

## XXII. FOUNDATIONS OF LAW, LESSON 19: DEPRIVATION OF RIGHTS AND THE ATTACK OF THE PETIT JURY/TRIAL JURY

### A. Introduction

By the time the United States Constitution and the Bill of Rights were established and ratified, the trial by jury was widely regarded as one of the most crucial rights. In almost every major document and speech before the Revolution, the colonists emphasized trial by jury as either their most significant right or one that was absolutely essential.

Blackstone celebrated the institution as part of a *"strong and twofold barrier . . . between the liberties of the people and the prerogative of the crown,"* noting that *"the truth of every accusation . . . [must] be confirmed by the unanimous suffrage of twelve of his equals and neighbors indifferently chosen and superior to all suspicion."*

This right was guaranteed in the constitutions of the original 13 States, was enshrined in the body of the Constitution and the Sixth Amendment and was protected in some form in the constitution of every State joining the Union thereafter. Those who emigrated from England to America brought with them this great privilege "as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power."

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the proper enforcement of law and administration of justice. A right to jury trial is granted to criminal defendants to prevent oppression by the Government. The framers of our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges used to eliminate enemies and against judges too responsive to higher authorities. They aimed to create an independent judiciary but insisted on further protections against arbitrary action. Providing an accused with the right to be tried by a jury of peers offered an invaluable safeguard against corrupt, overzealous prosecutors and biased, compliant, or eccentric judges. The jury trial provisions reflect a fundamental decision about the exercise of official power—a reluctance to entrust complete power over the life and liberty of citizens to a single judge or a group of judges. Fear of unchecked power found expression in criminal law through this insistence on community participation in determining guilt or innocence.

The concept of the petit jury, or trial jury, has undergone significant changes throughout history, evolving from ancient legal systems to its current form in modern judicial practice. This evolution reflects broader shifts in legal philosophies, political power structures, and societal values.

## B. Definitions:

1. **Trial Jury** The jury participating in the trial of a given case; or a jury summoned and impaneled for the trial of a case, and in this sense a petit jury as distinguished from a grand jury. A body of men returned from the citizens of a particular district before a court or officer of competent jurisdiction, and sworn to try and determine, by verdict, a question of fact. **Code Civ. Proc. Cal. § 193.**
2. **Petit Jury** The ordinary jury of twelve men for the trial of a civil or criminal action. So called to distinguish it from the grand jury. A petit jury is a body of twelve men impaneled and sworn in a district court, to try and determine, by a true and unanimous verdict, any question or issue of fact, in any civil or criminal action or proceeding, according to law and the evidence as given them in the court. **Gen. St. Minn. 1878, c. 71, § 1 (M.S.A. § 593.01).**

## C. Two Types of Petit Juries: "Trial by jury" and "jury trial" are often used interchangeably, but they can have slightly different connotations depending on context:

1. **Trial by Jury:** refers to the process by which a case is heard and decided by a jury of one's peers.
  - a. This term emphasizes the right of a defendant to have their case adjudicated by a jury, **as guaranteed by the Sixth Amendment of the U.S. Constitution in criminal cases and the Seventh Amendment in civil cases.**
  - b. In essence, trial by jury emphasizes the procedural aspect of the trial itself, emphasizing the involvement of a jury in the adjudication process.
  - c. As Justice Hugo Black wrote in 1961, "*[the denial of trial by jury] led first to the colonization of this country, later to the war that won its independence, and finally, to the Bill of Rights.*"
2. **Jury Trial:** "Jury trial" also refers to a legal proceeding in which a jury hears evidence and renders a verdict, similar to "trial by jury."
  - a. However, "jury trial" can be a more general term that encompasses both trials by jury and trials by judge (bench trials).
  - b. In some contexts, "jury trial" might be used to distinguish trials by jury from bench trials, where a judge alone hears evidence and renders a verdict without a jury.

## D. Historical Background

- a. In 1215, King John I endorsed the Magna Carta, commonly known as the "great charter," which ensured the fundamental elements of democratic society: representative government and trial by jury. Additionally, it established the precedent that the monarch was bound by the law and secured the right to a fair trial by one's peers, setting the groundwork for curtailing arbitrary authority.

