

**ESSAY: OF RIGHTS LOST AND RIGHTS FOUND: THE
COMING RESTORATION OF THE RIGHT TO A JURY
TRIAL IN MINNESOTA CIVIL COMMITMENT
PROCEEDINGS**

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I. INTRODUCTION

In 1939, the Minnesota Supreme Court declared in *State ex. rel. Pearson v. Probate Court of Ramsey County*,¹ that the right to a jury trial guaranteed by the Minnesota Constitution did not apply to civil commitment cases.² Since then, thousands of Minnesotans have been sent to mental institutions and other facilities against their will, based only upon the ruling of a probate court judge. Once committed to a state institution, their petitions for release are heard only by members of the judiciary. Since it is hornbook law that a State supreme court is the final arbiter of the constitution of that state, the accepted wisdom has been that the right to a jury in civil commitment cases *cannot* exist in Minnesota. Because the United States Supreme Court has never ruled on the question,³ the

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1. 205 Minn. 545, 287 N.W. 297 (1939), *aff'd*, 309 U.S. 270 (1940).

2. *Id.* at 557, 287 N.W. at 297.

3. Although the U.S. Supreme Court upheld the civil commitment standards applied by the statute in *Pearson*, it did not rule on the jury trial issue decided by the Minnesota Supreme Court in *Pearson*. In fact, the United States Supreme Court has never been presented with the issue since every case decided by the Court regarding civil commitment standards has arisen from state procedures based upon a jury verdict. *See Kansas v. Crane*, 534 U.S. 407 (2002); *Kansas v.*

Pearson ruling has remained unchallenged for more than half a century. This article takes issue with that “accepted wisdom.”

The first sections of this article will begin by briefly tracing the right to a jury trial from its roots in the *Magna Carta* and the Common Law of England.⁴ It will demonstrate that the jury was considered a necessary “bulwark” against government whenever loss of liberty was at issue in both criminal and civil proceedings, up to the adoption of the Seventh Amendment in 1791. It will also show that the right to a civil jury when government sought to deprive a person of liberty was recognized in the constitutions of most of the original thirteen colonies, and is recognized in most states even today.

The next section of the article will review the Minnesota Supreme Court civil jury jurisprudence from 1860 to the present.⁵ It will show that, for more than 140 years, the Minnesota Supreme Court has consistently held that the right to a jury that existed in the Minnesota Territory was part of the 1857 Constitution, and that this constitutional right to a jury trial cannot be altered by the Legislature or the courts. The article will then review the right to a jury in civil commitment proceedings in the Minnesota Territory by showing that the Territorial Probate Court, which had original jurisdiction over civil commitment proceedings, included the right to a jury.

Hendricks, 521 U.S. 346 (1997); *Heller v. Doe by Doe*, 509 U.S. 312 (1993); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Allen v. Illinois*, 478 U.S. 364 (1986); *Jones v. United States*, 463 U.S. 354 (1983); *Addington v. Texas*, 441 U.S. 418 (1979); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Humphrey v. Cady*, 405 U.S. 504 (1972); *Baxstrom v. Herold*, 383 U.S. 107 (1966).

Because this article focuses exclusively on the right to a jury under the Minnesota Constitution, the right to a jury trial under the Seventh Amendment, or under the Due Process clause of the Fifth and Fourteenth Amendments, is beyond its scope. However, the Seventh Amendment “historical test,” which looks to the common law to determine the right to a jury, leads to the conclusion that civil commitments required a jury at common law, and would therefore, be required under the Seventh Amendment. *See Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990).

In addition, the analysis of the right to a jury trial in serious criminal cases set out in *Duncan v. Louisiana*, which looks to the importance of that right in English Common Law and in the English Bill of Rights, supports a conclusion that the right to a jury in civil commitment proceedings is no less deserving of Due Process protections. *Duncan v. Louisiana*, 391 U.S. 145, 149-50 (1971). *But see Walker v. Sauvinet*, 92 U.S. 90 (1895) (rejecting a Due Process right to a jury when property is at issue).

