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All views expressed are those of the author, not of the municipal courts wherein she sits as a Judge Pro Tem.

# Sure You Have A Right To A Jury Trial. YOU THINK. Maybe.

BY DEBBIE WEECKS

You're filing a lawsuit or defending a criminal charge (your client's, not your own.).

You know about the right to "a jury of your peers," and so does your client.

We all get it — **"The right of trial by jury shall remain inviolate."**

So, no matter what, you get a trial if you ask for it. Don't you?

You might want to reconsider your answer.

For example, the demand for a jury trial needs to be in writing, per the governing rules.<sup>1</sup> Unless, of course, in a criminal case, it's a matter of right—then if trial is proceeding, the right of a jury trial must be waived in writing, by both sides; except when the granting statute also provides a right for only one party to waive that right.<sup>2</sup>

Furthermore, the civil jury should be comprised of eight people, six agreeing, unless it's a criminal case requiring eight, or a misdemeanor requiring only six.<sup>3</sup> But then if the alleged crime is punishable by 30 years or more incarceration,<sup>4</sup> well, 12 jurors will be indicated, plus alternates.

Note the phrase "common law," not "equity" and not "statute that existed at statehood." There is a large volume of case law about what was or was not eligible for a jury "at common law" and about what's "inviolate."

For example, in 1899, the United States Supreme Court concluded "the explicit ref-

erence to the 'common law' in the Seventh Amendment referred to the rules of the common law of England, not the rules as modified by local or state practice."<sup>5</sup>

In *Markman v. Westview Instruments, Inc.*,<sup>6</sup> the Court explained the meaning of the Seventh Amendment further, stating in relevant part:

Since Justice Story's day, *United States v. Wonson*, 28 F. Cas. 745, 750 (No.

16,750) (CC Mass. 1812), we have understood that "[t]he right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted."

"[W]e ask, first, whether we are dealing with a cause of action that either was tried at law at the time of the Founding or is at least analogous to one that was." If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order

to preserve the substance of the common law right as it existed in 1791. [citations omitted].

...

"First we compare the statutory action to 18th century actions brought in the courts of England prior to the merger of the courts of law and equity." *Markman*, citing to *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (U.S. Fla. 1989). Secondly, "whether a particular issue occurring within a jury trial (here the construction of a patent claim) is itself necessarily a jury issue."

The debate continues at trial court and appellate levels today. As *Markman* explains, sometimes we just must proceed without certainty of 18th-century English actions.

This article provides a glimpse at that analysis and its application.

## Criminal Charges

Currently, in Arizona's criminal law context, the right to trial by jury is interpreted to be a right that attaches to all felony charges, but not necessarily to misdemeanors.

The distinction came about in our appellate case law. There is now a distinction of "petty" offenses and crimes punishable by under six months of incarceration as those not automatically jury-eligible.<sup>7</sup>

Rather, invoking a right to a jury means that either the right must be one found at common law at the time of Arizona's statehood or that the Legislature must have included serious and onerous penalties even when a crime is punishable by six months or less.<sup>8</sup>

For a quick glance at authority and analysis of the source of jury trial rights in the criminal law context and for a list of misdemeanors without jury eligibility (post-*Derendal*),<sup>9</sup> see the sidebars on this page.

## The Civil Context

As to civil matters, the U.S. Supreme Court has not yet found the Seventh Amendment applicable to the states through the Fourteenth Amendment by way of the Selective Incorporation Doctrine. In the non-criminal context, it would be an oversimplification merely to conclude that there is a monetary claim of \$20 and one cent, therefore, there is an absolute right to a jury trial. Objecting to the Supreme Court's

Misdemeanors Without Jury Eligibility	
CHARGE	AUTHORITY
Leaving the scene	Impliedly overruled by <i>Derendal v. Griffith</i> , 209 Ariz. 416, 421 (2005).
Criminal trespass	<i>State v. Willis</i> , 178 P.3d 480 (Ariz. Ct. App. 2008).
Misdemeanor assault	<i>In re Buford &amp; Estrada, Phx. City Prosecutor's Office v. Klausner</i> , 118 P.3d 1141 (Ariz. Ct. App. 2005), <i>rev. denied</i> (May 2006).
Interference with judicial proceedings	<i>Ottaway v. Smith</i> , 113 P.3d 1247 (Ariz. Ct. App. 2005).
Drag racing	<i>Derendal</i> , 209 Ariz. at 416.
Topless dancing under city ordinance	<i>Crowell v. Jejna</i> , 161 P.3d 577 (Ariz. Ct. App. 2007), <i>rev. denied</i> (Nov. 2007).
Theft	<i>Garcia v. State of Arizona</i> , Superior Court Maricopa County LC2008-000487 (Oct. 2008 minute entry); 1-CA-CV-09-0194 (Div. One 2009) (appeal dismissed by court for lack of jurisdiction).

