HISTORY AND FUNCTION OF TRIAL BY JURY

HISTORY--

The framers of the American Constitution relied heavily on their English heritage in designing our judicial system. The Constitution reflects the radical idea that government is a public matter, to be conducted for the benefit of the people, rather than for the benefit of the sovereign.

The Constitution also reflects an optimistic evaluation of the relative strengths and weaknesses of human nature and institutions. But it structures government so as to restrain the arrogance of power and other human frailties.

The idea of popular sovereignty is reflected in the right of the people to select their executive and legislative officials by election. In the judicial branch, the Constitution provides for citizen decision-making through jury trials. The essence of the constitutional right to trial by jury is that a body of laymen, not permanently attached to the sovereign, participate along with the judge in the fact-finding required by a case.

Juries serve a number of important, related functions: They increase the accountability of the judicial branch to the popular will by reducing the isolation of the judiciary and by limiting the likelihood of arbitrary government action. Citizen decision-making also enhances the moral authority and public acceptance of judicial decisions. Service on juries also promotes individual dignity and responsibility, and educates citizens about government by bringing them into repeated contact with it.

The founders of our nation regarded trial by jury as an important bulwark against governmental tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign or
its judiciary. Thomas Jefferson said that he considered trial by jury "as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution." (Jefferson, T., 1861, vol. 3 p. 71.)

Confidence in the average person and in the rational, emotional, and social aspects of human nature was implicit in this democratic ideal. Although the willingness to grant only propertied, white males the right to serve on juries may seem narrow from today's perspective, it represented an important step away from the historic, feudal distinctions between royalty, nobles, and commoners. As our society developed, this confidence was extended to people who did not own real property, non-whites, and females. The extension of this confidence enhances the democratic principle that juries guard against the abuse of power by the government and those who are economically and socially powerful.

The ancient roots of the jury system can be traced to Greece and Anglo-Saxon England. Even in the relatively few places in which jury trials have been used, they have moved in and out of favor in competition with the power of the sovereign and other methods of settling controversies.

The Scandinavians brought jury trials to Normandy; the Normans then brought the jury concept to England in 1066.

Prior practice was to rely on God to decide disputes, posing questions and discerning answers through religious rituals. Criminal cases were decided through trial by battle or by ordeal. Civil cases were decided by the clergy and compurgators or oath helpers, who were often kin to the accused, and would swear to a party's honesty and counter the charges against him. These procedures were not sufficiently rational or reliable.

The jury system we are familiar with began when William the Conqueror used citizen inquests to record financial information, and Henry II impaneled citizens to consider criminal matters. An inquest consisted of a group of chosen and sworn neighborhood representatives who answered questions asked by an officer of the king. The scope of questions expanded as various sources of revenue, such as fines for offenses, were developed. The importance of the "inquest" was that it functioned as a buffer between the people and the arbitrary power of the king.

By the end of the twelfth century, an "accusing jury" or "jury of presentment" indicted suspected offenders. This was the precursor of our "grand jury". The accusing jury consisted of 12 men from each shire and 4 men from each township. Within the next two centuries, the functions of the modern grand jury and trial jury became distinct.

In 1215, the Magna Carta recognized the concepts of due process and trial by jury: "No free man shall be taken or imprisoned, or disseisined, or outlawed or exiled, or in any way ruined . . . except by lawful judgment of his peers or by the law of the land." This represented a significant shift from an inquest held for the benefit of the sovereign into a right established for the protection of the accused.
Criminals were indicted by the presenting jury and tried by the petit jury. Due to large caseloads, less serious offenses were tried by a court rather than by a jury.

The path to jury independence was tortuous. Over the centuries, the sovereign made various efforts to retain or regain control of the judicial decision making-process including: 1) establishing that certain cases (for example, divorce cases) did not have to be tried in courts which provided jury trials, but could be tried in specialized courts, 2) punishing jurors for "erroneous" decisions by fines and imprisonment, and 3) changing the power of appeals courts over jury verdicts.