4. *See infra* Part II.

5. *See infra* Part III.

With this jurisprudential and historical foundation in place, the article will then examine the reasoning of the Minnesota Supreme Court in *Pearson*, and *In re Vinstad v. State Board of Control*,⁶ which was cited as authority for the *Pearson* opinion and is the only other case that has addressed this issue, although in *dicta*.⁷ The article will show how *Pearson* was wrongly decided because it purports to eliminate a jury trial right that existed in the Minnesota Territory and was guaranteed by the 1857 Minnesota Constitution.⁸ This article concludes that, irrespective of language in *Pearson* to the contrary, the Minnesota Constitutional right to a jury trial in civil commitment cases remains viable even today, and that thousands of persons have been, and are being, unconstitutionally deprived of their liberty in juryless civil commitment proceedings in Minnesota.⁹

II. HISTORICAL BACKGROUND

At common law it was the practice to inquire whether a man was an idiot, or not, by the *writ de idiota inquirendo* [and, therefore, subject to civil commitment], in which proceeding there was the trial by jury. The method of proving a man non compos was quite the same.¹⁰

The ancient right to trial by jury, required whenever liberty was at issue, was first guaranteed in the *Magna Carta* in 1215, which provided that: “no freeman would be disseized, dispossessed or imprisoned except by judgment of his peers”¹¹ Even before the Sixth and Seventh Amendments,¹² English Common Law required a jury trial in both criminal and civil proceedings when liberty was at issue.¹³

The common law divided individuals with mental disorders into two groups: the “idiot” or “natural fool” who lacked basic understanding from birth, and the “lunatic” who once possessed

6. 169 Minn. 264, 211 N.W. 12 (1926).

7. *Pearson*, 205 Minn. at 557, 287 N.W. at 303.

8. *See infra* Part IV.

9. *See infra* Part V.

10. *In re McLaughlin*, 102 A. 439, 439 (N.J. Ch. 1917) (citing 1 Blackstone’s Commentaries 303).

11. Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 13 (1993) (citing the *Magna Carta*).

12. U.S. CONST. amend. VI, VII.

13. Arnold, *supra* note 11, at 13.

basic understanding but had subsequently lost such ability.¹⁴ As early as the fourteenth century, the sovereign was entitled to interfere with the liberty interest of those adjudged to be “idiots” or “lunatics” only after the mental status of the person in question was determined by a jury of twelve men, originally called the “folk moot.”¹⁵ It was deemed “a part of the liberties . . . that the king may not enter upon or seize any man’s possessions upon bare surmises, without the intervention of a jury.”¹⁶ This investigatory inquest was called the *writ de idiota inquirendo*.¹⁷

Over time, English Common Law civil commitment procedures came to include a presentation of the petition for civil commitment to a chancellor commission, which was empowered to hear cases of “idiocy” and “lunacy” at the initial stage.¹⁸ Under this common law practice, a person brought before the Commission had the right to appeal or challenge the initial findings of the Commission by invoking the right to a jury trial.¹⁹ This common law right of appeal to a jury of twelve was codified in 1509 during the reign of Henry VIII.²⁰ The right of appeal from the initial Commission findings was codified in 1548 by establishing that a traverse—a common law principle, which required a trial by jury—was the means to challenge the initial determination of the Commission.²¹

[W]hen application is made . . . for a commission of lunacy . . . a commission is issued under the great seal [of the sovereign], and the commissioners named. Upon notice to them they issue a warrant to the sheriff, directing him to summon a jury and witnesses to attend a trial. . . .

14. J.E. Macy, Annotation, *Constitutional Right to Jury Trial in Proceeding for Adjudication of Incompetency or Insanity or for Restoration*, 33 A.L.R.2d 1145, § 2 (1954). See also Vicki Gordon Kaufman, *The Confinement of Mabel Jones: Is There a Right to a Jury Trial in Civil Commitment Proceedings?*, 6 FLA. ST. U. L. REV. 103, 106 (1978).

