CHAPTER 7

The Right to Trial by Jury:
Political Philosophy or Constitutional History

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INTRODUCTION

For this bicentennial (1991) celebration of the Bill of Rights, the sixth amendment of the United States constitution presents a major conceptual and historical challenge. The fathers of the constitution considered trial by jury to be a paramount right, a right that went back to magnæ cartæ. In their own lifetimes the constitutional authors had experienced a deprivation of these “sacred” rights. It was in fact a limited deprivation of trial by jury and it could be argued a deprivation primarily in their minds. Thus one might argue that what is perceived to be is as important as an actual deprivation. This perceived deprivation of rights led the founding fathers to the constitutional guaranty of trial by jury.

It was with the imposition of the Sugar Act of 1764 that the colonists felt their first deprivation. As part of the Sugar Act the many offenses against the act were to be heard by the admiralty court and not the law courts. That meant that such offenses as bribery, smuggling and the like would be tried in admiralty and not in law. This kind of action was novel. In the admiralty courts, there was no jury and a person was guilty until proven innocent. This struck the colonists to the core. They felt that their basic rights as English subjects were being denied.

Ten years later in 1774 the colonists would be deprived of their right to be jurors in certain instances when as part of the Coercive Acts (also known as the Intolerable Acts) of 1774, in response to the Boston Tea Party, Parliament passed the Act of Impartial Administration of Justice which sent crown officials accused of
Rights and Justice

Rights and justice

The colonists were feeling put upon. They were beginning to perceive that their basic rights as citizens were being deprived. The conceptual history that supported the philosophical significance of a heightened perception of the importance of a trial by jury justifies the use of the language of "right" to trial by jury. Having a right, however, is one thing; grounding that right is quite another. The constitutional guarantee of trial by jury is a matter of history. It is, however, grounded in a political philosophy that raises a conceptual problem that needs to be resolved in order to show why the right was so important to the fathers and should be to us today.

CONCEPTUAL DEVELOPMENT OF TRIAL BY JURY

The right to trial by jury was considered an ancient right in England. The guarantees of this extend back to *magna carta*, the great charter that guaranteed the rights of the baronage which had slowly eroded under Henry II, Richard Coer de Leon, and finally John. John would be forced to restore these rights to the baronage. These were sacred because of the promises of land and power given to the nobles that followed William the Bastard, Duke of Normandy, later called the Conqueror. The descendants of those who followed William on that day in 1066 wanted their birthright.

By 1215 John, the second son of Henri d'Anjou (Henry II) had pushed the barons and the clergy to the breaking point. They followed him to Runnymede and forced him to sign their so called *magna carta* to restore to them their rights. Although Pope Alexander IV declared it null and there were various excommunications as a result, in the end, *magna carta* was redeemed. Over the next century the document would be revised and edited, but slowly it would come into the common law. These initial rights were guaranteed solely to the barons and clergy, not to the common person. As is the custom of English common law, slowly over time, these rights and privileges were extended to the common as well as the high born.1 Having the right represented in their minds the common law check on the power of the king and the government.

Among the rights extended by *magna carta* is the right that would become trial by jury. This would evolve into the system of jury that the U.S. has presently. The *magna carta* states "To all Free Men of our Kingdom we have also granted, for
us and our heirs for ever, all the liberties written out below, to have and to keep for them and their heirs, of us and our heirs.”

This provision would be used to extend the rights of *magna carta* to the common person who ordinarily would not have been touched by these benefits. The charter goes on to say: “For a trivial offense, a free man shall be fined only in proportion to the degree of his offense, and for a serious offense correspondingly, but not so heavily as to deprive him of his livelihood. In this same way, a merchant shall be spared his merchandise, and a husbandman the implements of his husbandry, if they fall upon the mercy of a royal court. *None of these fines shall be imposed except by the assessment on oath of reputable men of the neighborhood.*”

In this way the right to a jury of one’s neighbors is established. Later on the charter goes on to say: “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will proceed with force against him, or send others to do so, *except by the lawful judgment of his equals* or by the law of the land.” This further provision would reinforce the idea of trial by jury. That no one could be disposed of property or rights without the consent of neighbors is the protection from the arbitrary taking of land and rights by the crown. The neighbors, not wanting their land arbitrarily taken, would not allow the others to be taken without good cause and a just and lawful reason. Thus it was that trial by jury became so entrenched in the common law through the guarantee of *magna carta*. The right was grounded in the experience and lives of *ordinary people* and not just with the nobles.

