Chapter 18

The Right to Trial by Jury

Among all abuses of governmental power, we may fear the secret trial most. Trial by jury guards against this practice, and for this reason juries have long occupied an important place in our understanding of individual rights. English colonists identified trial by jury as one of the three rights central to their definition of liberty; the other two were due process of law and representative government. A local jury chosen from one's peers, or equals, guarded against vindictive and overbearing judges and distant government. Jurors from the neighborhood came to their task with knowledge about the events on trial and about the reputation of the accused and accuser. Their general verdict—a simple reply of guilty or not guilty to a charge of wrongdoing—was the people's most effective weapon against tyranny. The jury, quite simply, was the best available method of assuring justice and protecting liberty.

The struggle for independence convinced Americans that their confidence in the jury was not misplaced. The most troublesome actions of Great Britain centered on attempts to limit the use of jury trial in cases involving colonial protests against imperial laws. One of the provisions of the Stamp Act of 1765, for example, shifted trials of alleged violators to a court where a judge alone decided guilt or innocence; in 1774, another parliamentary statute denied the right to a trial by a jury from the neighborhood. To many colonists, these actions, when considered with other threats to liberty, were sufficient to justify separation from the mother country.

The Constitution and Bill of Rights testify to the importance the framers placed on trial by a local jury. Article 3, which outlines the functions of the judiciary, requires that 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 guarantee of this right appears twice more in the Bill of Rights. The Sixth Amendment defines the right more extensively: "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." The Seventh Amendment extends this right to civil cases, that is, noncriminal cases such as disputes over contracts, in which the amount in dispute is more than twenty dollars, a figure that has not changed over time even though a dollar was worth much more then. These amendments spelled out carefully the founders' criteria for fair trials: they must be speedy and public; the jury must be local; and jurors must be impartial. Underlying these criteria was a belief that justice in a republic depended upon the active involvement of virtuous citizens in the public affairs of a community. Juries were a means to this end.

The nineteenth century witnessed a decline in the jury's role in both civil and criminal trials, even though commentators continued to laud its virtues. In theory, jurors were considered to be the judges of both law and fact, which meant they not only determined what the facts of a case were but also decided

how to interpret the law. This practice was an old one that reflected the belief that justice required jurors to use their local knowledge to fit the law to the circumstances of their communities. For instance, a statute may forbid trespass on private property, but if it was long-standing practice in an area to cut across a field, then a local jury would know this and refuse to convict a person who simply was doing what everyone else did. But the nineteenth century witnessed a change in the jury's role: jurors could determine the facts, but they had to accept the law as interpreted by the judge. Civil juries, which decided noncriminal cases, especially felt this restriction because commerce required standards that did not vary from place to place. The goal was consistent and equal application of the law, an unlikely result if civil and criminal juries were free to determine in each case what the law meant.

Other changes affected the criminal jury primarily. In a pattern that continues today, many criminal prosecutions never reached trial. Plea bargaining and negotiated punishments became the typical way of managing the increase in crime that resulted from overcrowded cities. Citizens began to avoid jury duty, aided by state laws that excused entire groups, usually business and professional men, from this civic duty. (Women were not eligible for jury duty because they could not vote; also, some men considered them "too delicate" for this task.) Soon, juries were thought to be composed primarily of the least virtuous citizens rather than pillars of the community. By the end of the century, trial by jury was still praised formally as a bulwark against tyranny, but increasingly it was satirized in practice, as evidenced by Mark Twain's characterization that it "put a ban on intelligence and honesty, and a premium on ignorance, stupidity and perjury."

Despite this history, most Americans continued to believe that the right to a speedy public trial by an impartial jury of peers was a bedrock principle of American freedom. They were buoyed in this conviction by laws and court decisions, most of them in the twentieth century, that broadened the jury pool to include blacks and women, making juries, in theory, more representative of the community than ever. But with the rise of highly competitive mass media since the 1950s, a different issue has claimed our attention: does extensive media coverage undermine the constitutional promise of an impartial jury? Consider the 1995 trial of African American former football star and Hollywood celebrity O. J. Simpson, who was accused of killing his ex-wife and another man. For months, Americans watched as a drama of sex, race, and violence played itself out on national television. Simpson's acquittal divided the nation into racial camps, with blacks generally applauding the jury's decision and many whites condemning it. Commentators wondered whether juries were capable of reaching an objective verdict in a case so heavily promoted by Court TV and 24-hour news channels. Perhaps, they suggested, we should try such cases before judges alone.