15. Macy, *supra* note 14, at § 2; Kaufman, *supra* note 14, at 106.

16. *Phillips v. Moore*, 100 U.S. 208, 212 (1879). Since the condition of “lunacy” was thought to be temporary, the King merely held the land in trust, and profits from the land were used for support of the person and his family. Kaufman, *supra* note 14, at 106.

17. Macy, *supra* note 14, at § 2.

18. Macy, *supra* note 14, at § 2; Kaufman, *supra* note 14, at 6.

19. Kaufman, *supra* note 14, at 6.

20. Macy, *supra* note 14, at § 2.

21. *Id.*

22. *Shumway v. Shumway*, 2 Vt. 339, 341 (1829).

The British colonies in North America generally followed the English Common Law civil commitment requirements, including the right to inquest of trial by jury. In a fashion similar to the historical test applied by the United States Supreme Court in *Curtis v. Loether*²³ to determine the right to a jury trial in civil proceedings under the Seventh Amendment, the common law right to an inquest by a jury in commitment proceedings was retained in the jury trial requirements of the constitutions of most of the original thirteen colonies.²⁴ The second constitution of Pennsylvania of

23. 415 U.S. 189 (1974).

24. Georgia: "Freedom of the press and trial by jury to remain inviolate forever." GA. CONST. art. LXI (1777).

Maryland:

That the inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according that law, and to the benefit of such of the English statutes, as existed at the time of their first emigration, and which, by experience, have been found applicable to their local and other circumstances, and of such others as have been since made in England, or Great Britain, and have been introduced, used and practiced by the courts of law or equity; and also to acts of Assembly, in force on the first of June seventeen hundred and seventy-four, except such as may have since expired, or have been or may be altered by facts of Convention, or this Declaration of Rights-subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State: and the inhabitants of Maryland are also entitled to all property, derived to them, from or under the Charter, granted by his Majesty Charles I. To Crecilius Calvert, Baron of Baltimore.

MD. CONST. art. III (1776).

New Jersey:

That the Common Law of England, as well as so much of the statute law, as have been heretofore practiced in this Colony, shall still remain in force, until they shall be altered by a future law of the Legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this Charter; and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever.

N.J. CONST. art XXII (1776).

North Carolina: "That in all controversies at law, respecting property, the ancient mode of trial, by jury, is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." N.C. CONST. art. XIV (1776).

New York:

And this convention doth further ordain, determine, and declare, in the name and by the authority of the good people of this State, that

1790,²⁵ and the third constitution of South Carolina of that same year,²⁶ also preserved the common law right to inquest by jury in civil commitment proceedings. States which entered the Union after the original thirteen also have recognized that the right to a jury in civil commitments existed at common law, and was a necessary element of their own jury trial provisions.²⁷ Numerous states have required jury trials in civil “sexual predator” commitment proceedings because such a right existed at the time their constitutions were enacted.²⁸

trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever. And that no acts of attainder shall be passed by the legislature of this State for crimes, other than those committed before the termination of the present war; and that such acts shall not work a corruption of blood. And further, that the legislature of this State shall, at no time hereafter, institute any new court or courts, but such as shall proceed according to the course of the Common Law.

N.Y. CONST. art. XLI (1777).

Pennsylvania: “That in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred.” PA. CONST. art. XI (1776).

South Carolina:

That all suits and process depending in any court of law or equity may, if either party shall be so inclined, be proceeded in and continued to a final ending, without being obliged to commence de nova. And the judges of the courts of law shall cause jury-lists to be made, and juries to be summoned, as near as may be, according to the directions of the acts of the general assembly in such cases provided.

S.C. CONST. art. XVIII (1776).

Virginia: “That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.” VA. CONST. § 11 (1776).