Between the fourteenth and seventeenth centuries, the jury system became a revered institution. Jurors had ceased acting as witnesses and became disinterested fact-finders. Traditionally, English juries could be fined or jailed for returning verdicts contrary to the interests of the sovereign. But, in 1670, the Court of Common Pleas freed the jury in the William Penn case from jail, and recognized the principle that a jury could not be punished for its decision. This principle has been adopted in the United States and is regarded as essential to the jury's independence from the sovereign. Thus, a jury may act effectively as a safeguard of the fundamental liberties of the individual, impartial fact-finder, and representative of the community.

The right to trial by jury was transplanted to the English colony at Jamestown in accordance with the charter granted by the king in 1606. It set a pattern for all of the British colonies in North America, but this pattern allowed for much diversity in practice and procedure. The jury system was embroiled in the struggle for individual rights in the colonies.

One of the most significant examples of this occurred in 1735, when a New York jury enlarged the freedom of the press in the criminal libel trial of John Peter Zenger, who had been accused of publishing defamatory statements against the royal governor, William Cosby. The jury accepted the defense attorney's argument that truth should be a defense and rejected the position of the judges that, under common law, the defendant was guilty if he had written the defamatory statements.

The right of trial by jury was held in such esteem by the American colonists that its deprivation by the British was one of the important grievances leading to the break with England. The Declaration of Independence set forth the deprivation of the "benefits of Trial by Jury" as one of the offensive English acts on which the declaration was based. Of all the methods adopted to strengthen the administration of the British laws, the most effective, and therefore the most disliked, was the deprivation of a colonist's right to be tried by a jury which was almost certain to acquit him. (Holdsworth, W. S., 1966, vol. 11 p. 110.)
Prior to the Civil War, juries in free states effectively nullified federal law by refusing to convict persons who had aided escaping slaves. After the Civil War, the thirteenth and fourteenth amendments to the Constitution and federal civil rights statutes removed race as a legal basis for disqualification from jury service. But, especially in the South, blacks continued to be excluded from jury service by state voting and jury service laws which appeared superficially to be non-discriminatory.

The right to trial by jury is guaranteed--in civil as well as criminal matters--by the constitutions of the federal government and every state.

JURY FUNCTION--

The two most common forms of juries are petit and grand juries. Petit juries decide criminal and civil cases at trials. Grand juries decide whether sufficient evidence exists to charge a person with a crime and may conduct investigations.

A jury is responsible for hearing evidence, deliberating impartially, and reaching a decision about pertinent issues. It takes an oath to do this according to law. Until the jury retires to deliberate, the jury is passive: it generally may not take notes or ask questions of the judge, lawyers, parties, or witnesses.

The trial is conducted by a judge, but the jury, not the judge, is the exclusive finder of facts. The jury's decision about facts is final, and generally cannot be disturbed by the judge at either the trial or appellate level.

In criminal cases, the jury must decide whether the person charged is guilty or innocent, depending on whether the prosecution has proven its case "beyond a reasonable doubt." In some cases, the jury may also decide the penalty to be imposed or may recommend a penalty to the judge. By contrast, in civil cases, the jury must decide whether the person charged is responsible for injuring the plaintiff, depending on whether the injured person has proven his case by a "preponderance of the evidence." If so, the jury must also determine the amount of compensation.

Juries may also be used to find facts relating to deaths or other particular facts.

The jury system was not intended to lead to more efficient judicial administration. Jury trials are longer, less convenient, and more expensive than non-jury or "bench" trials. Just as the principle of separation of powers was not incorporated by the Framers into the Constitution in order to promote efficiency or
dispatch in the business of government, the right to a jury trial was not guaranteed in order to facilitate prompt and accurate decision of lawsuits. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 348 (1979). (Rehnquist, J. dissenting.)

The impact of using juries in our common law system is obvious when ours is contrasted with the civil law system operating in a majority of countries. The use of lay people in the judicial process requires us to present evidence in court within a more limited amount of time, so as to limit the inconvenience to the citizens doing their civic duty, and to adopt rules governing what evidence may be presented and how it may be presented. It also becomes necessary to prepare and give instructions to inform the jury of the law which it is supposed to follow.