Forty years earlier, another notorious trial focused national attention on this issue. The case involved a prominent Ohio doctor accused of murdering his wife. It, too, raised important questions about the trust we place in juries. On July 4, 1954, residents of Cleveland, Ohio, awoke to read about the grisly murder of a prominent doctor's wife in one of the idyllic suburbs around Lake Erie. After entertaining neighbors at a holiday party, thirty-one-year-old Marilyn Sheppard had gone to bed while her neurosurgeon husband fell asleep on the couch. Sometime later Sam Sheppard heard her calling him. He ran to the

"The great value of the trial by jury certainly consists in its fairness and impartiality. Those who most prize the institution, prize it because it furnishes a tribunal which may be expected to be uninfluenced by an undue bias of the mind."

—Chief Justice John Marshall, *United States v. Burr* (1807)

bedroom where he saw an intruder—a "bushy haired man"—fighting with his wife. Before he could save her, he was struck on the head from behind and knocked unconscious. Regaining his senses, he found his wife dead, her face bloody and unrecognizable. His son, sleeping in a nearby room, was unharmed. Sheppard found the back door open, saw someone moving toward the lake, and gave chase. The two men began to fight and Sheppard again lost consciousness; the intruder escaped.

In front-page stories, the three major Cleveland daily newspapers at first described the events as a brutal tragedy that shattered a model family and horrified the community. They speculated that drug thieves were responsible and reported in detail on the police investigation.Within a week, however, doubts emerged about the doctor's story, even though he never changed his account under repeated questioning. There were too many holes in it, people thought: Why was there no evidence of a break-in? How had Sheppard's son slept through the violent struggle? Why didn't the dog bark? The only answer the doctor gave was, "I don't know."

The police suspected Sheppard from the outset, with a detective telling him, "I think you did it," less than twenty-four hours after the crime. No physical evidence linked Sheppard to the crime, and the injuries he suffered were consistent with his story, but police thought his motive was a sexual affair Sheppard denied for several days before admitting it. They also believed the family was failing to cooperate fully.

Reporting this story was an openly skeptical press, encouraged at every step by police leaks. A reporter traveled with the lead detective to Los Angeles to bring Sheppard's girlfriend back for questioning, with the story running on page one. The editorial pages began calling for Sheppard's arrest, culminating in a Cleveland Press editorial on July 29 that ran across the top of the front page, "Quit Stalling and Bring Him In!" That evening, the police charged the doctor with the murder of his wife.

Massive publicity accompanied the trial, which began almost four months later. The judge denied a motion to move the case to another venue because of prejudicial pretrial publicity and required the lawyers to agree on a jury from the sixty-four-person jury pool, all of whom were local celebrities because the newspapers published their names and addresses. He also made extraordinary efforts to accommodate press interest in the trial, setting up a table for local reporters in the space normally reserved for the judge, jurors, and lawyers only and assigning most of the spectator seats to out-of-town reporters. Sheppard's lawyers protested this "trial by newspaper," adding, "If you read a story like this about the People's Court in China . . . it would raise hair on your head." The-judge ignored their pleas to restrain the press, and after six weeks of testimony, the jurors found Sheppard guilty of second-degree murder.

Sentenced to life in prison, Sheppard appealed in the first of more than a dozen unsuccessful attempts to overturn the verdict. In 1961, he got a new lawyer—a flamboyant young attorney named F. Lee Bailey, who would make his reputation from this case—and finally in 1966, the U.S. Supreme Court agreed to hear him. Three years earlier, a new television series had begun, featuring a husband wrongly accused of killing his wife and his subsequent quest for the mysterious one-armed stranger he believed had killed her. Although the creator of "The Fugitive" denied any connection to Sheppard's case, the resemblance was striking, and pundits wondered whether its popularity influenced the jus-

tices to hear the case.

The Supreme Court reversed Sheppard's conviction. "The massive, pervasive, and prejudicial publicity attending the petitioner's prosecution prevented him from receiving a fair trial," the justices concluded. The litany of errors at trial was long, with most focusing on the courtroom's carnival atmosphere. The judge too easily accommodated the press at the expense of the defendant's rights and failed to sequester, or isolate, the jury, allowing them to go home at night without strong reminders that they should not read, watch, or listen to any account of the trial or testimony. The hostile coverage by the Cleveland press and the proceedings at trial prejudiced the jury against Sheppard and made a fair trial impossible. "Due process," the Court ruled, "requires that the accused receive a trial by an impartial jury free from outside influences." Sheppard's trial had not met this constitutional standard.

