

# TRIAL BY JURY

AND  
"COMMON  
LAW"  
ANTECEDENTS  
WHAT  
HATH  
*DERENDAL*  
WROUGHT?



**BY HON. GEORGE T. ANAGNOST**

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How much history sleuthing must a lawyer do when trying a case? How deeply should you dig to compare the misdemeanor at hand with centuries-old common law?

If you answered “very little,” your reasoning may be at odds with that of the Arizona Supreme Court, which has suggested that your history inquiries should be extensive.



In *Derendal v. Phoenix City Court*,<sup>1</sup> the Arizona Supreme Court analyzed the constitutional right to trial by jury for misdemeanor offenses. Noting that the jury trial right in Arizona's Declaration of Rights is essentially interpreted by the Sixth Amendment of the U.S. Constitution, the Court examined the three-prong test of a prior case, *Rothweiler v. Superior Court*,<sup>2</sup> and held that one prong—the “moral quality” or

“moral turpitude” factor—was neither constitutionally sourced nor objectively comprehensible. Overruling *Rothweiler's* moral prong, *Derendal* specifically held that drag racing, a class-one misdemeanor with a maximum sentence of six months in jail, was not a “serious” offense for Sixth Amendment purposes and was not jury eligible.

In reaching this accurate result, the Court's *dicta* also provided a larger per-

spective on when a particular misdemeanor offense is jury eligible *vis-à-vis* English common law. In doing so, *Derendal* reaffirmed two important principles:

1. The enactment of the Arizona Constitution did not create a right to trial by jury; it merely preserved the same right that existed at common law prior to statehood.
2. If a statutory offense contained the



same elements of a common law antecedent that enjoyed the right to trial by jury, then this “newly minted” statutory analog would also be eligible for trial by jury.<sup>3</sup>

This article explores the Arizona Supreme Court’s excursion into the realm of the common law and respectfully suggests that *Derendal*’s “same element” or “common law antecedent” test may not be an accurate lens when looking back some 300 years to what English common law provided as to a substantive right to trial by jury.

On the one hand, *Derendal* got it right when it adopted a “bright-line” from *Baldwin v. New York*<sup>4</sup> and *Blanton v. City of North Las Vegas*<sup>5</sup> that offenses with jail terms under six months were “petty” offenses and not jury eligible. On the other hand, leaving the door open so that we may still comb the misty past of the English common law for some sort of long-lost ancestor with the “matching DNA” of a present-day misdemeanor means that we may have replaced *Rothweiler*’s “moral quality” indeterminacy with an equally vague inquiry as to analogs and antecedents.

## What “Right” Is To Remain “Inviolable”?

Arizona’s Constitution speaks in categorical terms: “The right of trial by jury shall remain inviolable.”<sup>6</sup>

In an ideal world, Aristotelian logic and classical legal methodology would enable courts to accurately declare what specific offenses should enjoy the important right granted by these nine words. Like other constitutional provisions, however, the precise meaning of this sentence reminds us that the devil is in the details. Instead of a constitutional right delineated in clear, sleek terms, we encounter a “Christmas tree” situation in which, one case at a time and one offense at a time, an *ad hoc* approach has applied particular facts to law to see what crimes will stick to the main branch.

Since statehood, trial lawyers and advocates have waged seemingly endless case-by-case battles to determine what types of

offenses are jury eligible and deserving of a victor’s flag that reads “jury eligible misdemeanor.” Perhaps most telling of all, even since *Derendal* was decided, there have been several reported decisions ruling on the question of jury-eligible offenses and *Derendal*’s implications.<sup>7</sup>

All the while, whenever the fog of war has lifted, the misdemeanor terrain has remained rough and rocky. To look back at years of case holdings is to look back at desultory and arguably arbitrary outcomes.

