

Mansfieldism Reconsidered

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In a letter to James Madison, February 17, 1826, Thomas Jefferson wrote:

... In the selection of our Law Professor, we must be rigorously attentive to his political principles. You will recollect that before the Revolution, Coke Littleton was the universal elementary book of law students, and a sounder Whig never wrote, nor of profounder learning in the orthodox doctrines of the British constitution, or in what were called English liberties. You remember also that our lawyers were then all Whigs. But when his black-letter text, and uncouth, but cunning learning got out of fashion, and the honeyed Mansfieldism of Blackstone became the students' hornbook, from that moment, that profession (the nursery of our Congress) began to slide into toryism, and nearly all the young brood of lawyers now are of that hue. They suppose themselves, indeed, to be Whigs, because they no longer know what Whigism or republicanism means. ...¹

What was Jefferson referring to by the term "Mansfieldism"? It was a term the meaning of which was known by Madison, and presumably others of their circle, but only brief references have survived to shed light on what they meant, and therefore on historical investigation of the original understandings of the Constitution.

Some scholars might seize on the reference by Jefferson to Lord Mansfield in his 1824 letter to John Cartwright,² in which he writes:

I was glad to find in your book a formal contradiction, at length, of the judiciary usurpation of legislative powers; for such the judges have usurped in their repeated decisions, that Christianity is a part of the common law. ... Lord Mansfield, with a little qualification, in Evans' case, in 1767, says that "the essential principles of revealed religion are part of the common law."

But Mansfieldism as a doctrine is usually discussed in opposition to the views of Lord Camden, which might be called Camdenism.³ Their main area of disagreement was over the role of the trial jury, with Mansfield taking the position that the jury was to consider only the facts in a case, and not the law, and Camden holding that the jury must, in reaching a general verdict, review the legal decisions of the bench, as well as decide the facts in a case. As discussed by William E. Nelson,

... juries rather than judges spoke the last word on law enforcement in nearly all, if not all, of the eighteenth-century American colonies. ... eighteenth-century juries, unlike juries today, usually possessed the power to determine both law and fact. ... In the early 1770s [John] Adams observed in his diary: "It was never yet disputed, or doubted, that a general Verdict, given under the Direction of the Court in Point of Law, was a legal Determination of the Issue." Adams argued that even a verdict contrary to the court's directions should stand, for it was "not only... [every juror's] right but his Duty in that Case to find the Verdict according to his own best

Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the court." In 1781-82 Thomas Jefferson painted an equally broad picture of the power of juries over the law in his *Notes on Virginia*. "It is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges," Jefferson wrote. "But this division of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact." As late as 1793 John Jay, sitting as chief justice of the United States, informed a civil jury that while the court usually determined the law and the jury found the facts, the jury nevertheless had "a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy." "[B]oth objects," Jay concluded, "are lawfully, within your power of decision."⁴

Whigs and Tories, Camdenians and Mansfieldians

The writings of Edward Coke⁵, which Jefferson preferred to the writings of William Blackstone, needed to be adapted to the needs of the colonies and to the new United States, with additional notes or comments, and cites to more recent cases. But no legal scholar undertook to do that, and Coke's writings, in what was then already becoming an antique English, did not lend themselves as well to such an adaptation. *Tucker's Blackstone*⁶ filled that role, beginning in 1803, and continued to serve until displaced, in turn, by the treatises of James Kent⁷ in 1826, Joseph Story⁸ in 1833, and Thomas M. Cooley⁹ in several works 1868-91. However, all these writers except Tucker, tended to follow the tory views of the Hamiltonians rather than the whig views of the Jeffersonians. They tended to favor Mansfieldism, and to accept a stronger form of *stare decisis*, as binding precedent rather than persuasive, and were more disposed to acquiesce in creeping departures from original understanding.¹⁰

Most of the controversy over the role of the jury in criminal cases arose from cases of treason, sedition, and libel, which were based on criminal statutes, rather than from trials for common law crimes like murder or robbery. In his treatise on libel, Joseph Towers writes:

English juries have been in possession, time immemorial, of the right of giving a general verdict, of determining both the law and the fact, in every criminal case brought before them.¹¹

The First Amendment right to petition arose from the conflict between citizens peacefully assembling to seek redress for grievances and the British government, which tended to view such assemblies as sedition and to prosecute them for a crime,¹² or to prosecute them for libel for criticizing officials, in speaking or publishing, on the grounds that such criticism incited sedition.

