

Congress has attempted to protect informational privacy through a number of statutes, including the Electronics Communications Privacy Act, but the problem is that the amount of information available is growing at an exponential rate, far faster than the means to control and regulate access. There is so much information available today that a clever person, armed only with access to the Internet and a person's Social Security number, can secure all sorts of information about that person, including traffic violations, credit report, purchasing habits, and more and, with enough information, even "steal" that person's public identity. The right to be let alone is still valued highly by civi-

lized people; how they will protect that right in the new Information Age remains to be seen. ■

*FOR FURTHER READING:*

**Ellen Alderman and Carolyn Kennedy**, *The Right to Privacy* (New York: Knopf, 1995).

**David H. Flaherty**, *Protecting Privacy in Surveillance Societies* (Chapel Hill: University of North Carolina Press, 1989).

**Richard F. Hixson**, *Privacy in a Public Society* (New York: Oxford University Press, 1987).

**Philippa Strum**, *Privacy: The Debate in the United States since 1945* (Fort Worth: Harcourt Brace, 1998).

**Alan F. Westin**, *Privacy and Freedom* (New York: Atheneum, 1968).

## Trial by Jury

*In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.*

— SIXTH AMENDMENT TO THE U.S. CONSTITUTION

It has been said that a society can be judged by how it treats its least favored citizens, and people accused of crimes, by definition, fall into this category. They have allegedly broken the social compact by depriving other people of life, limb, or property, and if in fact the charges are true, they have placed themselves outside the bonds of society; they are, literally “out-laws.” But before we consign people to prison, purge them from the community, or even deprive them of life, we want to be exceptionally sure that in fact they are guilty of the crimes with which they are charged—guilty, that is, “beyond a reasonable doubt.”

There are two reasons for this cautious approach. The first, and most obvious, is to avoid lasting harm to the individual. If the accused did not commit a crime, then that must be determined through the rule of law, so that the innocent shall not be punished. Another, and equally important reason, is to prevent both harm to society and the erosion of the people’s liberties. A system of justice that is corrupt, that is used by authorities to punish political opponents, or that lets the guilty go free, erodes the trust in government and society that is essential in a democratic society. Just as one cannot have a free society without liberty of speech or press, neither can democracy exist without a justice system that treats people accused of crimes fairly and ensures them their rights.

This is not to say that the criminal justice system in the United States is perfect; there are often gaps between the real and the ideal, as there are in any society. But the constitutional requirements found in the Fifth and Sixth Amendments serve as constant reminders of what the ideal is, and provide those who believe they have been unfairly treated the right to appeal adverse judgments to higher courts.

Because the workings of the criminal justice system are very important in a democracy, the right to a speedy and public trial refers not just to those accused of crimes; it is also a right of the public, one that suggests people may examine how the system is working and determine whether there are significant problems. Moreover, jury duty is an

essential responsibility of citizenship, second only, perhaps, to voting itself. In no other governmental function is the average citizen asked to shoulder the task of determining whether someone is innocent or guilty of a crime, or bears the responsibility for civil damages. Jury duty is an education, in which people are asked to apply the law, and so they must learn to understand what the law is, and how it affects the case in front of them.

*Alexis de Tocqueville,  
Democracy in America*

1835

*The jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it to rule well.*

---

There are many aspects of the right to a fair trial, and while in certain instances one aspect may be of more importance than another, they are all part of that “bundle of rights” to which we have referred over and over again. At a trial, for example, the type of evidence that may be introduced is governed by the rules of the Fourth Amendment, which requires the police to have probable cause for searching a person’s home, and then to secure a warrant in order to actually do so. Should the police fail to obey these constitutional commands, the evidence they seize may not be used at trial. Should the police fail to warn a suspect of his or her constitutional rights, then confessions made are considered invalid in a courtroom. When charged with a crime, if a person is denied access to an attorney, then it is clear that justice cannot be done in a fair trial.

To some people, all of these safeguards appear to be too favorable to the criminal, and they argue that a smart lawyer can ensure that a client, even a guilty one, will not be punished. Although there are occasionally high-profile cases where apparently guilty defendants have been freed, in fact if we look at the system overall it works remarkably well. The safeguards involving pre-trial investigations and arrest guarantee better, more professional police work, so that when an arrest is made, the chances are that sufficient evidence has been legitimately collected, proof of guilt is high, and the criminal is punished. But all of this takes place within a constitutional framework carefully designed to limit the arbitrary power of the state.