Jury trials were not intended to reach the same results that a non-jury trial would reach. To the contrary, the disadvantages of jury trial were accepted because of the jury's ability to disregard rules of law and reach a result that a judge could not or would not reach. After serving as a juror, an English writer noted:

> And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it. . . .

> Our civilization has decided, and very justly decided, that determining the guilt or innocence of a man is a thing too important to be trusted to trained men. If it wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things that I felt in the jury box. When it wants a library cataloged, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing round. The same thing was done if I remember right, by the Founder of Christianity. (Chesterton, G. K., 1968, p. 55.)

Juries represent the "passional elements in our nature" and thus keep the administration of law in accord with the wishes and feelings of the community. (Holmes, O. W., 1920, p. 237.) Although jurors as well as judges are subject to personal limitations and to prejudice against unpopular litigants, the limitations of a group of jurors are preferred over those of an individual judge.
The length or complexity of a case, the introduction of expert evidence, or an emotional factor which blurs the issue may present a greater problem in a jury trial than would be presented in a bench trial. The complexity may be caused by the number of parties to the litigation, the number of claims, or the nature of the subject matter. The evidence may be the source of confusion because of the amount or its technical nature. Although it is essential that juries represent our passions as well as our logic, this passion may at times obscure the issues and reduce the likelihood that justice will be done.

THE NATURE OF THE FEDERAL CONSTITUTIONAL RIGHT

Unlike other fundamental rights, our Constitution addresses the right to trial by jury several times. Article III establishes the right to trial by jury in criminal cases: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed. . . ." The Bill of Rights guarantees the right to indictment by a grand jury in the fifth amendment, trial by jury in criminal cases in the sixth amendment, and trial by jury in civil cases in the seventh amendment.

The right to trial by jury is regarded as a fundamental right, essential to a fair trial. But the right is not absolute. There is no federal constitutional right to a jury trial for "petty offenses". The distinction between "serious" and "petty" offenses is defined in terms of the nature of the offense and the severity of the punishment.

Crimes punishable by less than six months' imprisonment are generally regarded as petty. But charges of crimes which were indictable at common law are not regarded as petty and require a jury trial. Additionally, charges of crimes which are inherently base or depraved are not petty and require a jury trial.

A child who is prosecuted as a delinquent in a juvenile court is not entitled to a jury trial.

The following basic principles of our jury system have been the subject of contention or abuse:

**Civic Duty** -- Because the parties to a law suit have a right to a jury, the citizens of the community have a civic duty to serve as jurors. The court has the power to compel citizens to appear for jury service. Failure of a prospective juror to attend is punishable by contempt, unless the absence is excused by the court.

Since jury service is regarded as a civic duty, compensation is minimal and generally consists of payment of a per diem expense and mileage. Jury service is usually inconvenient and
often means a financial loss to those called.

In making decisions as a juror, a citizen may be called upon to exercise the greatest power and responsibility in his lifetime: Deciding the innocence or guilt of another person, or deciding whether that person dies, goes to prison, or pays a substantial financial penalty. The proper exercise of this power is often a source of discomfort to jurors.

Qualifications -- Qualifications for jury service reflect a democratic, egalitarian ideal. Competence to serve as a juror is an individual matter, not a class or group matter. It generally depends on an individual's good character and his having no relevant physical or mental impairment.

Our jury system is an evolving social institution which has reflected the broader societal trend toward empowering individuals. Since 1787, our society has empowered various groups of persons who were not even regarded as "persons" by the framers of our Constitution. Thus, juries have come to more adequately reflect the wide range of our communities' values and life experiences.

Selection -- It is often said that a person is entitled to be tried by a jury of his peers. This is true only in the most general sense.

A defendant has a right to a jury selected at random and impartially. It is not proper to select a jury by intentional, proportional representation of any identifiable group or groups. The purpose of the requirement is to insure that the jury generally represents the community and is not an instrument of any special group or class.

A particular jury need not contain representatives of all groups within the community. But those groups cannot be intentionally or systematically excluded. For example, women cannot be systematically excluded or excused upon request from jury service.

The Constitution requires only that a jury be selected from a cross-section of the community. This "fair cross-section" requirement means it is not permissible to include or exclude a juror on the basis of race, color, national origin, gender, or any other identifiable group characteristic.