acceptance of directed verdicts as not violative of the Seventh Amendment, in dissent, Justice Black provided an impassioned argument, explaining in relevant part:

Hamilton's view, that constitutional protection of jury trial in civil cases was undesirable, did not prevail. On the contrary, in response to widespread demands from the various State Constitutional Conventions, the first Congress adopted the Bill of Rights containing the Sixth and Seventh Amendments, intended to save trial in both criminal and common law cases from legislative or judicial abridgment. The first Congress expected the Seventh Amendment to meet the objec-

tions of men like Patrick Henry to the Constitution itself. Henry, speaking in the Virginia Constitutional Convention, had expressed the general conviction of the people of the Thirteen States when he said, "Trial by jury is the best appendage of freedom. ... We are told that we are to part with that trial by jury with which our ancestors secured their lives and property. ... I hope we shall never be induced, by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common law suits. The unanimous verdict of impartial men cannot be reversed." The first Congress, therefore provided for trial of common law cases by a jury, even when such trials were in the Supreme Court itself. 1 Stat. 73, 81.<sup>10</sup> (citations omitted)

And yet Justice Black's dream did not carry the day into all litigation in our 21st century. Instead, today as then the reader will need to distinguish the claim(s) into the various causes of action. "Thus, our inquiry becomes whether any of the individual causes of action at issue here created a constitutional right to a jury trial."<sup>11</sup>

The Court looked to whether there was some a right in 1910 (Arizona Statehood) in the case of *In re Newman*, when it summarized the analytical question thus:

The Arizona Constitution preserves the right to a jury trial only in cases where it would have existed under the common law prior to statehood. Unless the statute expressly so provides, there is no right to a jury trial on statutory claims

Jury Trials in Criminal Law Context		
CRIMINAL CHARGE	JURY	AUTHORITY OR ANALYSIS
All Felonies	Yes	<i>Blanton v. City of North Las Vegas</i> , 289 U.S. 538 (1989) and its progeny; because they are punishable by more than six months of incarceration.
All DUIs	Yes	A.R.S. §§ 5-395 <i>et seq.</i> ; §§ 28-1381(F) and -1382(C); <i>Manic v. Dawes</i> , 141 P.3d 732 (Ariz. Ct. App. 2006), <i>as corrected, rev. denied, redesignated as opinion</i> (Mar. 15, 2006); <i>State ex rel. Wangberg v. Smith</i> , 118 P.3d 49 (Ariz. Ct. App. 2005), <i>rev. denied</i> (May 2006). <i>But see Rogers v. Cota</i> , 219 P.3d 254 (Ariz. Ct. App. 2009) (judge may determine whether BAC exceeds 0.2 for sentencing purposes).
Allegation of sexual motivation as a factor	Yes	<i>Fushek v. State</i> , 183 P.3d 536 (Ariz. 2008) (Indecent exposure, A.R.S. § 13-1402.A., when the allegation of sexual motivation invoked possible sex offender registration as a punishment, adding to the seriousness) (trial still pending on the merits as of Feb. 2010).
Resisting Arrest	Yes	<i>State v. Le Noble</i> , 164 P.3d 686 (Ariz. Ct. App. 2007) (finding a right to jury at common law, at the time of statehood).
Reckless Driving	Yes	<i>Urs v. Maricopa County Attorney</i> , 31 P.3d 845 (Ariz. Ct. App. 2001), <i>rev. denied</i> (April 2002), finding a common law right to a jury.
Shoplifting by Concealment	Yes	<i>Sulavka v. State</i> , ___ P.3d ___, 2009 WL 4638853 (Ariz. Ct. App. Dec. 2008) (appeal pending: motion granted to extend time for filing of petition for review).



that did not exist at common law prior to statehood.<sup>12</sup> (citations omitted)

*Newman* clarifies that in those cases wherein there is statutory mention of a jury, there is not necessarily a statutory grant of such right. Instead, there is simply the recognition that if we had it then, we have

it now. In addition, there is no right to a jury trial for equitable actions, such as breach of fiduciary duties as existed at the time of statehood.<sup>13</sup>

### Is There A Statutory Right?

In addition to the constitutional analysis, there may be a legislative right to a jury trial. Many statutes provide a “right” to a jury trial, and several other statutes discuss the court or jury without stating that a right is conferred.