A widely-read work that defended the Camdenian position, criticized the government, and proposed reforms, was the *Letters of Junius*,¹³ by an anonymous author, 1767-72, which were collected and published in the United States in 1791 as a single volume. The preface, a 'Dedication to the English Nation,' exhorts readers "never to suffer an invasion of YOUR political constitution, however minute the instance may appear, to pass by, without a determined, persevering resistance. One

precedent creates another.— They soon accumulate and constitute law."

Mansfieldism did have its defenders. John Bowles published a treatise¹⁴ supporting the Mansfieldian position in 1791 that was rejected in America with the adoption of the Bill of Rights that year.

The language of the First Amendment, "Congress shall make no law ... abridging the freedom of speech, or of the press ..." ¹⁵ can be best understood as intended to prohibit, among other things, criminal libel laws.

To understand what the Jeffersonians seem to have been concerned about in 1826 regarding judicial due process and the role of the jury we need to examine the history of the written legal pleading, and the practice of requiring written legal pleadings and briefs to be submitted in advance of a trial, and of the bench hearing arguments on them, and deciding them, outside the hearing of the jury. That was not the practice in either England or America in the 18th century when the Constitution and Bill of Rights were adopted. Written legal pleadings and briefs were mainly for appeals,¹⁶ and little used in most trials, especially criminal trials. Most argument on key issues of law was conducted orally in the presence of the jury. This was the standard of practice that comprised part of what the Founders meant when they used the terms "jury trial" and "due process".

By 1826 in the United States it seems that much if not most legal argument had been removed from the hearing of the jury, and evidence suggests that this was at least a critical element of the practice that Jefferson was complaining about, to someone he could expect would agree with him, even if he did not expand on their concerns as fully as we might prefer.

Argue Law before Jury

My thesis in this article is that legal argument in the presence of the jury is an essential element of due process as it was originally understood when the Constitution and Bill of Rights were ratified; that in rendering a general verdict, such as guilty or not guilty, even though the jury may not be specifically reviewing each legal decision of the bench, the jury is necessarily sustaining or rejecting the decisions when they reach their general verdict; that the decisions on law are an essential element of a general verdict; and that the jury cannot have sufficient information to competently render such a verdict without hearing the argument and making a general review of the decisions of the bench.

The implication of this is that most of the criminal jury trials for the last 180 years, in not arguing all issues of law in the presence of the jury, have violated the due process rights of the defendants, in what should be regarded as reversible error. The duty of those sworn to defend the Constitution, as originally understood, is to correct this error, and restore the due process of arguing all issues of law in the presence of the jury.

There are further implications of this. Jurors must receive copies of all pleadings, have access to an adequate law library, and have instructions on how to use it. Furthermore, instruction in law, equivalent to at least the first year of law school, including instruction on how to use a law library, should be made part of the public school curriculum, so that the public from whom the jury is drawn

will be prepared to serve as jurors, and will need little further instruction after they are chosen.¹⁷

Now it should be understood that arguments on law are not arguments on the admissibility of evidence, unless there is a statute prescribing what evidence is admissible or not admissible. Motions *in limine* to exclude prejudicial evidence from the hearing of the jury were not unheard of in 18th century legal practice, but such motions excluding evidence or argument by the defense would have been then considered an abuse of due process in America, and they are a common abuse in courts today.

The main constitutional problem in criminal legal practice today is that people are being convicted of crimes as the result of legal decisions and jury instructions by the bench, perhaps based on what are regarded as binding precedent, that the offense charged is authorized by a statute, and properly applied to the facts in the case, or that the statute is authorized by the constitution for the jurisdiction, when a jury, if it could hear argument that the logical chain of authority is broken, or that the precedent was wrongly decided, or that the charge is not properly applied to the facts in the case, would acquit.

The distinction between “fact” and “law” is carried from English law, which was based on a constitution in which whatever the king and his ministers said was law, with a Parliament which functioned as an ongoing constitutional convention that could amend the constitution from one act to the next. However, the adoption of a written Constitution by the United States represents a fundamental change in that distinction. Under the U.S. Constitution, all issues of law are also issues of fact: It is a fact issue whether the law was properly adopted, and the logical chain of authority, or lack thereof, for any official act, is also a fact, and a fact the decision on which is too important to be left to corruptible public officials.