Sam Sheppard had spent ten of the previous twelve years in prison based on the verdict of a biased jury, but his ordeal was not over. The state tried him again, this time governed by rules that guaranteed an impartial panel. Judged not guilty, he was finally free from his legal nightmare, although not his personal one. He became an alcoholic and died in 1970, a broken man. Seeking to restore his reputation through a declaration of innocence, his son unsuccessfully sued the state in a civil trial in 2000. In this case gone wrong, the failure to provide an impartial jury had resulted in a bitter irony: Sheppard's family ultimately believed it had to prove his innocence instead of the state having to prove his guilt.

In *Sheppard v. Maxwell*, the right to a public trial by an impartial jury and freedom of press were in conflict. In such instances, the Court decided, nothing prevented the press from reporting on the trial, but judges had a duty to ensure that the balance between this right and an impartial jury "is never weighed against the accused." Although the circumstances of the Sheppard case were decidedly modern, the measure used by the justices was an old one. The founding generation adopted a Bill of Rights to protect individual liberty against governmental power, including governmental actions (or inactions) that allowed the abuse of power by other parties, even if the result met popular approval.

Juries have unique roles in protecting our rights.No other institution of government places so much power—the power literally to decide issues of life and freedom—directly in the hands of average citizens. Juries by definition require government to prove guilt before taking away life, liberty, or property. Although rarely done, jurors can refuse to convict a defendant when they believe the law is wrong or when they believe following the law will lead to a greater injustice, such as when antebellum northern juries refused to send runaway slaves back to their masters despite the law's command. The acceptance of this practice, often called jury nullification, predates the Constitution. An American jury's refusal to follow the British government's instructions to convict printer John Peter Zenger of libel (after he had published criticisms of New York's colonial governor) was evidence to America's founders that this institution protected liberty even when it disobeyed the law. We have faith in such jury power for a variety of reasons: we trust the judgment of twelve members of the community over that of a single judge; juries exercise limited power, operating only in one case; and verdicts are subject to review on matters of law. We also believe jurors will be true to their oath to follow the law as they understand it.

The jury is among our most democratic institutions, especially now that we

insist that its membership be as diverse as our pluralistic society, a true cross section of the population. Also, jury service is the primary way most of us participate directly in government. Open to all adult citizens, the jury embodies a belief that each of us is equally competent to do justice.

Ironically, some observers believe this recent democratization of the jury has not solved its problems but only made them worse. Critics of the jury system argue that juries make decisions based on emotion, prejudice, and sympathy rather than law and evidence. They believe modern cases, especially complex civil lawsuits, are too technical for lay people to understand; in medical cases, for instance, they fear juries will award extraordinary damage awards for negligence or error that make the practice of medicine even more expensive. Insurance companies often make this complaint; patients who have been harmed by negligent acts hold an opposite view. Other critics worry about the ability of jurors to ignore the laws of democratically passed legislatures, which, they charge, makes the jury itself a lawless institution. They are also concerned that too much emphasis on ethnically balanced juries results either in deadlocked panels or different standards of justice for different groups. For these reasons and more, we hear periodic calls to reform or abolish the jury system.

Research on juries allays most of these concerns and strengthens our faith in this institution.Overall, jurors are competent and effective. They listen carefully and take seriously the charge not to discuss the evidence or reach a decision until the judge passes the case to them for deliberation and a verdict. They do not rush to judgment; instead, they reach a verdict through analysis of the evidence, not as experts but by judging its trustworthiness with common sense. They seek to persuade each other but also are open to persuasion. They do not reach perfect verdicts but, on the whole, they act as we hope and expect them to act—deliberately and fairly.

Ultimately, the jury's impartiality does not rest upon its ignorance or its superior knowledge; guided by careful judicial instructions, it stems instead from experiences that differ from juror to juror, thereby reflecting the variety of circumstances and opinions we find in real life. Jurors bring their prejudices into the jury room because they cannot do otherwise, but their deliberations, when conducted honestly, expose these prejudices, test them, and allow jurors to set them aside in an effort to be fair. Miscarriages of justice still occur, yet most often juries try to meet the constitutional test of fairness. In doing so, they help to realize the promise of the Bill of Rights and affirm Thomas Jefferson's belief that trial by jury is the "only anchor ever yet imagined by man, by which government can be held to the principles of its constitution."