Below you will see, first, the common law “snapshot.” Following that is a chart intended as a state statutory guide (see pp. 36-37).

Keep in mind that these do not exhaust all such instances of the confusing language, nor are federal statutes included.

### Common Law Analysis

There is no jury trial right at common law for the following:

- Equitable actions. *Arizona State Tax Comm’n v. Southwest Kenworth*, 561 P.2d 757 (Ariz. Ct. App. 1977). A court may, however, invoke an “advisory” jury. See ARIZ.R.CIV.PROC. 39(m). For example, there is no jury in a breach of fiduciary duties case because it is an equitable action.
- Bankruptcy for a claimant. But there is a jury as to criminal charges despite being a bankruptcy debtor. See *JNC v. Mehan*, 797 P.2d 1 (Ariz. Ct. App. 1990) (seeking bankruptcy approval of a plea bargain on felony counts).
- Judicial foreclosure. *Greer v. Goesling*, 97 P.2d 218 (Ariz. 1939). See also *Life Investors Ins. Co. v. Horizon Resources Bethany*, 182 Ariz. 529 (Ct. App. 1995) (deficiency judgment action).

However, there are examples of opposite results. The following have a right to jury trial at common law:

- Defending in an adversarial proceeding by a bankruptcy trustee, if the charged party is not a claimant in the bankruptcy itself.
- As to reasonable attorney fees, so long as there is a basis for the attor-

## JURY STATISTICS<sup>1</sup>

FY 7/1/08 through 6/30/09

### 1,192 jury trials were held at the Maricopa County Superior Court Locations:

Family Law	0
Probate	1
Civil Division	182
Criminal Division	1,009

### Jury Summonses in Maricopa County Superior Court:

Number Issued	555,487
Undelivered Return Mail	64,782 <sup>2</sup>
Waived by Court Without Appearing	For each 100 summoned, 30 are left for voir dire <sup>3</sup>
Disqualified	51,657 (non-citizen, non-resident, under 18, or convicted felon without rights restored)
Number Excused	46,586 for valid reason
Number Appeared	72,161
Number to a Courtroom	59,474 empanelled

### Other Courts For Which Maricopa County Superior Court Issues Summonses:

Total Summonses	772,230 minus 555,487 equals 218,743
For Municipal Courts	126,060
For Justice Courts	80,597
For State Grand Jury	3,087
For County Grand Jury	8,999

### Budget for All 44 Courts For Which Maricopa County Superior Court Issues Summonses:

Total Annual Budget	\$3.5 million paid by the County
Charged to the Cities	\$1.25 per summons sent
Assessed to Civil Litigants	\$122,987 (per A.R.S. § 21-122)
Reimbursements From AOC	\$571,223 from the Arizona Lengthy Trial Fund <sup>4</sup>
Postage Costs	\$300,000 appx’ly

**Note:** All jurors get free parking, or up to \$6.50/day for light rail or bus choice. All jurors who drive to serve get mileage reimbursement at the rate 44-1/2 cents. There is no compensation if serving only one day. Compensation is \$12/day if serving two days or more.

See George T. Anagnost, *Municipal Court Juror Fees: Time for a Change?* ARIZ. ATT’Y, Oct. 2001, at 41.

1. Courtesy Superior Court, Ernie Heitmuller, Deputy Director of Jury Management. and Mitch Michowski, Civil Court Administrator & Senior Researcher/Director of Jury Management.
2. According to Mr. Heitmuller, historically this usually runs just under 10 percent, but it has increased due to the foreclosure rates.
3. The court “will not know until the day before how many jurors are going to be requested by our divisions for a particular day. It could vary from 50 to 650 on any given Monday through Thursday. Therefore there is a ‘pipeline’ of approximately 650 jurors per day ready to serve. If they are not needed they are ‘waived off.’”
4. Once a sixth day is hit, from day four on up to \$300/day for actual lost wages, from the Arizona the Lengthy Trial Fund.



ney fee request that is not statutory (thus, no in the case of A.R.S. § 12-341.01 *supra*).