Trial by Jury

We must keep in mind why the Founders established the right to trial by jury in the Constitution. It wasn't to involve the public in the judicial process, or because jurors know the law better, or because jury verdicts would be more acceptable to the parties in cases. It was because judges, prosecutors, law enforcement officers, and other public officials, can't be trusted. Even if not initially corrupted when they take office, they hold their offices for long enough that they can become corrupted, whether by bribery, intimidation, ambition, or the undue influence of sponsors or cronies. They often become biased by their official duties, prone to become arrogant, impatient, careless, or jaded and dismissive of the ways the specific facts in each case can affect what is the just disposition of that case. A jury of citizens selected at random, excluding only those prejudiced by their previous involvement with the parties and facts in the case, comes with a fresh perspective, and if protected from tampering, are more likely to render verdicts that accord with the public sense of what is lawful and just, in the long term.

To understand the jury system, people also need to understand why our ancestors adopted the number twelve as the number for a trial jury, or the number needed to decide in a grand jury, or that a trial jury be unanimous. A unanimous verdict of twelve derives directly from the principle that a jury decides not just whether the accused committed the act, but whether the act was unlawful.

The jury arose from the English system of common law, which included common law crimes. Without a statute defining what is and is not an offense, the jury, like the bench, had to decide whether the act alleged was a violation, based on custom and precedent. The emergence of criminal statutes made it easier, when the statute was well-written, to reach a verdict, but since a statute is necessarily written in general terms, its applicability to the facts in a case remained a matter for the jury.¹⁸

A unanimous verdict of twelve makes it more probable than not that there will be at least one juror who does not think the law makes the alleged act an offense if there is not at least a 94% level of support in the community for acts of that kind being offenses.¹⁹ Although the Founders did not adopt a supermajority rule for the adoption of criminal statutes, they arguably should have done so, to match the requirement for a unanimous verdict of a jury of twelve. The criminal sanctions of deprivation of life, limb, or liberty were considered too serious to be defined by statutes adopted by simple majorities, even if the Constitution allowed it.

Trial Reports

To find historical evidence for this thesis, we need only examine surviving trial reports.

In the 1735 report of the trial of John Peter Zenger,²⁰ the jury decided that truth was a defense against libel. The charge was based on an English statute, tried in the colony of New York, defended by Andrew Hamilton, with a New York jury. The report is a transcript of oral argument made in the presence of the defendant, the jury, and the public. Although Hamilton did not challenge the constitutionality of the statute, he did challenge its applicability to cases of this kind, essentially the definition of the term “libel”, which today would be treated as legal argument, to be excluded from the hearing of the jury.

In the 1770 report, *The Trial of John Almon, Bookseller, ... For selling Junius's Letter*²¹, we see what we would today easily identify as a political trial, an attack on the publisher, presumably to pressure him into revealing the name of the author. That didn't work, and the publisher became a hero in the cause of a free press, but the transcript of the trial reveals that argument on issues of law was made in the presence of the jury, even if the bench, Lord Mansfield, tried to manipulate the outcome in favor of the prosecution in his statements to the jury, the foreman of which was a lawyer, whose career depended on pleasing the judge.

In 1777, John Horne Tooke, a member of the Society for Constitutional Information, also known as the Constitutional Society, the Constitution Society or Federalist Society of its day and country, published *Address on Libels, Case of John Horne*,²² as a criticism of indictment by information, rather than by grand jury. This case may have contributed to requirement for grand juries in U.S. Bill of Rights, but again, it shows argument on questions of law in the presence of the jury.

The Constitutional Society called a convention of its members and supporters to adopt proposals for republican reforms. The British government responded by trying its leaders, particularly its Secretary, Thomas Hardy, for treason, for “encompassing the death of the king”. Evidently it was afraid the American Revolution might be imported to Britain. The 1794 report of the trial²³ provides

insight into how a pro-prosecution bench would constrain the jury and manipulate them to get a conviction. This case provides both a manifesto for whig reformers and a how-to manual for tyrants.