- Disorderly conduct in public has been declared not jury eligible,<sup>8</sup> but lewd dancing in a bar is.<sup>9</sup>
- Even if a perpetrator cheated a homeowner out of thousands of dollars, contracting without a license is not jury eligible,<sup>10</sup> whereas shoplifting a two-dollar pack of cigarettes is.<sup>11</sup>
- Being drunk in public is not a jury-eligible offense,<sup>12</sup> but, until it was overruled, *Rothweiler* held that drunk driving was jury eligible.<sup>13</sup>
- Criminally damaging someone else’s property is not jury eligible,<sup>14</sup> but leaving the hit-and-run scene of a damaged property is.<sup>15</sup>
- If the defendant kills his neighbor’s pet, this cruelty might not be jury eligible,<sup>16</sup> but if instead the defendant steals his neighbor’s pet, he is entitled to trial by jury.

Ostensibly, *Derendal*’s pronouncements will reduce this flow of case-by-case inquiries, but leaving an exception for “common law” antecedents may mean that a fundamental right will remain vulnerable to contested interpretation.

And just what is this “inviolable right” exactly? What aspects of this one right became fixed like a fly trapped in amber while the rest of the common law changed and reshaped itself step-for-step with an ever-evolving society?

For example, in mid-1700s in England, the right to trial by jury involved a process in which trials were short (sometimes only minutes in length), there were no formal rules of evidence, the same jury might hear several trials in one day, the jury did not retire to deliberate but instead rendered its

verdict after a brief interlude in the courtroom,<sup>17</sup> and the duty of the state to show proof beyond a reasonable doubt was not firmly established.<sup>18</sup>

Was this the common law “right” to trial by jury that was preserved “inviolable”? Why not?

## Whose Common Law?

In *Urs v. Maricopa County Attorney’s Office*,<sup>19</sup> the court of appeals held that reckless driving, being in the character of recklessly operating a wheeled carriage, was an analogous jury-eligible “common law” offense. To reach this conclusion, *Urs* in turn cited *District of Columbia v. Colts*<sup>20</sup> for the proposition that reckless driving was “indictable at common law” and thus jury eligible. In *Colts*, the defendant faced up to 30 days in jail for the misdemeanor offense of recklessly exceeding the District’s 22 mile per hour speed limit. On appeal, the U.S. Supreme Court agreed with *Colts*’ claim that the trial court erred in denying his request for trial by jury. In Justice Sutherland words:

Whether a given offense is to be classified as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury, depends primarily upon the nature of the offense. The offense here charged is not merely *malum prohibitum*, but in its very nature is *malum in se*. It was an indictable offense at common law, *United States v. John Hart*, 1 Pet. C.C. 390, 392, when horses, instead of gasoline, constituted the motive power.<sup>21</sup>

Two items are noteworthy in assessing *Colts*’ continued precedential value in light of the six-month cut-off announced years later in *Baldwin* and *Blanton* and now adopted in *Derendal*.

First, and most obvious, a solid argument can be made that *Colts* was overruled *sub silentio*.<sup>22</sup> Justice Sutherland’s focus was on the “nature of the offense” and how reckless driving might endanger life and limb. This was the graveness component found wanting in the *Baldwin–Blanton–Derendal* trilogy.



However, there is a second point about the reasoning in *Colts* that is more important for the purposes of this article. The reader will note that “*United States v. John Hart*”<sup>23</sup> is squarely cited as support for Justice Sutherland’s assertion that reckless driving (by horse power) was “indictable at common law.” Perhaps it would be helpful to consult *Hart* itself to confirm it actually *held* what the learned Justice claimed.

If one disregards the space used to caption the case, identify the parties and list its three syllabus points, *United States v. John Hart* occupies one printed page. None of the syllabi refers to a right to trial by jury. Instead, the opinion’s opening sentence states the issue on appeal: “This was an indictment for knowingly and wilfully retarding the passage of the mail.”<sup>24</sup> The facts were that Hart was a “high constable” of the City of Philadelphia who had arrested, without a warrant, a postal worker for attaining the speed of “eight or nine miles per hour” and failing to operate his horse-drawn mail stage with warning bells. In other words, *Hart* was a “turf war” between two branches of government, law enforcement and the postal service. The more sinister the postal worker’s conduct appeared, the more valid the constable’s warrantless arrest became. Because the operation of the stage in a populated part of the city amounted to a breach of the peace, constable Hart was empowered to arrest the driver, and his indictment for impeding the delivery of the mail could not stand.