*Flieger v. Ash*, 624

P.2d 1295 (Ariz. Ct. App. 1980), *reh'g denied* 1981.

- In civil claims for intentional torts. *Franks v. U.S. Fidelity & Guar. Co.*, 718 P.2d 193 (Ariz. Ct. App. 1985). However, there is much case law regarding various aspects of what issues are for the jury. For instance, *Hays v. Continental*, 872 P.2d 668 (Ariz. 1994), overruled its *Franks* holding to the extent of implying that all intentional torts are recognized at common law. Indeed, some are statutory. Then, the reader would analyze under the Seventh Amendment monetary standard.
- When suing the State in a breach of contract action, interpreting A.R.S. § 12-821, which then read, “Persons having claims on contract or for negligence against the state, which have been disallowed, may on the terms and conditions herein contained, bring action

## How Can Anyone **Navigate** All This?

### A PRACTITIONER'S GUIDE—'TIL THE NEXT CASE

What is an “inviolable” right? In Arizona, if a civil cause of action or a crime alleged would have been eligible for a jury trial “at common law,” then it remains eligible for a jury today.

Here are foundational documents to consider:

UNITED STATES CONSTITUTION	ARIZONA CONSTITUTION
“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” Amend. VI.	“In criminal prosecutions, the accused shall have the right to ... have a speedy public trial by an impartial jury.” Art.2, § 24.
“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” Amend. VII.	“The right of trial by jury shall remain inviolate.” Art.2, § 23.

thereon against the state, and prosecute the same to final judgment.” *Tanner Co. v. Superior Court*, 601 P.2d 599 (Ariz. 1979). In contrast today, § 821 is a one-year statute of limitation for “[a]ll action against any public entity or public employee.”

- “An action for breach of contract, compensable in monetary damages, is an action at law and entitles the aggrieved party to trial by jury.” *Tanner*, 601 P.2 at 601.
- Express contractual assumption of risk,

*Phelps v. Firebird Raceway, Inc.*, 111 P.3d 1003 (Ariz. 2005), applying ARIZ. CONST. art.18, § 5.

- Release status from incarceration. While the Arizona Supreme Court’s decision in *State v. Hurley*, 741 P.2d 257 (Ariz. 1987), *cert. denied*, 484 U.S. 1028 (1988), would indicate no jury right, *State v. Gross*, 31 P.3d 815 (Ariz. Ct. App. 2001), not addressing the burden of proof, cites to the later *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny in concluding that adding

## Try Your Hand at the Jury Quiz

### QUESTIONS

1. May a litigant in a civil case be assessed juror fees?
2. May a defendant in a criminal case be assessed juror fees? What if s/he changes plea once the summoning of the jury pool has commenced?
3. Where can a potential British juror appeal the order to serve? Where can a juror recover lost wages and childcare fees?
4. How would I find the jury budget in the Common Courts of Great Britain, whence our jurisprudence on the topic emanates?