\* \* \* \* \*

A jury trial is essentially an effort to determine the truth. Did a person actually do what the state says he or she has done? In the past, efforts to determine truths took many different forms, and often included terrible physical ordeals. Hundreds of years ago, for example, the accused might suffer through a physical ordeal, in which he called upon God to prove his innocence. A person might be tossed into a pool to see if he would sink (innocent) or float (guilty); and if innocent, be retrieved, hopefully while still alive. In Europe, for the knightly classes, the ordeal often took the form of trial by combat, in which it was believed that God would strengthen the arm of the innocent who would then prevail over a false accuser or a true felon.

When the jury system that Americans have come to prize so highly first developed is not known. Before the Norman conquest of England, Saxon law required a definite and known accuser to publicly confront the accused; proceedings were open, and the presence of the community ensured fairness. The Norman Conquest introduced the grand jury, which derived from the Norman institution of "recognition by sworn inquest," whereby 12 knights, chosen to serve as "recognitors," inquired publicly into various matters of interest to the new rulers of England. These matters might include issues such as the rate of taxation or the feudal duties owed by a vassal to his lord.

As early as the 12th century, those bringing suit in certain cases relating to land ownership applied to the King's Court for the summoning of recognitors to ascertain the fact, either from their own knowledge or on inquiry of others; the verdict of the court, if unanimous, was accepted as conclusive. Eventually other questions of fact arising in the King's Court were handled in a similar manner, and a panel of knight recognitors became the jury. Originally, the jury members not only judged fact, but might also serve as witnesses because of their knowledge of the customs and the people of the locality. By the early 15th century, however, the judges of the common law courts restricted the jury to the single function of determining fact based on the evidence submitted in an action.

By the era of the American Revolution, trial by jury was an accepted right in every colony. The colonists saw it as a basic protection of individual freedoms, and Edmund Burke, the British statesman, warned Parliament that the American colonies would rebel if the mother country attempted to restrict trial by jury. But that is exactly what Parliament did in the Stamp Act of 1765, when it transferred the trial of persons accused of smuggling to admiralty courts, where naval officials sat in judgment without a civilian jury.

## *John Adams, on the Stamp Act*

# 1765

*But the most grievous innovation of all, is the alarming extension of the power of the courts of admiralty. In these courts, one judge presides alone! No juries have any concern there! The law and the fact are both to be decided by the same single judge.*

---

Over time, two kinds of juries evolved, grand and petit, serving two different functions. The *grand jury* determines whether there is sufficient evidence to bring an indictment (official accusation) against a person for a particular crime, while the *petit jury* hears the actual case. The two juries are different in size, method of operation, and standards of evidence.

Currently, in the United States, a grand jury may have as many as 24 members. It may be called to investigate a complex issue or merely to determine whether to hand up an indictment to a court. If the former, the prosecuting attorneys will bring in witnesses, and the jury may return a report detailing its conclusions or it may indict persons whom they believe might be guilty of crimes. The procedures in a grand jury are quite flexible; it may hear evidence not permitted in regular trials, such as hearsay evidence, and its standard for returning an indictment is one of possibility rather than certainty. If there is sufficient evidence to make the members of a grand jury believe that a person may have committed the crime, they can return an indictment. A much higher standard prevails in the petit jury, when the case finally goes to trial.

*Sir William Blackstone,  
Commentaries on the Laws of  
England  
1765*

*But in settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice had an ample field to range in; either by asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and varying others, and distinguishing away the remainder. Here, therefore, a competent number of sensible and upright jurymen, chosen by lot from among those of middle rank, will be found the best investigators of truth, and the surest guardians of public justice. For the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression may be examined and decided by twelve indifferent men, not appointed until the hour of the trial; and that, when once the fact is ascertained, the law must of course redress it. This, therefore, preserves in the hands of the people that share which they ought to have in the administration of general justice, and prevents the encroachment of the powerful and wealthy citizens.*

The institution of the grand jury has often been seen as an important bulwark against tyranny. Despite the existence of the grand jury in England as far back as the 12th century, the Crown could also initiate criminal prosecutions on its own. The abuse of this prerogative led to popular uprisings against the Stuart monarchs Charles I and James II in England in the 17th century and by the American colonists against George III in the 18th century. In the Declaration of Independence, the colonists listed those rights that they claimed the King had transgressed, and prominent among them were rights of the accused. The leaders of the American revolution pointed out that judges served at the King's pleasure, trials were rigged, jury trials had been denied, and trials had been moved to faraway venues—all of which mocked the ideal of due process of law that had been handed down from the Magna Carta. The principle that only the people as a whole through their representatives should have the power to institute criminal prosecutions is embodied in the Fifth Amendment of the Constitution, which guarantees the institution of the grand jury. Most state constitutions have similar provisions. Although the use of the grand jury was abolished in England in 1933 and replaced with the court clerk's preparing the indictment, it continues as an active although not universal feature of the American criminal justice system.