*Magna carta* with its revisions and reissuances would remain a significant concept for the rest of the century. It would also be on the minds of the common people for the rest of the next century and a half. It would, however, become lost in a Tudor fog for a time. It would be reasserted by Sir Edward Coke and once again be in the forefront of the common people’s consciousness. The right waxed and waned with English politics.

**The Political Philosophy of Fortescue**

It was during the war that tore England from coast to coast that the great outliner of the rights of the English would philosophically develop the concept of
“trial by jury.” The war set Plantagenet against Plantagenet under the red and white roses of Lancaster and York. The former chief justice and legal scholar, Sir John Fortescue, arrived at the court of Henry VI. He was named the Chancellor of the realm of this king *in partibus infidelium*. The crown at that time was in the hands of Edward IV. Between the years 1468 and 1471, Sir John wrote his great work *De Laudibus Legum Anglie*. In this work he writes as chancellor to the young Prince of Wales, Edward, son of Henry VI. To this ill-fated princeling Sir John writes of the laws of England. He tells of the rights of the English as they descended from common law and *magna carta* (then only a little over 200 years old). He writes them to Edward who had not been raised in England and thus would not understand those rights. The right to trial by jury had fallen out of the perception of the people until Fortescue rekindled that consciousness.

At the time of Fortescue, trial by jury had become quite sophisticated. It had evolved from a system whereby jurors were people who actually knew of the circumstances of the case to jurors who did not necessarily know of the case. By the time Fortescue was writing the jurors were neighbors who had a stake in a well ordered society. This is especially so at a time when it was uncertain from day to day who the king was. In his chapter “How juries ought to be chosen and sworn” he wrote

12 good and lawful men from the neighborhood where the fact is alleged, who stand in no relation to either of the parties at issue, to declare upon their oaths whether the facts be such as one of those parties says, or not, as the other party avers.\(^5\)

A jury of twelve had been established who did not know of the affair, but who would know of the people involved so that they could make an informed decision.

It is interesting to note that either party could challenge jurors and thirty-five jurors might be challenged without cause.\(^6\) There was no need for our modern system for selecting a jury, *voir dire*, because the parties would most likely have known the jurors quite well. This concept is repulsive to the modern idea of an impartial jury. One can see the taint of corruption in their method, where for them it would have been exactly the opposite. A group of ordinary people from the community could place a limit on the power of the government. This carries with it strong feeling. This familiarity would not have been as repulsive to our
constitutional authors since many colonial communities were still small enough that the jurors would easily have known the parties involved.

There was also a property qualification to sit on a jury. This would assure the court that those on jury had a stake in the society and so were interested in seeing justice done. The requirement was that all jurors must have at least land for life or rents with the value of 40 shillings per year. This kind of a requirement would also be repugnant to our society today because we do not see a stake in our society in quite the same way. When a society is based on land ownership the only people seen to have rights in that society are those that hold, in one form or another, land. This qualification, however, is not at all silly in that context.

Our constitutional forebears as well were quite happy to place property and race restrictions (a problem the English did not have to deal with) on one's rights to serve on a jury. This was a land based society which recognized only those with property as having a stake in that society. Edward Corwin, in his book The Higher Law Background of American Constitutional Law, paraphrases Fortescue. He says: "In no other country in the world, Fortescue contends, would trial by jury of the vicinage be feasible, for the simple reason that in no other country would there be a sufficient number of honest men of the neighborhood capable of undertaking the service." Fortescue makes this claim in reference to the property requirements. He says that this requirement makes sure one is sufficiently well off so as not to be tempted to take a bribe. France he would contend would not be such a place because there was not a large landholding class as there was in England. The property holding then was really the ground of the entire system. The society as a whole would benefit from the judgment of the propertied who made their decisions, not on the basis of bribes, but on the basis of facts. The propertied had a stake in their society and would protect their own rights by protecting their neighbors. The qualification to have property before one could sit on a jury was perceived as very important in England.