### ANSWERS

1. Yes. This is discretionary with the court, pursuant to A.R.S. §12-1128. Normally the prevailing party in a civil case can anticipate recovering juror fees as taxable costs. *See Pima County v. Hogan*, 3 P.3d 1058 (Ariz. Ct. App. 1999), *rev. denied* (Sept. 2000), *overruled in part at Salt River Project v. Miller Park*, 183 P.3d 497 (Ariz. 2008) (harmonizing Rule 68 costs as a sanction and A.R.S. §12-1121 to -1128 discretionary cost awards in condemnation cases). For other reading, *see* A.R.S. § 21-122 regarding juror lodging expense and A.R.S. § 21-221 regarding juror mileage.
2. No. This author’s opinion is that a defendant in a criminal case may not be assessed juror fees, although there is disagreement among some colleagues on the point. First, there is no statutory provision for assessment of costs and fees. *State of Arizona v. Payne; Nelson; Daniels*, 2 CA-CR 2008-0166, 2 CA-CR 2008-0171, 2 CA-CR 2008-0309 (Consolidated); not reported in P.3d, 2009 WL 2211036, Ariz. Adv. Rep. 11 (Div. Two 2009), *rev. denied* (Jan. 2010) (prosecutor’s fee pursuant to an ordinance disallowed). Second, due process mandates a right to trial. To impose a juror fee, when the case is jury eligible, would in effect deny an indigent defendant that right. *See Griffin v. Illinois*, 351 U.S. 12 (1956) (no right to assess transcript costs from an indigent defendant in a criminal matter).
3. The Jury Central Summoning Bureau processes jury summonses for Her Majesty’s Court Service, and will provide actual appellate instruction to the Head of the JCSB for any potential juror who is denied request to be excused or to have service be deferred. One may request yet further appeal to the Senior Judge of the Crown Court, and may then be required to appear for “oral application.” A potential juror who fails to appear without “reasonable cause” may be fined up to 1,000 Euros (about US \$1,395).  
For those jurors who serve, there is a complaint process to the jury manager, apparently if denied one of the listed juror amenities, followed by audience with a Customer Service representative or court manager, with reconsideration to the Area Director.
4. This and other information may be found at “Her Majesty’s Court Service” ([www.hmcourts-service.gov.uk/docs/infoabout/jury/jurors\\_charter\\_september\\_2008.pdf](http://www.hmcourts-service.gov.uk/docs/infoabout/jury/jurors_charter_september_2008.pdf)). You will even find instruction there for the procedure to discuss upsetting evidence in confidence, and how to be reimbursed for losses related to service (“A financial loss allowance may cover loss of earnings or benefit ... fees paid to carers or child minders ... or other payments which you have had to make as a direct result of jury service”).



time to the release date is a jury decision. The reader will wish to read the line of cases to make this determination, especially in conjunction with the decision now pending in the case of *United States v. Comstock* (argued January 2010).

### Conclusion

Absent exhaustive research, how many of us truly know what was existent and identifiable as jury-eligible in England in the 1800s—or in 1910 in Arizona—when comparing today's causes of action? Mere

jury eligibility in 1910 for state law analysis does not assure that the eligibility was based on British “common law” and not a statute in the first place.

Comparison to the body of case law and any statutory reform in the future may yield predictability to the average litigant. In the meantime, given the complexities and nuances of presentation to a jury, a good many would take issue with Justice Black's passion applied to today's practices. Perhaps there is a place for a bench trial, after all. ☐

## SOME Practice TIPS

### To Waive or Not To Waive

Trial strategy is a topic unto itself. A lawyer or a client may decide that the client may not have the desire to proceed with a jury trial, such as in a complex business matter. Sometimes prudence will dictate a trial to the bench when there is a choice. In those circumstances, of course, attorneys will want to obtain an acknowledgment in writing from the client for the file.

### Motions To Set Trial

Motions to set and certificates of readiness in a state court action are filed in due course pursuant to the governing rules. However, in federal practice, the demand will need to be within 14 days of the last pleading “directed to the issue,” such that a practitioner will want to contemplate such demand being presented in the complaint itself. (Cf. ARIZ.R.CIV.PROC. 38(b); FED.R.CIV.PROC. 38.)

## ARIZONA REVISED STATUTES—JURY ELIGIBILITY ANALYSIS

### 4-§311

Jury right in personal property, personal injury or wrongful death action against a licensee of spirituous liquors? Should be eligible as monetary, not equitable, claims. Also see infra 12-§ 613. (The statute refers to “if a court or jury finds ...”)

### 8-§ 223

No jury in termination of parental rights' cases. The right was previously found to be statutory, not constitutional, in *John v. Sargeant*, 1 CA-SA 04-0051 (Div. One 2004). The statutory section took effect as part of emergency legislation in 2003, granting that right, but also providing for its repeal effective at the end of 2006. See Sess. Laws 2003, 2d Sp. Sess., ch.6 § 45. (Current Rule 66; Rule providing for a jury was ARIZ.R.JUV.PROC., Rule 66.1; deleted by R-06-0019.) On that right accruing and vesting before the repeal, read *Arizona Dept. of Econ. Sec. v. Reinstein*, 150 P.3d 782 (Ariz. Ct. App. 2007).

### 9-§ 518; 12-1145;46; ARIZ. CONST. art. 2, § 17

Title 12 provides for the compensation for the taking to be by jury upon demand, with waiver thereof if not demanded. Title 9 contains “court or jury” language (subsections H, I) recognizing either possibility regarding compensation for taking of property of a public utility.