The petit jury normally has 12 members, but some states have smaller jury panels. They are chosen, like the members of the grand jury, from a pool of registered voters. The procedural requirements of a jury trial are quite precise, and rest upon the assumption that the accused is innocent until proven guilty. It is not the defendant's task to prove that he or she is innocent of the crime; rather, the burden is on the state to prove the guilt of the accused, and for felonies, the most serious crimes, the standard is "beyond a reasonable doubt." In federal courts and in most state courts, unanimous agreement is required for a guilty verdict. Should a majority of the jury vote for innocence, the defendant is discharged. Should a majority vote for guilt, however, this may result in what is known as a "hung jury," and lead to a new trial with a different panel.

The phrase "innocent until proven guilty" is not empty rhetoric. Constitutional provisions and the procedural rules that have flowed from them are designed to redress the clear advantage that the state has when confronting a single citizen. At the grand jury stage, the prosecution must prove, by a preponderance of the evidence, that the accused might have committed the crime. This standard is similar to the "probable cause" standard that police must meet in securing a search warrant. The grand jury need not know absolutely that the accused is in fact guilty, only that there is a reasonable possibility; actual guilt is determined by the petit jury.

In that trial, the prosecution lays out its case first, and each witness for the prosecution may be cross-examined (subject to questioning) by the defendant's attorney. The state must present evidence that has been lawfully secured, and it cannot introduce certain types of evidence, such as hearsay, that is, assertions based entirely on things a witness has heard from other people. Moreover, it cannot refer to matters that are beyond the scope of the current trial, such as the defendant's problems with the law at other times. If there are witnesses with evidence against the defendant, they must be presented in court, since under the Constitution the accused is entitled to confront those giving testimony against him. At the end of the prosecution's presentation, if the defense believes that the state has failed to make its case, it may request that the court summarily dismiss the charges. This rarely happens, but occasionally it does, and serves to remind the state that bringing ill-founded charges does not sit well with the judiciary.

The defense then presents its case, and its witnesses may also be cross-examined by the prosecutor. The defense has the power, under the Constitution, to compel the appearance of witnesses who can testify to the defendant's innocence. The defense need not prove the innocence of the defendant, only that there is *a reasonable doubt* regarding guilt.

This outline is, by its nature, merely an overview, and the actual procedural rules governing a trial are quite complex. That is one reason why the Constitution guarantees that a person accused of a crime is entitled to counsel to aid in his or her defense.

*Justice Byron White,  
in Duncan v. Louisiana*

# 1967

*The question has been asked whether [trial by jury] is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . . We believe that trial by jury is fundamental to the American scheme of justice. . . . The jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.*

Regrettably, the reality of the American criminal justice system often falls short of the ideal. Harried and overworked prosecutors, public defenders [lawyers provided for free to indigent defendants] and judges often engage in “plea bargaining,” in which the defendant agrees to plead guilty in return for a reduced sentence, thus saving the state the time and expense of a trial. And, despite the rules, trials are rarely the neat affairs one sees on television or in the movies. There is confusion and delay, lawyers are not always eloquent, nor are judges always paragons of judicial wisdom. Yet even with all its problems, the American judicial system both in its ideal theory and its sometimes flawed practice offers persons accused of crimes more protection than any other system in the world.

Like all liberties, the right of fair trial is a work in progress, changing and improving to match similar transformations in society.

Indeed, if we look at how the jury system has changed over the years, we see that change within the Constitutional framework has always been the rule rather than the exception. Thomas Jefferson in the late 18th century noted that “the common sense of twelve honest men” (jurors) enhanced the chances of a just decision. He might well have added, at that time, “twelve honest, white, property-owning men,” since jury rolls in the United States have always been taken from voter registration lists. Just as the right to vote has expanded over history (see Chapter 12), so have the rights and responsibilities of people heretofore excluded from full participation in the workings of government and law. As the Supreme Court noted in 1940, “Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. It is part of the established tradition . . . that the jury be a body truly representative of the community.”

