

THE AMERICAN CRIMINAL JURY TRIAL – JUSTICE AND DEMOCRACY IN ACTION

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INTRODUCTION

Only 2% of roughly 80,000 persons charged with crimes in 2018 in federal court in the United States of America had their cases heard by juries of their peers. In those trials, 83% of defendants were convicted and 17% were acquitted. Approximately 90% of criminal cases are resolved by way of plea agreement and sentencing with only 8% dismissed.¹ The percentages of jury trials and plea agreements are roughly the same at the state level. Civil cases are also tried by juries but are not the focus of this article.

The jury trial has a long history in the world which this article summarizes below. Specific attention is given to its importance in the formation of the government of the United States of America. The right to trial by jury in a criminal case in the United States has not changed significantly since it was included in the Bill of Rights in 1791 and applied to all states and territories in 1868.

¹ Gramlich J. Only 2% of federal criminal defendants go to trial, and most who do are found guilty, official link on web site: <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/>.

This author believes that the right to trial by jury preserves a fundamental human right under rule of law even when rarely used by the criminal defendant. In this article the author aims to assess whether the criminal jury trial should remain a fundamental part of the American legal system by cogently discussing the major advantages and disadvantages of trial by jury.

HISTORY OF CRIMINAL TRIAL BY JURY

The jury trial system has its roots in antiquity. First recorded evidence of the jury system is found in Athenian law and described by Aristotle. The following timeline generally describes the development of trial by jury as follows:²

- (c. 350 BCE) The Athenian jury system

In descriptions of the Athenian system of law, written around 350 BCE, Aristotle describes the use of a jury system. Jurors are selected at random and assigned to courts at the last minute, probably to prevent bribery, and after hearing the case from both sides, they cast their vote by dropping a ballot into one of two jars. Jurors are expected to know Athenian law already.

- (c. 950 CE) Norway's system of things

Around 950 CE, Norway establishes a system of things, where farmers can set laws and convict people of breaking them. The main things are Borgarting, Eidsivating, Gulating and Frostating, but smaller courts exist throughout the country. These are some of the earliest instances of a jury system, and England and Scotland later adopt similar systems.

- (997 CE) The Wantage Code

In 997 CE, King Aethelred of England issues the Wantage Code, an early English law code written in Old English. Using Scandinavian vocabulary, the code features perhaps the earliest description of a jury of presentment to decide cases, as well as regulations for trial by ordeal,

which assumes God will intervene for the innocent.

- (1155 CE) Henry II of England's early jury system

When Henry II ascends to the English throne in April, 1155 CE, he reforms the Norman government by weakening the feudal ties of powerful English and Norman barons. Among other changes, he replaces local laws with a system of common law, which includes trial by jury. Previously, English courts used the old Germanic custom of trial by ordeal or battle.

- (1166 CE) The Assize of Clarendon jury system

In 1166 CE, Henry II sets forth a series of ordinances called the Assize of Clarendon that establish the jury system systematically throughout England. Aiming to improve criminal law procedures, the Assize creates the presenting (or grand) jury of 12 men in each hundred and 4 men in each township. This jury informs the King's judges of serious crimes committed in local districts. Jurors are supposed to collect information on the accusations before meeting.

- (1215 CE) The Magna Carta guarantees judgment by peers

When King John signs into law the Magna Carta on June 15, 1215, he guarantees that no free man will be punished without "the lawful judgment of his peers." This guarantee restricts the judicial power of the king. While the jury system is already in use, the Magna Carta inspires later governments to see trial by jury as a basic right to protect citizens from arbitrary government.

- (1215 CE) The Fourth Lateran Council bans trial by ordeal

Pope Innocent III calls the Fourth Lateran Council to convene on November 11, 1215, and by the end of the counsel the church bans clerical participation in trial by ordeal. Without the church's sanction, trial by ordeal drops in use. Most of England now turns to the jury system, already in use in assizes.

- (1275 CE) First Statute of Westminster makes jury trial compulsory

Edward I holds a parliament at Westminster and issues the first Statute of Westminster

2 Development of the Jury System Timeline, official link on web site: https://www.softschools.com/timelines/development_of_the_jury_system_timeline/374/.

in 1275 CE. This ordinance alters land law and makes trial by jury compulsory in criminal cases. The rest of Edward's ordinances amend the unwritten common law in England and remain active for much of the Middle Ages.

