers.*

*At the federal level, the Framers of the Constitution asserted the right to trial by jury "of all Crimes, except in Cases of Impeachment," adding that "such Trial shall be held in the State where the said Crimes shall have been committed…." [Article III, Section 2, Paragraph 3].*

The Bill of Rights, adopted in 1791, provides that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." [Amendment VI] In 1968, the Supreme Court held in the case of in Duncan v. Louisiana that, under Amendment XIV, rights guaranteed by the Constitution of the United States apply equally to the states, thus ensuring the fundamental right to trial by jury in state as well as federal criminal prosecutions.

As far back as the Revolutionary Era, jurors had been expected not only to determine the facts of a case but also to interpret the meaning of law itself. This was a right and power rooted in classical republicanism and also in the English common law tradition. Both theory and tradition were celebrated by the leading political theorist of the 18th century, Montesquieu, who interpreted the British Constitution as placing the judicial branch in the hands of the people through the supreme power of the popular juries.

In the ratification debates on the proposed charter, the Anti-Federalists foresaw and warned that juries would lose the right to interpret the meaning of the law. Juries would be limited to judging only the facts of the case before them. Regarding the power of interpreting the law, the Anti Federalists warned that this power would be handed over entirely to unelected judges, who would thus become a kind of aristocracy dominating the judicial branch. These Anti Federalist fears came to pass in 1896 when the Supreme Court enhanced the power of judges in Sparf & Hansen v. United States, noting that the authority formerly exercised by juries was based on custom rather than the Constitution. Only two states, Maryland and Indiana, have retained the "custom" of charging jurors with the task of interpreting the law as well as deciding the facts.

Alexis De Tocqueville writing in the mid 1830's celebrated the jury system as one of key political devices which allows citizens to be active participants in their government. It also has the effect of improving the quality of their citizenship. As he explains:

*The jury contributes most powerfully to form the judgement and to increase the natural intelligence of a people, and this is, in my opinion, its greatest advantage. It may be regarded as a free public school ever open, in which every juror learns to exercise his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws of his country, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even by the passions of the parties. I think that the practical intelligence and political good sense of the Americans are mainly attributable to the long use which they have made of the jury in civil causes. I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ. [Alexis De Tocqueville, Democracy in America, Vol.1, Part II, Chapter XVI]*

Yet in in the late 19th century, there was a shift of responsibility to judges which coincided with a growing sense that jurors were not capable of making impartial judgments. Mark Twain voiced the views of many Americans when he wrote that jury duty "put a ban on intelligence and honesty, and a premium on ignorance, stupidity, and perjury." [Quoted in Bodenhamer, p. 166] The fact that state legislators, many of whom were themselves business and professional men, had passed laws excluding members of their class from serving on juries, may help to explain the disdain with which juries were held.

Throughout much of the 20th century, justices addressed the question of what it means to be tried by a jury of one's peers. With a few notable exceptions, African-Americans and women had been systematically excluded from jury duty since the founding of the republic, denying individuals from those groups the constitutional right to be tried and judged by individuals of the same race or gender. In 1935 the Supreme Court, in Norris v. Alabama—one of two Scottsboro cases to reach the high court, held that the systematic exclusion of African-Americans from the jury had denied the defendants equal protection guaranteed by the Fourteenth Amendment. Not until 1994 did the Court finally overrule the use by prosecutors of peremptory challenges based on gender.

Additional rulings relating to the right to be tried by a jury have affirmed the traditional standard of requiring that proof of guilt be established "beyond a reasonable doubt," approved the use of six-person juries in state criminal trials, and allowed juries to convict criminals in non-capital cases without a unanimous vote.

In the 1960s, the Warren Court handed down a series of landmark decisions intended to ensure the rights of individuals accused of criminal actions. Among the most important were those dealing with right to counsel: who should be provided with legal representation and at what point in the process.