In 1786 there was an interesting trial on a *quo warranto* before a special jury composed of prominent citizens, all or most of whom were read in the law.²⁴ While it was not an ordinary jury, and would raise due process issues in the United States, it presents an interesting way of solving the problem of arguing complex legal issues before a jury, by selecting legally trained persons as jurors.

American patriot Thomas Paine got prosecuted in England in 1792 for the publication that year of his book, *Rights of Man*,²⁵ and a jury found him guilty. His revenge was to publish his report of the trial, which from the viewpoint of his prosecutors might have been seen as more of a libel than the original work was.

The Hardy trial was followed in 1800 by *The Two Trials of John Fries for Treason*,²⁶ which exhibits the further Mansfieldization of the role of the jury in Britain, even though by this time Mansfield was dead.

We can see in this progression of trials the increasing narrowing of the role of the jury as the establishment sought to suppress its critics and reformers. Eventually, the reformers' causes would win, but not before a legacy of bad precedents was laid down that oppresses people to this day, not only in Britain, but by a peculiar kind of seepage, eventually to the United States and other nations.

Charges to Juries

In 1725 James Astry published a short treatise, *A General Charge to All Grand Juries, and Other Juries*,²⁷ which was intended to serve as a model. It provides a base for comparison to later charges that reflect the emergence of Mansfieldism.

There was a rather prejudicial 1791 charge to the grand jury in a case against persons characterized as "levellers",²⁸ who the establishment of that era in England treated the way the establishment would treat "communists" a couple of centuries later, even though they were only demanding a right to vote for citizens without a property qualification, and voting districts, or boroughs, with more nearly equal population. It reveals the beginnings of the trend toward the capture of grand juries by professional prosecutors.

Law Manuals

Some early manuals provide insight into the practice of law in 18th century England that indicate the role of the jury and legal argument in their presence. One such manual is *The English Lawyer, showing the Nature and Forms of Original Writs, Processes, and Mandates*, by William Bohun.²⁹ Another is *The Present Practice of the Court of Common Pleas*, by Joseph Harrison.³⁰ A third is *The Attorney's Practice in the Court of Common Pleas*, by Robert Richardson.³¹ One has to infer the role of the jury in hearing and deciding legal issues indirectly, but the careful reader can discern what was the practice of the time.

Commentaries

Several early commentaries on the role of the jury are instructive.

In Rhode Island in 1787 there was a legal tender case that may have inspired the prohibition in the U.S. Constitution of states making anything but gold or silver legal tender for the payment of debt. However, the case did not go to a jury, because the bench ruled the statute unconstitutional and the court lacking in jurisdiction, which resulted in legislative action against the bench. The report of that case, written by James M. Varnum,³² provides an eloquent legal argument on the issues in the case that also sheds light on the role of the jury in the American tradition of the era.

In 1803 an anonymous author wrote a short treatise, *Observations on the Trial by Jury*.³³ This was advice to the Pennsylvania Legislature on the administration of the state judiciary which touched on the role of the jury.

In 1815 there was published in Britain a review of the progress of Mansfieldization in that country also entitled *Observations on the Trial by Jury*.³⁴

Later U.S. Cases

In *Games v. Dunn*, 39 U.S. 322 (1840),³⁵ the Supreme Court held that when judge and jury disagree on a question of law, the decision of the judge prevails. Previously, the decision of the jury had often prevailed. This was the key break in the chain of precedents that sustained the right to have a jury review questions of law and override the bench. However, it does show that up to that time at least, legal argument was often, if not always, made to juries.

In the landmark case of *Sparf & Hansen v. United States*, 156 U.S. 51, 64 (1895),³⁶ it was held not to be a reversible error not to instruct the jury of their power to judge the law in bringing a general verdict. The majority opinion³⁷ essentially accepted the argument that it was general knowledge and as such did not need a specific instruction, but this and later precedents have since been taken by judges as a license to forbid counsel from informing the jury of its power and duty to judge the law, to the point of holding persons in contempt who attempt to do so, or seeking to disbar lawyers that try to do it.