- (1670 CE) Bushel's Case determines that jurors cannot be punished for their verdict

In November 1670, two Quakers, including William Penn, are arrested for unlawful assembly. In the subsequent trial, the jury submits a verdict of not guilty, and the judge demands jurors pay a fine for contempt of court. Juror Edward Bushel refuses to pay, and Penn protests that the decision violates the Magna Carta. In Bushel's subsequent petition for justice, the court rules that jurors cannot be punished for their verdict as long as they have acted properly.

- (1733 CE) The trial of John Peter Zenger in the United States of America

In 1733 CE, German immigrant John Peter Zenger is accused of libel, for printing unflattering articles about the royal governor of the American colony of New York. In the subsequent trial, the jury returns a verdict of not guilty, in an attempt to protest the rule of an unfair governor. This trial also establishes the American right to freedom of the press.

- (1798 CE) Trial by jury is established in Germany

Germany's first modern jury system is established in the Rhenish provinces in 1798 CE, with a court of 12 citizens. As the monarchy takes power, this system is gradually pushed back in favor of a more tyrannical system of justice, where judges wield most of the power.

- (1804 CE) The Napoleonic Code establishes jury trials in France

The Napoleonic Code goes into effect on March 12, 1804, and establishes clearly written civil laws to replace feudal laws in France. The Code strongly influences other legal systems in developing countries. It supports jury trials (or petit jury), but avoids implementing a grand jury.

- (1733 CE – Present) The jury trial in the United States of America

In the United States the right to vote and the right to a jury trial are considered the two funda-

mental rights which most effectively reflect democracy. One of the American founding fathers, John Adams, once wrote:

*"Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds."*³

Another founding father, author of the Declaration of Independence and later president, Thomas Jefferson, wrote:

*"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."*⁴

Perhaps the most significant case in American jurisprudence by which the right to trial by jury was affirmed is the case of John Peter Zenger (mentioned above). Zenger was a publisher who wrote a column in his weekly newspaper criticizing the New York British Royal Governor William Crosby. Governor Crosby had Zenger arrested and imprisoned for the crime of libel. In 1735, Zenger was tried before a jury of his peers and was found not guilty. The jury reasoned that because he printed the truth, he could not be held guilty of libel. Zenger's case demonstrated the power of a jury of peers' ability to thwart the tyranny of a government official. Furthermore, it guaranteed freedom of the press and became one of the foundations by which the American Revolution took place just 41 years later.⁵

By 1774 the American colonials, in anticipation of separation from Great Britain, met at the First Continental Congress in Philadelphia. The Congress resolved that the colonials were entitled to "the great and estimable privilege of being tried by a jury of their peers in the vicinage." In

3 Zouhary J. Jury Duty: a Founding Principal of American Democracy, 2020. Civil Jury Project, New York University School of Law, official link on web site: <https://civiljuryproject.law.nyu.edu/jury-duty-a-founding-principal-of-american-democracy/>.

4 Thomas Jefferson quotes, official link on web site: https://www.azquotes.com/author/7392-Thomas_Jefferson/tag/jury.

5 White BA, 2017. Trial by Jury "Inherent and Invaluable" official link on web site: <https://www.wvaj.org/index.cfm?pg=HistoryTrialbyJury>.

1776, Thomas Jefferson, in the Declaration of Independence, asserted this charge against Britain's King George III:

"Depriving us in many cases, the benefits of trial by jury."⁶

Subsequent to the Declaration of Independence, each colony was required to write its own state constitution, all of which were based upon the rights outlined in the Magna Carta and the British Bill of Rights and included the right to jury trial.⁷ The United States Constitution was developed in 1777 and subsequently ratified on June 21, 1788. On September 25, 1789 the first ten amendments to the constitution were created and subsequently ratified by the states on December 15, 1791. The 6th amendment provides the right to a speedy, public, and impartial trial by jury. Specifically, it reads:

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.⁸

The 14th amendment, ratified on July 9, 1868, assured that the federally protected 6th amendment right to trial by jury was a right available to persons in all states and territories.⁹ The right to trial by jury in a criminal case in the United States has not changed significantly since 1868.