- b. Regrettably, the entitlement to trial by jury started to diminish around 1500. During this time, King Henry VIII asserted absolute authority and employed the "Star Chamber" to prosecute those who opposed him. These clandestine proceedings lacked indictments, jury trials, or avenues for appeal. The U.S. Supreme Court noted in 1975 that "the Star Chamber has, for centuries, symbolized a disregard of basic individual rights."
- c. In the meantime, British citizens who had lost rights at home reasserted them when they colonized America. The right to trial by jury was guaranteed in the First Charter of Virginia (1606) and all subsequent colonial charters. In the 18th century, that right allowed American colonists to challenge the British king, Parliament and their laws. American juries nullified the laws they found were unfair to colonists. An important example was juries who refused to convict local business owners and sea captains for violating the British Navigation Acts, which restricted imports and exports to only British ships.
- d. In Great Britain, these abuses persisted under subsequent leadership until 1689 when the British Bill of Rights was created to once again affirmed the rights enshrined in the Magna Carta.
- e. To eliminate challenges to British authority, jury trials were eliminated. For example, the 1765 Stamp Act forced colonists who violated the act to appear in admiralty courts with no juries. Colonists issued a formal response to Parliament. While remembered for "no taxation without representation," that response also stated that "trial by jury is the inherent and invaluable right of every British subject of these colonies."
- f. As America moved toward revolution, trial by jury was central to the cause. The First Continental Congress in 1774 included preservation of the right in its resolutions. It is cited in the 1775 Declaration of Causes and Necessity of Taking Up Arms. In 1776, the crimes against King George III cited in the Declaration of Independence included "depriving us in many cases the benefits of trial by jury." As such, this right became one for which our founding fathers pledged "[their] lives, [their] fortunes, and [their] sacred honor."

### **E. Fundamental Law and Constitutional Foundation:**

#### **1. Sixth Amendment**

In all criminal prosecutions, 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**, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## 2. Seventh Amendment

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of **trial by jury** shall be preserved, and **no fact tried by a jury, shall be otherwise reexamined in any court of the United States**, than according to the rules of the **common law**.

The inclusion of the 7th Amendment was a direct response to the grievances of the American colonists against the British Crown, which had denied them the right to jury trials in many cases. The framers of the Constitution and the Bill of Rights sought to rectify this by explicitly protecting the right to a jury trial, thereby safeguarding individual liberties against potential government overreach.

Despite its important role in both colonization and the revolution, trial by jury in civil cases was left out of the draft U. S. Constitution. While it preserved jury trials in criminal cases, Alexander Hamilton believed that differences in state law made it too difficult to preserve civil jury trials at the federal level.

Massachusetts delegate Elbridge Gerry argued that **"a tribunal without juries would be a Star Chamber in civil cases."** Attempts to amend the document to include civil jury trials failed. The Massachusetts Compromise ended the debate. States would ratify the Constitution, but it needed to be amended to include a Bill of Rights--including the 7th Amendment right to trial by jury in civil cases. Historian Roger Roots said, *"Juries were at the heart of the Bill of Rights."* The 7th Amendment is of paramount importance to the rights and liberties we enjoy as Americans. Indeed, it can be argued that the Bill of Rights and the additional rights enshrined there exist due to the fact that trial by jury in civil cases was excluded from the original draft constitution.

It's sad that this our 7th Amendment and its role in American have been largely forgotten in 21st century America. In his 1833 Commentaries on the Constitution, U. S. Supreme Court Justice Joseph Story wrote, *"The inestimable privilege of trial by jury in civil cases is conceded by all to be essential to political and civil liberty."* It is a right that we cannot afford to overlook--or let the government and powerful corporations take away.