Fully Informed Jury Movement

There is already a movement and an organization³⁸ devoted to informing jurors of their power and duty to review the law in a trial. However, its present leadership has adopted the mistaken doctrine that the duty of the jury is to render a verdict based on conscience and a natural sense of justice. That is incorrect. Jurors are judicial officers, just as much as the bench is, even if only for the duration of a trial. The Constitution provides that "... all judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution;"³⁹ It is unconstitutional to have jurors take an oath to "follow the law as given by the judge" or words to that effect. Jurors should take the same oath the bench does, to "preserve, protect, and defend the Constitution of the United States [and of this State]", or words to the same effect. Their duty is to

the governing constitution, not to the presiding officer of the court, who is called “judge”, but shares the duties of judge with the jury when there is one. The duty of the jury is to do what a good judge is supposed to do, to decide the issues of fact, and to review the legal decisions of the bench in reaching their general verdict, deciding whether those decisions are authorized by the governing constitution and statutes, and returning a verdict of not guilty if they have a reasonable doubt about that.

Contrary to movement leaders, conscience and a natural sense of justice is not enough. To fulfill their duty to defend the constitution from government usurpation, they must hear the legal arguments, read copies of the pleadings, and have the use of a law library. They can’t be expected to know the law well enough to perform their duty without hearing the legal arguments. We can’t expect that of the bench or the lawyers in the case. Every trial is an educational process for everyone concerned. Almost every case contains some elements new to someone involved in it. Most jurors might lack legal training, but that is a deficiency of our education system, and they can learn, just as the other participants in the trial do. The process of educating them provides a valuable check on law becoming an esoteric art not understood by even its most experienced practitioners. If reasonable persons who serve on a jury can’t learn to understand the law well enough to render a verdict consistent with the constitution, then how can we expect a reasonable person to obey the law under which he might be tried?

Many legal practitioners, especially prosecutors and judges who are former prosecutors, will object that arguing issues of law in the presence of the jury, and inviting them to review the legal decisions of the bench, will make trials too long and expensive, will “confuse the jury”, and result in more hung juries or acquittals. During the transition away from the Mansfieldian order, that is likely to be true. Correcting errors is usually painful, especially if the errors have gone uncorrected too long. But society will adjust. Education will improve when there is a demand for it. Public interest and debate will increase, so that people will educate themselves. Lawyers and judges will adjust their presentations to make them more accessible to laypersons. The law itself will become more accessible, and this will benefit practitioners as much as laity.

It probably won’t have that much of an effect on most ordinary cases. The cases on which it will have an impact are precisely those that need to be impacted, the political cases, where undue influences are at play to fix the outcome. Those are the cases that produce unsatisfactory and unjust results, that undermine public confidence in law and the judicial system, and that build festering resentments that can lead to civil disorder.

The Present Divide

We find ourselves in an unstable state of tension between a Mansfieldian judicial establishment that attempts to manipulate trial and grand juries for their own purposes, and juries that have the power, and arguably the duty, to overturn that regime and review the law in a case, who fail to do so only because most of the population today from whom juries are drawn are ignorant or easily manipulated. But in the Age of the Internet the establishment cannot depend on that ignorance or passivity to endure much longer. Many educated persons are already aware of the power and duty of juries to review the legal issues in a case in reaching a general verdict. Increasingly, persons are

being questioned in *voir dire* about their knowledge of the power and duty of jurors to review the law, and excluded from panels. But it is only a matter of time before it becomes nearly impossible to empanel a jury without either excluding all but a few of the most ignorant, or else getting people on the jury who refuse to convict unless or until all issues of law are argued in their presence.

Instead of trying to cling to the present Mansfieldian order for as long as possible until the breakdown occurs, I propose an orderly transition to the Camdenian order understood and intended by the Founders. The process can begin with a constructive debate on these issues in legal fora and law review journals, which this article is intended to initiate. As support grows for reform, legal counsel can proceed to file notices of intent to argue issues of law in the presence of the jury, in friendly courts, until the bench yields and the practice is sustained on appeal, establishing a precedent. Then it will be a matter of enlarging the precedent until the Camdenian order prevails.

*. Founder and President, Constitution Society, <http://www.constitution.org> . Editor and online publisher of many of the most important works of constitutional history, law, and government.

1. Letter to James Madison, February 17, 1826, complaining of Mansfieldism, http://www.constitution.org/tj/ltr/1826/ltr_18260217_madison.htm .

2. Letter 1824/06/04 to John Cartwright comparing the English and American constitutions, http://www.constitution.org/tj/ltr/1824/ltr_18240604_cartwright.htm .