DISADVANTAGES OF CRIMINAL TRIAL BY JURY

There are numerous disadvantages in trying a criminal case before a jury. However, the author focuses on three predominate ones here: bias, income inequality, and ignorance of the

law. The first is rooted in the jurors' pre-conceived notions. The jury system is designed, in the ideal, to minimize bias and encourage the jury panel to make its decision purely based upon the facts and the law. Theory and reality sometimes diverge. Inescapably, jurors bring their biases into the jury proceedings. Gifted and experienced advocates are able to expose these biases in the voir dire (jury selection). Biased jurors can be removed with or without cause. But in some instances the community sentiment is so overwhelming that the removal of every biased juror is simply not possible. Perhaps the most poignant example of irreparable community bias in the United States is analyzed and exposed in the famous American novel by Harper Lee, "To Kill a Mockingbird". The story is that of a young black man accused of raping a white woman in the early 20th century in the American Deep South where slavery had previously prevailed until 1865. Even after the Civil War and well into the early 1960s, blacks remained second-class citizens and were subjected to, in effect, apartheid. In Ms. Lee's epic novel, the protagonist, Jim Robinson, is accused of murder. He is represented by attorney Atticus Finch who, during the trial, exposes the lies and the false allegations against Robinson. It is clear to all that he is innocent. Robinson is called to testify on his own behalf and denies rape but admits to helping a young white woman move furniture in her home after she requested his help. When asked why he would help a white woman, he stated that he "felt sorry for her". This was not a crime but was a clear violation of community standards in the Deep South. No black man was entitled to feel sorry for a white woman. Robinson was convicted of murder, notwithstanding all of the facts and evidence which proved his innocence, based wholly upon the injustice of community bias.¹⁰ The jury in "To Kill a Mockingbird" further demonstrates a fundamental risk in the system which is that the jury makes its decision in complete secrecy, and jurors are never required to dis-

6 Declaration of Independence, 1776, official link on web site: <https://www.archives.gov/founding-docs/declaration-transcript>.

7 White BA, 2017. Trial by Jury "Inherent and Invaluable", official link on web site: <https://www.wvaj.org/index.cfm?pg=HistoryTrialbyJury>.

8 Bill of Rights Transcript, 1789, official link on web site: <https://www.archives.gov/founding-docs/bill-of-rights-transcript>.

9 6th Amendment to the United States Constitution, 1868. National Archives and Records Administration, official link on <https://www.archives.gov/founding-docs/bill-of-rights-transcript#toc-amendment-vi>.

10 Lee H, To Kill a Mockingbird, 1960, renewed 1988. Published by arrangement with McIntosh and Otis, Inc.

close the reasons for their decisions. Thus, it is very difficult to prove any fundamental underlying bias.

Deeply held biases can be extremely difficult to overcome because humans suffer from cognitive dissonance. This condition is defined by an extreme resistance to information contradictory to personal beliefs, ideals, or values. Prospective jurors, like all people, come to the courtroom with deeply held beliefs with respect to crime, judges, lawyers, and the court system. It is difficult to expose these biases in jury selection. Furthermore, the jury selection provides a limited number of opportunities, also called strikes, to remove those prospective jurors who most prominently display their biases. The great danger with juries is that for some jurors facts do not change their minds.¹¹

Another potential disadvantage for defendants in the criminal justice system is related to the fact that the United States has the highest level of income inequality among its post-industrialized peers.¹² Thus, the vast majority of criminal defendants lack sufficient financial resources to hire highly skilled and competent trial attorneys. In the hands of less competent attorneys, these defendants are therefore exposed to a greater risk of conviction at trial to all of the charges filed without the benefit of sentencing and charge limitations provided in plea agreements. Alternatively, many defendants are forced into less than ideal plea agreements. It is without debate that there is a direct correlation between poverty, minority status, and injustice within the legal system.

African Americans are imprisoned at a rate of more than 5 times the white population. African Americans and Latinos make up approximately 32% of the United States population but comprise 56% of persons incarcerated as of 2015.¹³

Clearly, there is a correlation between criminal charging and jury conviction rates which weighs heavily against minorities and impoverished. Furthermore, studies show there has been a systematic effort to insure juror bias by excluding minorities from the jury panel.¹⁴