### Solid Case Law, or Justice Holmes to the Rescue?

The only way one can connect the dots from *Hart* to *Colts* to *Urs* is by blurring the distinction between a case’s holding and its *dicta* and generously extrapolating from one fact-specific case to a full-blown constitutional standard conferring a right to trial by jury.

Moreover, a general observation about how the “common law” is invoked in contemporary reported cases may be mentioned. Despite references to what the “common law” held, one rarely sees cita-

tion to actual English common law cases whose holdings involved a determination of the right to trial by jury. The uncertainty surrounding this interplay of myriad offenses, statutes and centuries of evolving case law jurisprudence cuts in both directions—first by failing to identify a true source of decisional law that articulates an ascertainable jury trial right<sup>25</sup> and then by re-validating the “bright-line” standard enunciated in *Baldwin* and approved in *Derendal*. As both those cases acknowledged, the most objective basis by which to measure the seriousness of criminal conduct is to ascertain the potential maximum penalty of imprisonment that might be assessed.

Short of that, searching for “common law” antecedents whose elements are analogous to modern-day crimes opens an inquiry that risks incomplete historical records, assumptions or speculation as to how the law was actually interpreted in the past. It also allows potentially artificial comparisons separated by centuries of time and experience. As Justice Felix Frankfurter observed, “[W]hile the Constitution was written in 1787, it was not written for 1787.”<sup>26</sup>

In a different setting, Justice Holmes’ skepticism as to a knowable and discrete body of common law is also noteworthy. In *Black and White Taxicab v. Brown and Yellow Taxicab*,<sup>27</sup> Black and White brought a diversity suit in federal court to enjoin Brown and Yellow from interfering with an exclusive railroad passenger cab service contract. Brown and Yellow answered that the Kentucky appellate courts had ruled such exclusive contracts were invalid restraints of trade.

Nevertheless, the U.S. Supreme Court ruled against Brown and Yellow, holding that it was not bound by the Kentucky state court’s interpretation of the common law and that it could determine and apply a general American common law. Justice Holmes dissented with observations that would be vindicated a few years later in *Erie Railroad Co. v. Tompkins*,<sup>28</sup> which held that there was no general federal common law in diversity cases.


Books written about any branch of the common law treat it as a unit,

cite cases from this Court, from the Circuit Courts of Appeal, from the State Courts, from England and the Colonies of England indiscriminately, and criticise them as right or wrong according to the writer’s notions of a single theory. It is very hard to resist the impression that there is one august corpus. ... If there were such a transcendental body of law ... the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found.<sup>29</sup>

## Conclusion

With the stroke of a pen, by applying the reasoning used in *Colts*, the Court in *Derendal* could have easily reached an opposite result and held that drag racing was a common law analog worthy of trial by jury. After all, drag racing is inherently dangerous, its motive power is a horse made of steel, and as such, it would be indictable as a common law breach of the peace. The rub here is that, ultimately, whichever way *Derendal* went, it is not clear that common law sources would have compelled either holding one way or the other.

Certainty in the law should be one of its most important goals. With certainty, rights, duties and other jural correlatives become verifiable and predictable. With certainty, the law can attain objective standards of fairness and justice. Lastly, on a less important pragmatic level, certainty can reduce the flow of litigation and the social cost of expending judicial resources, time and effort to declare what the law is.

*Derendal* represents an important step in understanding the meaning of a constitutional right. But in that case the Court also announced that some aspects of English common law still cast a shadow over the Sixth Amendment on the basis of similar elements. Given that imperative, the question remains whether we will continue to search for a common law tradition that is intractably elusive. 