### 3. Maxims

- a. **Maxim of Law 67a.** Jurors ought to be neighbors, of sufficient estate, and free from suspicion. *Jenk. Cent.* 141; *Bouv.* 134.
- b. **Maxim of Law 67b.** Juries are the judges of fact and law in American jurisprudence. *State of Georgia v. Brailsford*, 3 Dall. 1, 4; *U.S. v. Dougherty*, 473 F.2d 113233.
- c. **Maxim of Law 67c.** The decision of twelve good and upright men is thought by the common law to be the dictate of truth. *Halk. Max.* 73.
- d. **Maxim of Law 67d.** A jury ought not to be harassed by labors and expenses. *Jenk. Cent.* 6.
- e. **Maxim of Law 67e.** The administration of an oath is an indispensable requisite to the formation of a legal jury. *Lumsden v. City of Milwaukee*, 8 Wis.485,486.
- f. **Maxim of Law 67f.** The verdict of a jury is a bar to equity. Branch, *Max.* 155.
- g. **Maxim of Law 67g.** There can be no valid trial jury of less than 12 men, and a consent even by the defendant to a trial by a less number is absolutely void. *Hunt v. State*, 61 Miss. 577, 580, 581.
- h. **Maxim of Law 67h.** The verdict of a jury is, as it were, the dictum of truth, even as the judgment of the court is the dictum of law. *Co. Litt.* 226.

**F. Founding Fathers' Views:** It is a right unknown to most--even though its history is central to the creation of the country.

1. Thomas Jefferson criticized the document for neglecting to preserve the civil jury trial. Jefferson listed among the rights he wished had been explicitly guaranteed **"a trial by jury in all cases determinable by the laws of the land."** Jefferson later said, **"I consider [trial by jury] as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution,"** and, **"Were I called upon to decide whether the people had best be omitted in the legislative or in the judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making of them."**
2. In Federalist Paper No. 83, Hamilton wrote that **"the friends and adversaries of the plan of Convention, if they agree on nothing else, concur at least on the value they set upon trial by jury."**
3. Anti-Federalist, Patrick Henry, speaking at the Virginia Constitutional Convention, said: **"Trial by jury is the best appendage of freedom.... We are told that we are to part with that trial by jury with which our ancestors secured their lives and property.... I hope we shall never be induced by such arguments, to part with that excellent mode of trial."**
4. Patrick Henry, George Mason and other anti-federalists may have used the "jury trial" issue to stir up political opposition to the constitution, which they opposed more for its usurpation of local political influence. But populist sentiment was strongly in favor of a Bill of Rights, particularly the right to a civil jury trial.

5. James Madison: Advocated for the inclusion of the right in the Bill of Rights, recognizing its role in protecting citizens from government overreach.
6. The colonists' Resolution of the Stamp Act Congress, passed on October 19, 1765, declared, "Trial by jury [is] the inherent and invaluable right of every British subject in these colonies." *Id. at 267; Instructions of the Town of Braintree, Massachusetts on the Stamp Act (Oct. 14, 1765).*
7. Late in 1772, the Boston town meeting passed a resolution charging that the right of trial by jury was in jeopardy from the power of the vice-admiralty courts, which did not provide jury trials. *See, e.g., Wolfram, Charles W., The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 654, n. 47 (1973); Sources and Documents Illustrating the American Revolution, 1764-1788 at 94 (2d ed. S. Morison 1929).*
8. In 1774, the First Continental Congress declared in its Declaration and Resolves that the colonists were entitled to the "great and estimable privilege of being tried by their peers of the vicinage." *Singleton, John N., "Jury Trial: History and Preservation," 32 Trial Lawyer's Guide (1988) at 273, 274.*
9. Colonists called trial by jury "a great right" when describing this declaration to the French settlers of Quebec in 1774, in an address urging them to support the American cause. *Perry, Richard and John C. Cooper, Sources of Our Liberties, American Bar Foundation (1959) at 284.*
10. In the Declaration of the Causes and Necessity of Taking Up Arms in 1775, the colonists listed deprivation of "the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property" as specific grounds for forcibly resisting English rule. *Id. at 290; Singleton at 274.*
11. Among the grievances against George III listed in the Declaration of Independence was "depriving us, in many cases, the benefits of trial by jury." *Perry, Richard and John C. Cooper, Sources of Our Liberties, American Bar Foundation (1959) at 320.* (The only other Bill of Rights provision mentioned specifically in the Declaration of Independence was the prohibition against quartering troops.)