In addition, jurors are almost universally inexperienced in the law. Their impressions of the legal system are formed based upon cinema, television shows, and books they may have read. Their ignorance of the law is both a blessing and a curse. The ideal juror should come into the proceedings open-minded, willing to follow the judge's instructions on the law, and earnestly absorb the evidence. But the lack of understanding of the law can lead to confusion and jurors can be susceptible to being misled by gifted and articulate advocates bent on confusing the issues. In some jury trials the process is far less about finding the truth than the performance of the attorneys and their theatrical attempts to sway the jurors. Thus the jury trial can devolve into a spectacle at the cost of justice. Perhaps the most vivid example of this perversion of justice is the case of *People of the State of California v. O.J. Simpson*. Simpson, a highly gifted athlete and celebrity, was accused of murdering his ex-wife and a male companion. Simpson employed, through the course of the trial, ten attorneys who were described as the "Dream Team". Despite clear and compelling evidence of guilt, Simpson's attorneys were able to sow sufficient reasonable doubt in the jurors' minds so that Simpson was acquitted. He was later found liable in civil court for the killings and held to a multi-million dollar judgment.¹⁵ The Simpson trial exposed several flaws within the jury system: the advantage of wealth, the advantage of gifted trial attorneys, and the immense burden placed upon lay jurors who were subjected to sequestration during the

11 Teasdale B. Why Don't Facts Change People's Minds? January 20, 2018, official link on web site: <https://www.varsity.co.uk/science/14447>.

12 UN Report: 40 Million in Poverty, US Most Unequal Developed Nation, June 22, 2018, official link on web site: https://www.upi.com/Top_News/US/2018/06/22/UN-report-With-40M-in-poverty-US-most-unequal-developed-nation/8671529664548/.

13 Criminal Justice Fact Sheet, official link on web site:

<http://www.naacp.org/criminal-justice-fact-sheet/>.

14 Liptak A. New York Times, August 16, 2015, official link on web site: <https://www.nytimes.com/2015/08/17/us/politics/exclusion-of-blacks-from-juries-raises-renewed-scrutiny.html>.

15 1995: OJ Simpson verdict: 'Not guilty', On this day: 3 October, BBC, official link on web site: http://news.bbc.co.uk/onthisday/hi/dates/stories/october/3/newsid_2486000/2486673.stm.

nearly nine month jury trial. While the jurors were not necessarily ignorant of the process, they were clearly vulnerable to the “Dream Team” attorneys. The defense theorized that the forensic evidence was tainted and that Simpson was the victim of a frame-up based upon racial bias. Most jurors did not have college degrees and some critics contend that they did not understand the forensic evidence.¹⁶ Other critics further contend that the verdict was rooted in racial bias in favor of Simpson, an African American. One of the jurors, Lionel Cryer, a former Black Panther Party member, gave Simpson the black fist salute after the verdict. He later stated that he would render a guilty verdict.¹⁷

The great American writer, Mark Twain, recognized flaws in the jury trial system, describing the jury trial process as follows:

*The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury. It is a shame that we must continue to use a worthless system because it was good a thousand years ago... I desire to tamper with the jury law. I wish to so alter it as to put a premium on intelligence and character, and close the jury box against idiots, black legs, and people who do not read newspapers. But no doubt I shall be defeated – every effort I make to save the country “misses fire”.*¹⁸

And in another instance Twain stated the following:

The humorist who invented trial by jury played a colossal practical joke upon the world, but since we have the system we ought to try and respect it. A thing which is not thoroughly easy to do, when we reflect that by command of the law a criminal juror must be an intellectual vacuum, attached to a melting heart and perfectly maca-

*ronian bowels of compassion. – “Fosters case,” New York Tribune, 3/10/1873.*¹⁹

Twain overstates the flaws in the jury system but his points are well-taken. Jurors are ordinary citizens with varying degrees of intelligence, education, and moral compass and little or no legal experience who are thrust into the legal arena and expected to do justice.

ADVANTAGES OF TRIAL BY JURY

There are many advantages to the criminal trial by jury. First, such a jury trial offers the opportunity to educate citizens on how the system works. While it is true that the vast majority of jurors come in to the system ignorant of the law, it is clear that they leave the system highly educated. From this experience they are able to discuss with family and friends how the process works. For the most part, it is the author’s opinion from his experience in a substantial number of jury trials that most jurors leave the process with a positive view. And one can safely conclude that these jurors express their experiences to family and friends who are able, as citizens, to better understand how the process works.

The jury trial also provides an excellent tool for prosecutors to learn how jurors think and what they believe is a just verdict. This is so because prosecutors may interview jurors after their service. From these interviews, prosecutors are able to become highly educated on the best forms of advocacy and whether the laws they are endeavoring to enforce reflect community sentiment.