3. The controversies between William Murray, Lord Mansfield (1704-1793), and of Charles Pratt, Lord Camden (1713-1794), are documented and discussed at <http://www.constitution.org/bcp/man-cam.htm> .

4. “The Jury and Consensus Government in Mid-Eighteenth-Century America”, William E. Nelson, article in *The Bill of Rights: Original Meaning and Current Understanding*, edited by Eugene W. Hickok, Jr., University Press of Virginia, 1991. <http://www.constitution.org/jury/pj/nelson.htm> .

5. Selected Works of Edward Coke (~1628) — Commentary on English common and statutory law, including the *Institutes* and the *Reports*. <http://www.constitution.org/coke/coke.htm> .

6. *Tucker's Blackstone*, St. George Tucker, 1803. The *BCommentaries on the Laws of England* by William Blackstone, published in four volumes 1765-69, was the canonical codification of the Common Law, but it needed to be adapted to the needs of the U.S. Constitution. This was done in 1803 by St. George Tucker, who republished the Commentaries, and added commentaries of his own, making the needed adaptations. <http://www.constitution.org/tb/tb-0000.htm> Also see *An Analysis of the Laws of England*, William Blackstone. (1762), <http://www.constitution.org/cmt/blackstone/ale1762.htm> .

7. *Commentaries on American Law*, James Kent (1826). http://www.constitution.org/jk/jk_000.htm (Work in progress).

8. *Commentaries on the Constitution of the United States*, Joseph Story (1833).
http://www.constitution.org/js/js_000.htm .
9. *Treatise on the Constitutional Limitations Which Rest Upon the Legislative Powers of The States of the American Union*, Thomas M. Cooley (1868, 1883); *The General Principles of Constitutional Law in the United States of America*, Thomas M. Cooley (1891).
<http://www.constitution.org/cmt/tmc/pcl.htm> (Work in progress).
10. “How *stare decisis* Subverts the Law”, Jon Roland, Jun. 10, 2000.
<http://www.constitution.org/col/0610staredrift.htm> .
11. *Observations on the Rights and Duty of Juries, in Trials for Libels: Together with Remarks on the Origin and Nature of the Law of Libels*, Joseph Towers, London, 1784.
<http://www.constitution.org/jury/cmt/towers/towers.htm> . Also see *Tracts on Political and Other Subjects*, Joseph Towers (1796), <http://www.constitution.org/jury/cmt/towers/towers1796.htm> , and *The Elements of the Art of Packing, As Applied to Special Juries, Particularly in Cases of Libel Law*, Jeremy Bentham (written 1809, published 1821).
<http://www.constitution.org/jb/packing.htm> .
12. *The Subject's Right of Petitioning*, Anonymous. (1703).
<http://www.constitution.org/cmt/jpa1703/jpa1703.htm> .
13. Being rendered, to be published online at <http://www.constitution.org/junius/junius.htm> .
14. *Considerations on the Respective Rights of Judge and Jury; Particularly upon Trials for Libel*, John Bowles. (1791),
<http://www.constitution.org/jury/cmt/judge-jury1791/judge-jury1791.htm> .
15. U.S. Const., Amd. 1.
16. The earliest known legal brief in British North America was recently discovered. See Appeal Brief in *Matson v. Thomas*, John Valentine (1720),
http://www.constitution.org/bcp/eab/matson_v_thomas.htm . In winning, got precedent that British colonists in North America had inherited the rights of Englishmen, laying the foundation for the American War of Independence.
17. This was done to some degree in early American education. *The American Manual, or, The Thinker*, by Joseph Bartlett Burleigh, published in 1854, for use by students of high school or college age, was largely devoted to instruction on how to serve on a jury.
http://www.constitution.org/cmt/burleigh/amer_man1.htm .
18. Common law crimes were ruled unconstitutional in *United States v. Hudson*, 7 Cranch 32 (1812), <http://www.constitution.org/ussc/007-032.htm> . The opinion does not explain the decision well, but further analysis finds that they are precluded by the prohibition *on ex post facto* laws, inasmuch as, without a statute, every common law criminal conviction is for a newly defined crime.