Property requirements for civic participation fell into disrepute early on in American history, so that by the 1830s no state imposed the ownership of property as a precondition for either voting or for jury service. However, though the Civil War ended slavery, some southern states attempted to keep blacks off juries simply because of their race. In 1879, the Supreme Court struck down a West Virginia statute that excluded blacks from grand and petit jury service. But since voting qualifications were then considered a matter of state law, once southern states devised various stratagems to deprive blacks from voting, they also managed to keep them off juries. If the voting lists did not include blacks, then neither did the jury pools.

But as the civil rights movement began to take shape in the 1940s, challenges to keeping blacks off juries found a sympathetic ear in the federal courts. In part, the country's ideas and ideals regarding race were changing, and they would come to fruition in the great upheavals of the 1950s and 1960s which finally won black Americans full legal rights in the country. As the courts have emphasized time and again, barring particular groups from jury service not only discriminated against those groups and prevented them from partaking fully in their responsibilities as citizens, it also deprived persons accused of crimes from one of the basic attributes of a free trial—a jury of one's peers.

Over the years, court cases have arisen not only from those who have, for one reason or another, been kept off jury rolls, but also from defendants who have claimed that barring certain groups from jury service denied them due process of law.

---

*Justice Thurgood Marshall, in  
Peters v. Kiff*

# 1972

*When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.*

---

The largest group of people to be kept off jury lists consisted of women. Even after they received the vote in 1920, women were still excluded from jury service on the grounds that their primary duty was to take care of their homes and families. Even if women could vote, strong male prejudices continued to dictate that the “raw” material women might hear in the course of a criminal trial would shock their “delicate sensibilities.”

*Justice William O. Douglas, in  
Ballard v. United States*

# 1946

*If the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible: a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence of one on the other is among imponderables . . . A flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community.*

---

Eventually women won the right to full participation in the jury system, and there is no evidence that it has done anything to harm them. To the contrary, it has—as is the case with all groups whose rights have expanded—given them a better sense of the responsibilities that accompany citizenship.

\* \* \* \* \*

The jury system, as we have seen, is designed to protect first and foremost the rights of persons accused of crimes. The theory is that a panel of one’s fellow citizens—one’s peers—are best qualified to judge guilt or innocence. Second, the jury system is essential to democracy in that it imposes a serious responsibility upon individuals who, as in perhaps no other setting, can learn how democracy works. But there is still a third aspect to the jury trial, the assurance to the community at large that the legal system is functioning properly.

*Chief Justice  
Warren E. Burger, in Richmond  
Newspapers, Inc. v. Virginia*

# 1980

*The origins of the proceeding which has become the modern criminal trial in Anglo-American justice can be traced back beyond reliable historical records. . . . What is significant for present purposes is that throughout its evolution, the trial has been open to all who care to observe. . . . From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice.*

*The First Amendment, in conjunction with the Fourteenth, prohibits governments from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted.*

*The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself; the conduct of trials "before as many of the people as chose to attend" was regarded as one of "the inestimable advantages of a free English constitution of government." In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. . . . What this means*

*in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted. "For the First Amendment does not speak equivocally. . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."*

*We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated."*

---

Although many people will never attend a trial in their entire life, they have a right to do so. Some would say that they even have an obligation to do so, because if eternal vigilance is the price of liberty, then there should be constant oversight of what many people consider a key element of democratic society.

\* \* \* \* \*

Unlike nearly all the other liberties of the people, trial by jury has been the subject of serious criticism, and of the sort that requires extensive examination. Nowadays, people do not claim that the right of trial by jury should be replaced with ordeals by combat, or closed courtrooms where a single judge hands down unreviewable decisions. The ideal of a free and fair trial is that justice be done, and critics claim that the current system is so overloaded that truly free and fair trials cannot take place.

The current system, it is claimed, works poorly. There are too many trials, many of them for petty offenses that could and should be handled in a more efficient manner. Court calendars are overcrowded, so that oftentimes there may be delays of months or perhaps even years before an accused person is brought to trial, and, as the saying goes, justice delayed is justice denied. Public defenders are overworked, and cannot give truly effective assistance to the poor people whom they serve. Public prosecutors, faced with too many trials and insufficient staff, are willing to enter into plea bargains that often penalize those accused of relatively minor crimes while letting those accused of more serious felonies off with minimal penalties.