### 12-§ 341.01

No right to a jury trial regarding the determination of attorneys' fees in a breach of contract action.

### 12-§ 613

Damages in a wrongful death action are determined in the manner set forth in this statute.

### 12-§ 653.03

The statute addressing libel, slander and invasion of privacy is a uniform law providing for jury trial related to exemplary damages for broadcasts with actual malice in libel actions by “court or jury,” apparently based on the law of the adopting jurisdiction.

### 12-§ 863-864

Yes to a criminal contempt proceeding. No jury in civil contempt proceedings, as discussed by Judge Howard, dissent in *Green v. Lisa*

*Frank, Inc.*, 221 Ariz. 138 (Ariz. Ct. App. 2009). (But see ARIZ.R.CRIM.PROC. 33.4; jury or waiver required in criminal contempt proceeding over six months or \$300.) See also *Trombi v. Donahoe, Hon.*, 1 CA-SA 09-0260 (Ariz. Ct. App. 2009). For an overall view of contempt, see George T. Anagnost, *Avoid the Woodshed: A Contempt of Court Primer*, ARIZ. ATT'Y, Mar. 2005, at 12.

### 12-§ 1176

Right in forcible entry or forcible detainer, if demanded (§ 1177).

### 12-§ 1584

No jury trial in garnishment proceedings; see also *Parking Concepts, Inc. v. Sheldon*, 193 Ariz. 432 (Ariz. Ct. App. 1998) (involving action arising under a stipulated judgment in a *Morris* agreement context).

### 12-§ 1839

Whether there is a jury right in a declaratory action is a perfect shade of gray, as the answer would seem to depend upon the cause of action—which is the topic at hand. “When a proceeding under this article involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.” *Id.*

### 12-§ 2505; ARIZ. CONST. art. 18, § 5

Jury right granted regarding assumption of risk or contributory negligence under the Uniform Contribution Among Tortfeasors Act.

### Title 13

See *supra* text and charts regarding all criminal charges.

### 14-§ 1306

Jury eligibility of title 14 cases (trusts, estates, probate) if there is a “constitutional right” AND “any controverted question of fact”; otherwise, an advisory jury in the court's discretion. (See main article, *supra* note 9.)

### 14-§§ 5310.G, 5401.01.G

The sections “do not limit” the right to trial by jury in temporary conservatorships and guardianships. See *In re Newman*, 196 P.3d 863 (Ariz. Ct. App. 2008).

1. ARIZ.R.CIV.PROC. 38(b),(c).
2. A.R.S. § 13-3983; ARIZ.R.CRIM.PROC. 18.1(b); *But see* A.R.S. § 22-§ 320 (waived in justice courts if demand not timely made). Section 320 is interpreted merely as procedural, addressing neither rights nor waiver. *City of Phoenix Prosecutor's Office v. Ybarra*, 218 Ariz. 232 (2008) (requiring consent of both prosecution and defendant to waive a jury trial regardless of whether the right arises statutorily, in the absence of clear statutory language providing an option to only one party, or whether arising constitutionally).
3. A.R.S. § 21-102.
4. *See* ARIZ. CONST. art. 2, § 23, regarding the number of jurors required.; *State v. Escobedo*, 213 P.3d 689 (Ariz. Ct. App. 2009) (analysis on when the inadequate size of the jury is reversible error).
5. *See Capital Traction Co. v. Hof*, 174 U.S. 1, 5-8 (1899).
6. 517 U.S. 370 (1996).
7. *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Sixth Amendment analysis of "petty" versus "serious" and the six-month rule); *Benitez v. Dunevant*, 7 P.3d 99 (Ariz. 2000); *Blanton v. City of Las Vegas*, 489 U.S. 538, 543 (1989) (presumptively "petty" if six months or less without an automatic right then to a jury trial).
8. *Derendal v. Griffith*, 209 Ariz. 416, 421 (2005) (moral turpitude no