Additionally, the criminal jury trial provides an excellent forum for cross-examination. The American legal system is adversarial in nature. Fundamental to the system is the right of a criminal defendant to confront and cross-examine any and all witnesses against him or her.²⁰ Cross-ex-

16 Hutson M, Unnatural Selection, Psychology Today, 2007, official link on web site: <https://www.psychologytoday.com/us/articles/200703/unnatural-selection>.

17 Coggan D, O.J. Simpson jurors reflect on the history-making trial in Oxygen’s The Jury Speaks, Entertainment Weekly, 2017, official link on web site: <https://ew.com/tv/2017/07/22/jury-speaks-oj-simpson-trial/>.

18 Mark Twain quotes, Jury, official link on web site: <https://www.twainquotes.com/Jury.html>.

19 Mark Twain quotes, Jury, official link on web site: <https://www.twainquotes.com/Jury.html>.

20 6th Amendment to the United States Constitution, 1868. National Archives and Records Administration, official link on web site: <https://www.archives.gov/founding-docs/bill-of-rights-transcript#toc->

amination must be considered a fundamental pillar of justice which, when used properly, exposes the opponent's fallacies and brings forth the truth. Several thousand years ago King Solomon stated the following in his collection of proverbs:

*In a lawsuit the first to speak seems right, until someone comes forward and cross-examines.*²¹

In the American criminal proceeding, with a relatively passive judge and partisan advocates, the greater the degree of adversarial cross-examination, the greater the likelihood that the truth will be exposed.

Perhaps the most fundamental advantage of the jury trial is that it permits citizens rather than government officials to endeavor to reach a just verdict on alleged misconduct. History clearly teaches us that when judgments with respect to citizens are left in the hands of government officials, corruption and injustice are not far behind. As Thomas Jefferson said:

*I consider 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.*²²

The Frenchman, Alexis de Tocqueville spent several years observing and writing about early America. In 1835 he wrote:

*The civil jury is the most effective form of sovereignty of the people. It defies aggressions of time and man. During the 16th Century the civil jury did in reality save the liberties of England.*²³

The same, of course, can be said of the criminal jury trial. Later, Supreme Court Justice Hugo Black wrote:

*It is essential that the right to trial by jury be safeguarded as the Bulwark for civil liberty.*²⁴

Jefferson further stated the following:

*Freedom of religion, freedom of the press, freedom of person under protection of Habeas Corpus; and trial by juries impartially selected, these principles form the bright constellation which is gone before us, and guided our steps through an age of revolution and reformation.*²⁵

Jefferson's words were compelling approximately 250 years ago. They are just as compelling today. Jurors remain empowered to judge both the law and the facts and while they may not ignore or rewrite the law, they may decide, without explanation, whether the law applies to the evidence presented.²⁶ Citizens, not government officials, hold justice in their hands.

CONCLUSION

There are obvious disadvantages to the criminal jury trial. Jurors, like all of us, have biases and deeply held beliefs. Furthermore, income inequality and juror ignorance pose significant risks to administration of justice. But the alternative to the criminal jury – cases heard by government-appointed judge panels – is not the answer. Rather, we must work diligently to reform the ills of the jury system and in that way assure citizen participation in the business of government and the administration of justice. In doing so both rule of law and fundamental human rights are preserved and protected.

amendment-vi.

21 Proverbs 18:17, Holy Bible, New International Version, 2011, official link on web site: <https://www.biblegateway.com/passage/?search=Proverbs+18%3A17&version=NIV>.

22 Thomas Jefferson quotes, official link on web site: https://www.azquotes.com/author/7392-Thomas_Jefferson/tag/jury.

23 White BA, 2017. Trial by Jury "Inherent and Invaluable"; official link on web site: <https://www.wvaj.org/index.cfm?pg=HistoryTrialbyJury>.

24 White BA, 2017. Trial by Jury "Inherent and Invaluable"; official link on web site: <https://www.wvaj.org/index.cfm?pg=HistoryTrialbyJury>.

25 Thomas Jefferson quotes, official link on web site: https://www.azquotes.com/author/7392-Thomas_Jefferson/tag/jury.

26 Hornberger J. March 4, 2020. The Right of Trial by Jury, official link on web site: <https://www.fff.org/2020/03/04/the-right-of-trial-by-jury/>.