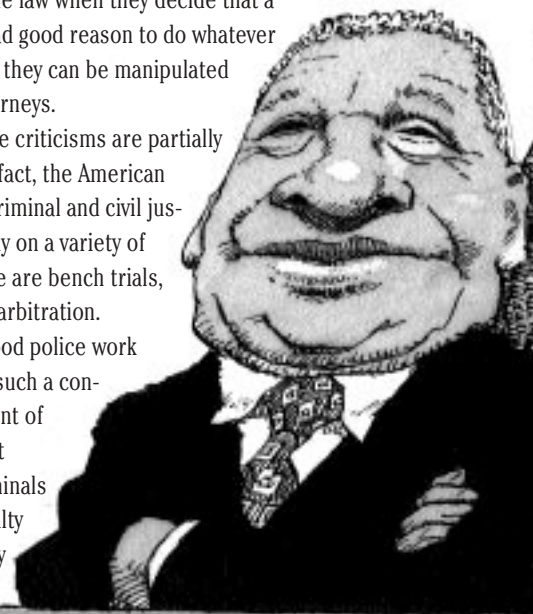
Even when a case goes to trial, are juries actually the best means of determining truth? In former times, part of the rationale for a jury was that the panel members would know the neighborhood, know both the victim and the defendant, know the facts, and thus be able to reach a fair and just decision. Today, juror panels are taken from voting lists of jurisdictions that cover hundreds of square miles and contain hundreds of thousands of people. Jurors rarely know the accused, and if they do may be excused because of it, under the assumption personal acquaintance might unduly influence their judgment. In antitrust cases and in charges of stock manipulation and fraud, can the average citizen really understand the economic and accounting issues involved?

Are there more efficient means of managing the criminal justice system? After all, in Great Britain, the birthplace of trial by jury, only one percent of civil trials and five percent of criminal trials are decided by juries. "Bench trials," in which a single judge or a panel of judges hears the case without a jury, take less time, cost less money, and since they are open to the public and may be reviewed by appellate courts, are considered by many to be fair *and* efficient. Moreover, in cases involving difficult questions of law, judges rather than laypersons are better equipped to make a determination.

Prompted by such considerations, in the United States, in the area of civil law, there has been a growing movement toward impartial arbitration, where both parties agree to be bound by the ruling of an impartial outsider. Arbitration, it is claimed, is faster since there is no delay caused by overcrowded court calendars; it is fair; and when businesses are involved, it allows the parties to have the decision made based on the rules of the marketplace in which they operate.

Finally, it is charged, juries are notoriously fickle, and can ignore the law when they decide that a defendant had good reason to do whatever was done, or they can be manipulated by crafty attorneys.

All of these criticisms are partially true, and, in fact, the American systems of criminal and civil justice today rely on a variety of forms. There are bench trials, and there is arbitration. Moreover, good police work often yields such a convincing amount of evidence that accused criminals will plead guilty without a jury trial.



As for so-called renegade juries that ignore the law to vote their emotions, this is an occasional weakness of a system that relies heavily on the decisions of ordinary citizens. In addition, there have also been times in American history when “jury nullification” has taken place because juries have believed the laws to be unjust. Prior to the American Revolution, local juries refused to convict their neighbors accused of smuggling, believing the English trade and navigation acts to be unjust.

But to eliminate trial by jury because of perceived defects in the system would be to strike a blow against democratic government itself. For those who believe they will do better by bench trial or (in civil matters) through arbitration, that option is there. But for many, their only hope of establishing their innocence is to go before a jury of their peers, where the state must establish the issue of guilt “beyond a reasonable doubt.”

Critics who look at the jury system simply in terms of its efficiency or inefficiency also fail to recognize the importance the jury has beyond the question of determining guilt or innocence. As society grows more complex, many people worry that the average citizen is growing disconnected from the government, that he or she is losing a sense of participation in the daily processes of democracy. Jury service, almost alone of everything a person does as a citizen, continues to provide that sense of both responsibility and participation.

A free and fair trial by a jury of one’s peers remains a critical right of the people, both of those who may be accused of a crime, as well as those called upon to establish that fact. ■

*FOR FURTHER READING:*

**Jeffrey Abramson**, *We the Jury: The Jury System and the Ideal of Democracy* (New York: Basic Books, 1994).

**Harry Kalven, Jr., and Hans Zeisel, eds.**, *The American Jury* (Boston: Little, Brown and Company, 1966).

**Linda K. Kerber**, *No Constitutional Right to be Ladies* (New York: Hill & Wang, 1998).

**Godfrey D. Lehman**, *We the Jury: The Impact of Jurors on Our Basic Freedoms* (Amherst, NY: Prometheus Books, 1997).

**Leonard W. Levy**, *The Palladium of Justice: Origins of Trial by Jury* (Chicago: Ivan R. Dee, 1999).