In his chapter on "How jurors ought to be informed by evidence and witnesses," Fortescue discusses the way evidence is presented to a jury and the punishment for a false judgment. He says that the evidence should first be read by the court to the jury, afterwards the parties themselves will tell their stories. Next the witnesses on both sides will be heard. Finally, the jury retires to a place where
no one can get to them, and they deliberate on the case. Interestingly enough, the witnesses are kept apart during the testimony stage so that they cannot corrupt one another's testimony.

It is striking as well to note how a jury, as a body, is treated for a false judgment.

That those first jurors make a false oath, then the bodies of the jurors shall be committed to the prison of the lord king; their goods confiscated, and all their possessions seized into the king's hand; their houses and buildings demolished, their woods cut down, their meadows plowed up and they themselves shall hence forth be infamous and their testimony as to the truth shall nowhere be accepted.9

Fortescue goes on to say that this was a good way by which the bulk of the jurors would keep the bad ones in line.

The punishment was, accordingly, for the whole jury not just for the false juror. The good were expected to coerce the ones who would be false into being true. The punishment was for all the men on the jury. The true jurors would have a very good reason to make sure a true verdict was returned. The just would not want to see themselves become infamous for a crime that they were not guilty of committing. This punishment is designed, it would seem, to reinforce the perception that this was an offense against society. If it were committed, then all that one had built would no longer remain standing, not even one's character. It is interesting to note that Fortescue never mentions that one who breaks the oath also commits an offense against God by breaking the covenant with God that an oath brings on. This certainly would have been an issue of concern in fifteenth century England. The commission of an offense against God would seem to be of paramount importance. It is interesting that this punishment puts a person in much the same standing as one who was excommunicated. The temporal punishments were such that one's family would probably starve to death because one was dispossessed and one's memory would be forever marred with shame.

The perception of a fair trial by an impartial jury who decides on facts alone with the weight of the scales of justice tipping toward innocence is very old. Fortescue says in the section entitled "Herein he shows how criminal causes are determined in England," "I should, indeed, prefer twenty guilty men to escape death through mercy, then one innocent to be condemned unjustly."10 Clearly the
jury was to lean to the side of the accused when rendering a decision. This truly is in step with our modern view that we must lean a little to the side of the accused.

This is also in step with the view that a person is innocent until proven guilty, beyond a reasonable doubt. The perception of a fair trial was of great concern to the founding fathers, because so many cases had been transferred to the admiralty court where these rules did not apply. This, of course, was done by the crown in an effort to circumvent the common person's rights. The need to preserve the presumption of innocence thus motivated our forefathers.

Before leaving Fortescue, there is one other question that he addressed: the question of twelve jurors. In his chapter entitled “Herein he shows that procedure by juries is not repugnant to divine law,” he discusses the number of jurors. It had been suggested that since scripture only called for two people to condemn another, allowing more people would contravene the law of God. He answers in the following way. “If the witness of two is true, a fortiori the testimony of twelve ought to be judged true; the greater always contains in itself the lesser, as the rule of law says.”11 Thereby Fortescue answers a problem that was of significance, since nothing could belong to the law of the people that was repugnant to the law of God.

TRIAL BY JURY: PHILOSOPHY OR HISTORY

Fortescue was placed on the shelf for a while to gather dust after Henry Richmond defeated Richard III at Bosworth Field, and the Tudor reign began. The Tudors once again began reigning in the power of the nobles. In part it was done by attrition since the better part of the nobility were killed off and were replaced by Henry’s loyal friends. The Tudors were also not opposed to putting people who opposed them in the tower of London. After the reign of the Tudors came the Stuarts who tried as well to be autocratic. They met up, however, with opposition in the form of Sir Edward Coke. Sir Edward was the chief judge who refused to do what James demanded of him. Corwin writes “The eventual role, indeed, of magna carta in the history of American constitutional theory is due immediately to its revival at the opening of the seventeenth century, largely by Sir Edward Coke.”12 The common law tradition of Coke is what the colonists would bring with them to the American colonies. Coke knew only too well how the common law placed limits on the power of the king. He, in particular, knew how the power
of the jury placed limits on official power. The right to trial by jury, as well as the opportunity to sit on the jury, were perceived as the power of the people over government.