## endnotes

1. 104 P.3d 147 (Ariz. 2005).
2. 410 P.2d 479 (Ariz. 1966). The three prongs that conferred a right to trial by jury were “serious” offenses due to the length of potential imprisonment, common law offenses, and offenses involving moral turpitude.
3. *Derendal*, 104 P.3d at 150.
4. *Baldwin v. New York*, 399 U.S. 66 (1970) (New York statute that authorized a maximum penalty of one-year imprisonment for “jostling” was jury eligible).
5. *Blanton v. City of North Las Vegas*, 498 U.S. 538 (1989) (Nevada DUI statute, which authorized up to six months in jail, classes and distinctive garb while performing community service was not a “serious” offense requiring a jury trial).
6. ARIZ. CONST. art. 2, § 23.
7. In *Stoudamire v. State of Arizona* (2006 WL 2129993 Ariz. App. Div. 2), defendant was charged with “felony turn-down” misdemeanor marijuana and drug paraphernalia possession offenses. The court of appeals rejected his alternative arguments that his crimes were analogous to a common law possession of opium offense or that the overall “seriousness” of the offense overcame the *Derendal* presumption that six-month or less offenses are “petty” in nature. See also *Manic v. Dawes* (2006 WL 667959 Ariz. App. Div. 2); *State ex rel. Wangberg v. Smith*, 118 P.3d 49 (Ariz. Ct. App. 2005); *Phoenix City Prosecutors Office v. Klausner*, 118 P.3d 1141 (Ariz. Ct. App. 2005); *Ottaway v. Smith*, 113 P.3d 1247 (Ariz. Ct. App. 2005).
8. See *O’Neill v. Mangum*, 445 P.2d 843 (Ariz. 1968).
9. *City Court v. Lee*, 494 P.2d 54 (Ariz. Ct. App. 1972).
10. *State v. Miller*, 836 P.2d 1004 (Ariz. Ct. App. 1974).
11. *State v. Superior Court*, 589 P.2d 48 (Ariz. 1978).
12. *State v. Cousins*, 397 P.2d 217 (Ariz. 1964).
13. *Rothweiler*, 410 P.2d 479. A.R.S. § 28-1381(F) provides a statutory right to trial by jury for DUI misdemeanors. A.R.S. § 5-397(C) provides a right to trial by jury for operating a watercraft under the influence. Curiously, there is no statutory right to trial by jury for operating an aircraft while intoxicated. See A.R.S. § 28-8284.
14. See generally A.R.S. § 13-1602.



15. *Frederickson v. Superior Court*, 928 P.2d 697 (Ariz. Ct. App. 1996). See generally A.R.S. § 13-2910.
16. *Campbell v. Superior Court*, 924 P.2d 1045 (Ariz. Ct. App. 1996).
17. See Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason and Politics in the New Republic*, 47 AM. J. LEGAL HIST. 44 (2005).
18. See JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 261-266 (2003).
19. 31 P.3d 845 (Ariz. Ct. App. 2000).
20. 282 U.S. 62 (1930).
21. *Id.* at 73.
22. When *Colts* is shepardized, one entry is “implied overruling recognized by *Campbell v. Superior Court*, 924 P.2d 1045.”
23. 26 Fed. Cas. 193 (C.C.D. Pa. 1817).
24. *Id.* at 194.
25. See e.g., David T. Konig, “*Dale’s Laws*” and the Non-Common Law Origins of Criminal Justice in Virginia, 26 AM. J. LEGAL HIST. 354, 363 (1982) (“The common law was not the only law in England, and on the frontiers it was conciliar justice that ruled”). Konig provides plausible authority for the proposition that the excesses of summary, non-jury trials during the Tudor and Elizabethan period were curtailed by debates in Parliament and not by way of common law decisions.
26. Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and Trial by Jury*, 39 HARV. L. REV. 917, 922 (1926).
27. 276 U.S. 518 (1928).
28. 304 U.S. 64 (1938).
29. *Black and White Taxicab*, 276 U.S. at 533. The fallibility of “well-settled” common law dogma has been addressed in other areas of constitutional law. For a persuasive re-examination of the long-accepted fact-law dichotomy imputed to the Seventh Amendment’s preservation of “suits at common law,” see Donald M. Middlebrooks, *Reviving Thomas Jefferson’s Jury: Sparf and Hansen v. United States Reconsidered*, 46 AM. J. LEGAL HIST. 353 (2004) (“We have come to assume as unquestionable truth that juries are merely finders of fact that must accept the law as explained to them in jury instructions. This was not, however, always the case. Nor was it the original intent of the founding fathers.”).