### G. Historical Erosion

1. 1500s England: King Henry VIII and the Star Chamber, where secret sessions without juries were used to suppress dissent.
2. Tort Reform-When politicians in Congress or at the state level pass "tort reforms" they are taking power and authority directly away from juries, or in some cases, eliminating juries altogether. Our founding fathers would not be happy!
3. Plea Bargains: The majority of criminal cases are settled without a jury trial.
4. Mandatory Sentencing: Reduces the role of juries in determining appropriate punishments.
5. Administrative Courts: Often bypass jury trials, especially in regulatory and administrative matters.

6. Jury Wheel: noun, Law. a device, containing slips with the names of prospective jurors, that when spun mixes the names for random selection. Software used to assemble the jury pool.
  - a. Clear Force is a government contractor operated by General Michael Hayden and General Jones. They operate a software product called the magic wheel that helps the courts to “randomly” select jurors. However, using ai, the software actually predicts the outcomes of cases based on who they have on the jury.
  - b. The courts in DC use AI-driven software with predictive analytic algorithms to help prosecutors select a jury pool that is most likely to provide the verdict they seek. This software was not only used in DC to select Roger Stone’s jury but a NY State version of that software was also used in the selection of the Grand Jury in the case of Alvin Bragg’s attempts to seek an indictment against President Trump. <https://toresays.com/2023/04/05/president-trumps-indictment-and-jury-was-ai-generated/>

## H. Impact on Justice

1. Reduction in Fair Trials: Fewer cases are being heard by a jury, potentially leading to unjust outcomes.
2. Increased Government Power: Limits the community's role in checking governmental authority.

## I. Restoring the Right to Trial by Jury

1. Public Awareness and Education
  - a. Understanding History: Educate the public on the historical importance and current erosion of the right to trial by jury.
  - b. All laws, governmental powers, and individual rights center around the State Constitution. The **Supreme Court of Delaware** gives an explanation as to the purpose of such a Constitution: “*We think it fundamental in our theory of constitutional government that the basic purpose of a written constitution has a two-fold aspect, first, the securing to the people of certain unchangeable rights and remedies, and second, the curtailment of unrestricted governmental activity within certain defined fields.*” **Du Pont v. Du Pont**. 85 A.2d 724, 728; 32 Del. Ch. 413 ((1951).
  - c. One of the most significant aspects of this form of government is its three separate and independent branches which includes a judiciary whose duty it is to protect rights and liberties secured in the Constitution. This was asserted by the **Supreme Court of Oregon** as follow: “*The constitutional rights of an individual are fundamental and inalienable. They cannot be destroyed nor diminished by legislative act, or failure to act. The duty of seeing that they are protected and preserved inviolate falls squarely upon the shoulders of the judiciary. The*

*performance of this duty is one of the inherent powers of the court, a power which the legislature can neither curtail nor abolish.” State ex rel. Ricco v. Biogs. 198 Ore. 413,430; 255 P.2d 1055 (1953).*

- d. The **New York Supreme Court** had stated the importance of a Judicial body as follows: The judicial power was intended to stand as a bulwark against all legislation which impairs any of the constitutional guaranties. \* \* \* The judicial power can and should pronounce null all laws which contravene its provisions, — a feature of our governmental system which De Tocqueville declared to be “one of the strongest barriers ever devised against the tyrannies of political assemblies.” **Volume 1, p. 129.**

### 2. Advocacy and Reform

- a. Legislative Action: Notice the government instructing them to pass laws that protect and expand the right to trial by jury.
- b. **Securities and Exchange Commission V. George R. Jarksey, Jr., et al., 22-859, 2022**

*“JUSTICE GORSUCH: So, Mr. Fletcher, with respect to your argument that Congress can move something from courts into agencies and the Seventh Amendment doesn't speak to that because it's not a suit, I think Noel Webster described a suit as any action or process for the recovery of a right or a claim before any tribunal, which would seem to be a problem. That's a pretty contemporaneous definition.*

*And then Justice Brennan in Granfinanciera I think addressed your argument pretty squarely when he said **Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action and placing jurisdiction in an administrative agency.**”*

*Real Law, Real Simple*