Details regarding selection and service are not explicitly set forth in the Constitution; procedures vary from state to state. Jury service in the various federal courts depends on the procedure of the state in which each is located.

Jury selection typically involves clerks compiling a list of names of prospective jurors. Some of these people are called to serve; some of those called are excused by the judge. A panel of
prospective jurors is brought to the courtroom, where the attorneys and the judge will then excuse some people and select others to serve on the particular jury.

There are two types of challenges which a lawyer may bring against a prospective juror: "for cause" and "peremptory". A challenge for cause asserts that the individual is not qualified because he is not impartial or has a relevant impairment. The judge decides if the challenge is valid. A peremptory challenge need not be based on any cause or reason. Neither type of challenge may be used to exclude a juror based on race.

Size of Jury -- Although a twelve person jury is traditional, and is the norm in many jurisdictions including the federal courts, it is not required by the Constitution. The Constitution requires only that the jury be large enough to promote group deliberation. The Supreme Court has held that a five person jury is too small to effectively accomplish this, but a six person jury is acceptable.

Deliberations -- In the United States, judges generally do not comment on or summarize the evidence for the jury. At the conclusion of the trial, the jury is removed from the presence of the judge, the parties, and the public to reach a decision. The seclusion behind closed doors is intended to promote a free exchange of ideas.

Unanimity -- The federal Constitution does not require that a twelve person jury be unanimous in cases tried in state courts. A six person jury must be unanimous in a civil case or if the criminal offense charged is not "petty".

Jurisdictions in which all jurors need not agree reduce the significance of minority views on the jury as well as the effectiveness of the jury in representing a cross-section of the community. Also, the idea that jurors can disagree about their decision poses an interesting problem when viewed in the context of the constitutional requirement that the prosecution must prove guilt beyond a reasonable doubt in a criminal case.

Selection in Capital Cases -- If a juror has principles which preclude him from considering the death penalty in a case in which the law allows such a sentence, the juror may be excluded for cause. The prosecution is entitled to jurors who can fairly consider all of the issues before them, even if this results in the exclusion from the jury of the segment of the community which is opposed to the death penalty.

Despite some problems with the practical aspects of our jury system, juries have served our nation well. When the jury system is criticized, it is often in terms of being insufficiently rational, reliable, or efficient as a means of dispute resolution. As the debate over the best method of dispute
resolution continues, it has become obvious that even the most ideal approach would leave many dissatisfied. Detractors of the jury system rarely recognize that juries do more than act as disinterested fact-finders. They are an experiment in democracy in our courts, serving to enhance government accountability and individual liberty.

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CONSTITUTION AND CASES

Constitution of the United States
   Article III, Section 2, Clause 2
   Amendments:  V, VI, VII


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Should we eliminate jury trials in criminal cases? In civil cases?

"Jury pardon" vs. Jury's oath to follow the law

In jurisdictions in which the jury need not be unanimous in criminal cases, does the fact that the jurors disagree about guilt indicate that there must be a reasonable doubt in the mind of the dissenting juror(s)?

Should a judge be allowed to comment on the evidence in order to assist a jury reach a decision in the ordinary case? In the extraordinary case?

Are some trials too complex for juries?
   Length
   Multiple parties
   Technical issues--accounting, chemistry, medicine, construction
Should the jury be able to take notes?

Should the jury be able to ask questions of the participants other than the judge? For example: of witnesses.

Civil jury for $20 case in 1787--What minimum today?

Capital cases:
   Impact of Witherspoon selection in death cases on: 1) likelihood of conviction, 2) likelihood of verdict for death (advisory or binding) where jury has this function, 3) conflict between fair cross-section requirement and fair trial for prosecution.
   Juries in capital cases may not serve as an accurate reflection of community values. That portion of the community which is opposed to capital punishment will not be heard on any jury which will decide the question, and the question of the death penalty in every case will be decided only by persons willing to impose it. In those regions in which a significant percentage of the citizens are opposed to the death penalty, this exclusion conflicts with the fair cross-section ideal.
   Also, removal for cause coupled with prosecutorial