"The Most Grievous Innovation of All"

In 1764, the Sugar Act transferred the prosecution of smugglers from local courts to vice admiralty courts. The British government was seeking to improve the collection of taxes, or customs duties, owed on imported goods, and Parliament believed that colonial juries too often refused to convict the violators of these imperial trade laws. The vice admiralty court did not have a jury. A judge alone decided guilt or innocence—and he received part of the fines assessed to individuals convicted of smuggling.

The colonists protested vehemently that the loss of trial by jury denied them one of their basic rights as Englishmen, as evidenced by John Adams's "Instructions of the Town of Braintree on the Stamp Act" (1765), in which he attempted to persuade the Massachusetts town to petition the king for a redress, or correction, of this grievance.

But the most grievous Innovation of all, is the alarming Extension of the Power of 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, whose Commission is only during Pleasure, and with whom, as we are told, the most mischievous of all Customs has become established, that of taking Commissions on all Condemnations; so that he is under a pecuniary Temptation always against the Subject. Now, if the Wisdom of the Mother Country has thought the Independency of the Judges, so essential to an impartial Administration of Justice, as to render them independent of every Power on Earth, nay independent of the King, the Lords, the Commons, the People, nay independent, in Hope and Expectation, of the Heir apparent, by continuing their Commissions after a Demise of the Crown; What Justice and Impartiality are we, at 3000 Miles distance from the Fountain to expect from such a Judge of Admiralty?

The same complaint—denial to the colonists of the right of trial by jury—was also part of the Declaration and Resolves issued by the Continental Congress in 1774. The First Continental Congress met in Philadelphia during the months of September and October in 1774 to protest British policies.

Resolved, . . . That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

The several acts. . . which impose duties for the purpose of raising revenue in America, extend the power of the admiralty courts beyond their ancient limits, deprive the American subject of trial by jury, authorise the judges certificate to indemnify the prosecutor from damages, that he might otherwise be liable to, requiring oppressive security from a claimant of ships and goods seized, before he shall be allowed to defend his property, and are subversive of American rights.

Prejudicial Publicity

In Sheppard v. Maxwell *(1966), Justice Tom Clark's majority opinion reviewed some of the newspaper coverage surrounding the murder of Marilyn Sheppard and the trial (and conviction) of her husband, Sam Sheppard. The evidence Clark cites reveals a press engaged in sensationalism. The Court ruled that Sheppard had not been tried by an impartial jury and reversed his conviction.*

Throughout this period the newspapers emphasized evidence that tended to incriminate Sheppard and pointed out discrepancies in his statements to authorities. . . .

A front-page editorial on July 30 asked: "Why Isn't Sam Sheppard in Jail?" It was later titled "Quit Stalling—Bring Him In." After calling Sheppard "the most unusual murder suspect ever seen around these parts" the article said that "[e]xcept for some superficial questioning during Coroner Sam Gerber's inquest he has been scot-free of any official grilling. . . . " It asserted that he was "surrounded by an iron curtain of protection [and] concealment."

That night at 10 o'clock Sheppard was arrested at his father's home on a charge of murder. He was taken to the Bay Village City Hall where hundreds of people, newscasters, photographers and reporters were awaiting his arrival. He was immediately arraigned—having been denied a temporary delay to secure the presence of counsel—and bound over to the grand jury.

The publicity then grew in intensity until his indictment on August 17. Typical of the coverage during this period is a front-page interview entitled: "DR. SAM: 'I Wish There Was Something I Could Get Off My Chest—but There Isn't.'" Unfavorable publicity included items such as a cartoon of the body of a sphinx with Sheppard's head and the legend below: "'I Will Do Everything In My Power to Help Solve This Terrible Murder.'—Dr. Sam Sheppard." Headlines announced, inter alia, that: "Doctor Evidence is Ready for Jury," "Corrigan Tactics Stall Quizzing," "Sheppard 'Gay Set' Is Revealed By Houk," "Blood Is Found In Garage," "New Murder Evidence Is Found, Police Claim," "Dr. Sam Faces Quiz At Jail On Marilyn's Fear Of Him." On August 18, an article appeared under the headline "Dr. Sam Writes His Own Story." And reproduced across the entire front page was a portion of the typed statement signed by Sheppard: "I am not guilty of the murder of my wife, Marilyn. How could I, who have been trained to help people and devoted my life to saving life, commit such a terrible and revolting crime?"We do not detail the coverage further. There are five volumes filled with similar clippings from each of the three Cleveland newspapers covering the period from the murder until Sheppard's conviction in December 1954. The record includes no excerpts from newscasts on radio and television but since space was reserved in the courtroom for these media we assume that their coverage was equally large.