19. This is obtained from solving the simple inequality

$$n^j > .5$$

where n is the probability of support for the act being a crime, and j is the number of jurors for which a unanimous verdict is sought. For $j = 12$, n is approximately .94. The .5 on the right side of the inequality represents the requirement of at least a 50% conviction probability, assuming the facts prove the accused committed the alleged act. This analysis shows that if the size of the jury is reduced, the probability of conviction is increased, which violates the substantive due process level of protection established by the ratification of the Constitution and Bill of Rights.

20. *The Trial of John Peter Zenger*, 1735. 17 How. 675.

<http://www.constitution.org/trials/zenger/zenger.htm> .

21. *The Trial of John Almon, Bookseller, ... For selling Junius's Letter*, 1770.

<http://www.constitution.org/trials/almon1770/almon1770.htm> .

22. *Address on Libels, Case of John Horne*, John Horne Tooke. (1777).

<http://www.constitution.org/jury/cmt/tooke1777/tooke1777.htm> .

23. *The Trial of Thomas Hardy for High Treason*, (1794).

<http://www.constitution.org/trials/hardy1794/hardy1794.htm> . Also see *A Complete Collection of State-Trials, and Proceedings For High-Treason, And Other Crimes And Misdemeanours; From the Reign of King Richard II to the Reign of King George II.* in Six Volumes.

<http://www.constitution.org/trials/ccst1742/ccst1742.htm> .

24. *The Trial at Large, ... In the Nature of a Quo Warranto, Against Mr. Thomas Amery, , ... of the City of Chester.* (1786).

<http://www.constitution.org/trials/amery1786/amery1786.htm> . For more on *quo warranto* and other common law prerogatory or extraordinary writs see <http://www.constitution.org/writ/writs.htm> .

25. *Rights of Man*, Thomas Paine, London, 1792.

http://www.constitution.org/tp/rightsman_pre.htm . His report on the trial is at http://www.constitution.org/tp/tp_libel.htm .

26. *The Two Trials of John Fries for Treason*, (1800).

<http://www.constitution.org/trials/fries1800/fries1800.htm> .

27. *A General Charge to All Grand Juries, and Other Juries*, James Astry. (1725).

http://www.constitution.org/jury/cmt/charge_jury1725/charge_jury1725.htm . Also see "If It's Not a Runaway, It's Not a Real Grand Jury", Roger Roots, *Creighton L.R.*, Vol. 33, No. 4, 1999-2000, 821. <http://www.constitution.org/lrev/roots/runaway.htm> .

28. *Short Hints upon Levelling — A Charge to the Grand Jury of Middlesex*, William Mainwaring. (1791).

http://www.constitution.org/18th/hints_level-1792/hints_level-1792.pdf .

29. *The English Lawyer, showing the Nature and Forms of Original Writs, Processes, and Mandates*, William Bohun. (1732).
http://www.constitution.org/cmt/eng_lawyer1732/eng_lawyer1732.htm .
30. *The Present Practice of the Court of Common Pleas*, Joseph Harrison.
<http://www.constitution.org/cmt/ppccp1761/ppccp1761.htm> .
31. *The Attorney's Practice in the Court of Common Pleas*, Robert Richardson.
<http://www.constitution.org/cmt/apccp1778/apccp1778.htm> .
32. *The Case, Trevett against Weeden, for refusing Paper Bills in Payment*. (1787).
<http://www.constitution.org/trials/varnum1787/varnum1787.htm> .
33. *Observations on the Trial by Jury*, Anonymous. (1803)
http://www.constitution.org/jury/cmt/observ_jury_1803/observ_jury_1803.htm .
34. *Observations on the Trial by Jury*, attributed to John Longley. (1815).
<http://www.constitution.org/jury/cmt/longley1815/longley1815.htm> .
35. *Games v. Dunn*, 39 U.S. 322 (1840). The issue was identification of a person where there was a confusion of names.
36. *Sparf & Hansen v. United States*, 156 U.S. 51, 64 (1895). For the dissenting opinion see <http://www.constitution.org/ussc/156-051c.htm> and commentary by Jon Roland at <http://www.constitution.org/ussc/156-051jr.htm> .
37. <http://www.constitution.org/ussc/156-051a.htm> .
38. Fully Informed Jury Association, <http://www.fija.org> .
39. U.S. Const. Art. VI Sec. I Cl. 3. <http://www.constitution.org/cons/constitu.htm#con6.1.3> .