The colonists brought the legal system of England with them to America. That system meant that they were reading Hale, Fortescue, Coke and later, most prominently, Blackstone. It was the writings of these legal philosophers that forged our constitutional ideas. The heightened interest of *magna carta* would be fundamental in their views of rights and freedoms. The colonists had few law books so they made sure that they had the respectable legal authorities from the English common law. These texts and customs led to the rights of the sixth amendment of the Bill of Rights.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of state and district of 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.

This is the sixth amendment. It can be seen how close to Fortescue this amendment really is. The jury of neighbors is preserved. The colonists are clear to note that it must be an impartial jury. This idea of the impartial jury can be seen more as a jury that does not know of the *events* of the crime, rather than one who does not know the *parties* involved. It would be difficult in the early federal period to find twelve people who did not know at least one person involved in the litigation.

The sixth amendment came out of a long tradition that extended back for over five hundred years. Certainly the concept of trial by jury was not introduced anew by the sixth amendment. It was simply preserved from the common law tradition. The trial by jury had become part of the common law of the colonies as it had existed in England. This was a long and venerable tradition that comes down to this anniversary year of the Bill of Rights, 1991. Certainly the jury today looks different from the jury of the eighteenth century. Most assuredly it is different from those of the thirteenth century. We have moved to a time where all property qualifications have fallen away, primarily because we are no longer a nation based on land holding. One has just as much stake in the society if one never owns land. Thus we have a stake in the society when we reach age 18 and start to vote and pay
taxes. We are no longer a nation of landed gentry. Thus the qualifications have changed for serving on a jury. The reason for the right however, and, especially, the perception of power when the right is expressed, remains the same as our forefathers.

We have done away with the race restrictions that were required in the past. It is no longer the case that a black person cannot sit on a jury. We allow all taxpayers to exercise their duty to sit on a jury. We have done away with the requirements that jurors be men. Women are taxpayers and share equally in the burdens of citizenship. Thus they too must do their duty and sit on a jury. What of the jury of an individual's peers, however? The resolution of the problem of who is a peer depends on our political philosophy and not on constitutional history.

CONCLUSION

We have developed this final point in conclusion because of its importance to the theme of this paper. The perception of right to trial by jury is as important as possession of the right itself. Do citizens today have a right to a jury of their peers? Reflecting on the late trial of Claus Von Bulow, socialite from Rhode Island, who are his peers? Certainly a common yeoman would not have been considered a peer to sit as a juror in the trial of a knight. Why? Because they were not peers. Yes, they were equally human, but not on a socially equal footing. One is a common laborer, and the other is of a different world, the business of the king. Who then are the peers of our socialites? Yes, we are all created equal, but that does not mean that we are equal in our gifts, talents, or position. A person's peers are those who share with that person a common background. How many of those on Von Bulow's jury were products of private boarding schools, nannys and exclusive colleges. We must ask ourselves the question, are we preserving the rights as given to the framers of the Bill of Rights for historical or philosophical reasons? Thus we must rethink our political philosophy. Who are our peers? This point remains problematic in a democratic society where all are created equal, but in fact are not equal. The common law in fact was not egalitarian and the colonists did not want to preserve the classed society of England. Thus the perception of a fair trial by jury depends on the perception of a trial by a jury of one's peers. On this fundamental philosophical question depends the efficacy of the ancient trial by jury. Fortescue gave us a clue to what it means to be a peer. It is to have shared
experiences. Thus the conceptual issue raises an issue in political philosophy and not just constitutional history.
ENDNOTES

1. Faith Thomson, *The First Centuries of Magna Carta: Why it persisted as a document*, Russel & Russel, New York, New York, 1967. All of the historical references made in this paper that relate to the period just prior to and following the *Magna Carta* come from this work.


3. Ibid., sec. 20.

4. Ibid., sec. 39.


6. Ibid., sec. XXV.

7. Ibid., sec. XXV.


9. *De Laudibus*, sec. XXVI.

10. Ibid., sec. XXVII.

11. Ibid., sec. XXXII.