- longer a test of jury eligibility), *overruling Rothweiler v. Superior Court*, 410 P.2d 479 (Ariz. 1966).
9. *See* George T. Anagnost, *Trial By Jury and "Common Law" Antecedents: What Hath Derendal Wrought?* ARIZ. ATT'Y, Nov. 2006, at 38.
10. *Galloway v. United States*, 319 U.S. 372, 398-99 (1943), *reh'g. denied*.
11. *In re Newman*, 196 P.3d 863 n.44 (Ariz. Ct. App. 2008), *as amended, rev. denied* (no statutory right to a jury trial in probate matters unless expressly provided by statute or constitutionally required).
12. *Id.* n.45.
13. Some explanation of the apparent development is found in the "special concurring" opinion of *Weaver v. Weaver*, 643 P.2d 499 (Ariz. 1982). There, Vice Chief Justice Gordon stated in part:
 

"It is well-settled in Arizona and elsewhere that in actions at law, such provisions give either party the right to demand a trial by jury with a binding jury verdict. But for actions in equity, I agree with the Court of Appeals when it said, "The situation in Arizona pertaining to the right of a jury trial in an equity case is a curious one \* \* \*." *Hammontree v. Kenworthy*, 1 Ariz. App. 472, 477, 404 P.2d 816 (Div. Two 1965).

*See Weaver*, 643 P.2d at 501, for a discussion of the path the jury right took, from the 1901 Territorial statutes through the present day.

20-§ 406

In actions against unauthorized insurers for failure of payment, there is reference to the "court of jury's findings."

22-§ 425

No jury trials in municipal court for "violation of ordinances of cities or towns" except "of such a nature as by the common law" were jury-triable.

22-§ 518

No jury trials in small-claims court. However, jury trials (excluding traffic violation citations) are permitted by demand in justice courts. *Cf.* A.R.S. 22-§ 220.B.; *State v. Richey*, 158 Ariz. 298 (Ariz. Ct. App. 1988), *modified on other grounds*, 160 Ariz. 564 (1989). On its face, this would deprive a jury trial to a claimant with a law claim of at least \$20 (Seventh Amendment) and under \$2,500 (small-claims venue). However, a party may object to proceeding in that division and remove the case to the justice court as a matter of right, by following the procedure in A.R.S. 22-§ 504.A.

23-§ 806; ARIZ. CONST. art. 18, § 5

Jury entitlement on assumption of risk or contributory negligence of an employee under the Employer's Liability Law (hazardous occupations; chapter 5, art.1 of the labor laws), both as to liability and proportion of the employee's contributory negligence.

23-§ 930

In allegations of unfair claim processing of workers' compensation, the Commission is given exclusive jurisdiction. This was found not to violate any right to a jury trial at the Court of Appeals in *Hays v. Continental*. However, at the Supreme Court, 872 P.2d 668 (Ariz. 1994), the Court concluded "that this phrase means that the administrative complaints over which the Commission has exclusive jurisdiction are those lodged with it under the regulations that the statute directs it to adopt." *Id.*, which again the reader might ponder as the perfect shade of gray. The appellate case of *Mendoza v. McDonald's Corp.*, 213 P.3d 288 (Ariz. Ct. App. 2009) sheds light, distinguishing bad faith in the processing of the claim from the claim itself.

25-§ 407

No jury in child custody hearings.

28-§ 1596

No jury in civil traffic hearings.

36-§ 3707

Addresses a court or jury making determination under the commitment procedures for "determining sexually violent person status." Watch for a decision of the United States Supreme Court in *United States v. Comstock*, 08-1224 (oral argument scheduled to Jan. 12 2010) (challenge to a federal statute permitting the court to order civil commitment to keep an inmate in custody at the end of sentence or when the defendant is not competent to stand trial). *Comstock*, and the underlying 18 U.S.C. § 4248; previously upheld Kan.Stat. Ann. § 59-29a07, which provided for jury determination in civil commitment cases and proof beyond a reasonable doubt.

38-§ 343

Yes when accusation of "willful or corrupt misconduct" in office for those named offices.

44-§ 1658

A "court shall so instruct the jury" in "futures contracts" prosecutions.

44-§ 2003

In which the court shall provide special interrogatories for the jury to answer in private actions involving voidable contracts related to securities.

46-§ 455.H.4

Vulnerable adult neglect, speaks of the court or jury, but only alluding thereto in the sentence regarding punitive damages. In neither case, however, does § 46-456(E) create an independent entitlement to a jury trial. *Newman*, 196 P.3d at 863 n.vii.

49-§ 287.07.C

No jury in water quality control remedial actions.