25. PA. CONST. art. IX, § 6 (1790) (“That trial by jury shall be as heretofore, and the right thereof remain inviolate.”); *Commonwealth v. Williams*, 733 A.2d 593, 597 (1999) (exemplifying that the right to a jury trial in civil commitment proceedings remains unchanged up to the present).

26. S.C. CONST. art. 9, § 6 (1790) (“The trial by jury, as heretofore used in this State . . . shall be forever inviolably preserved.”).

27. *See, e.g.*, TENN. CONST. art. 11, § 6 (1796) (“The right of trial by jury shall remain inviolate.”); TEX. CONST. art. 1, § 15 (1876) (“The right to a jury trial shall remain inviolate.”); WASH. CONST. art. 1, § 21 (1889) (“The right of trial by jury shall remain inviolate. . . .”); VT. CONST. ch. 1, art. XIII (1777) (“That, in controversies respecting property, and in suits between man and man, the parties have a right to a trial by jury; which ought to be held sacred.”).

28. ARIZ. REV. STAT. § 36-3706 (2001); CAL. WEL. & INST. CODE § 6602.5

III. THE RIGHT TO A JURY TRIAL IN MINNESOTA

On its face, the Minnesota Constitution clearly has incorporated pre-existing jury trial rights within its provisions:

The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy. A jury trial may be waived by the parties in all cases in the manner prescribed by law.²⁹

In a long line of cases beginning with *Whallon v. Bancroft*,³⁰ the Minnesota Supreme Court has recognized two main effects of this clause. First, it recognizes the right to a trial by jury as it existed in the Territory of Minnesota at the time the state constitution was adopted.³¹ Second, it recognized the continuation of the right to a jury trial unimpaired and inviolate.³² Wherever the right to a jury trial existed under the territorial laws, it continues to exist and may not be abridged by the Legislature. The Legislature may expand the constitutional right to a jury trial, however it may not withdraw the right merely by codifying a common law cause of action.³³

As recently as last year, the Minnesota Supreme Court held in *Abraham* that the nature and character of the controversy as determined from all the pleadings and the relief sought determines whether an action is a “case at law,” and thus carries the attendant constitutional right to a jury trial.³⁴ The term “case at law,” as used in the Minnesota Constitution, has been construed as referring to ordinary common law actions.³⁵ Since the common law right to a

(2001); COLO. REV. STAT. § 27-10-109 (2001); D.C. CODE ANN. § 21-545 (2001); FLA. STAT. § 394.916 (2002); 405 ILL. COMP. STAT. 5/3-802 (2002); IOWA CODE § 229A.7 (2002); KAN. STAT. ANN. § 59-29a03 (2001); KY. REV. STAT. ANN. § 202.140, *repealed by* Act of 1968, ch. 90, § 63 (as interpreted by *Denton v. Commonwealth*, 383 S.W.2d 681, 682 (Ky. 1964)); MO. REV. STAT. § 632.495 (2001); N.Y. MENTAL HYG. LAW § 9.35 (McKinney 2002); S.C. CODE ANN. § 44-48-90 (2001); TEX. HEALTH & SAFETY CODE ANN. § 841.061 (2002); VA. CODE ANN. § 37.1-70.9 (2002); WASH. REV. CODE § 71.05.310 (2002); WIS. STAT. § 51.20 (2001); *Commonwealth v. Williams*, 733 A.2d 593 (Pa. 1999); *Commonwealth v. Page*, 159 N.E.2d 82 (Mass. 1959); *Johnson v. Nelms*, 100 S.W.2d 648 (Tenn. 1937); *Shumway v. Shumway*, 2 Vt. 339 (1829).

29. MINN. CONST. art. 1, § 4 (1857).

30. 4 Minn. 109 (1860).

31. *Id.* at 113.

32. *Id.*

33. *Abraham v. County of Hennepin*, 639 N.W.2d 342, 354 (Minn. 2002).

34. *Abraham*, 639 N.W. 2d at 349. *See also* *Bond v. Welcome*, 61 Minn. 43, 46, 63 N.W. 3, 4 (1895) (the nature of the proceedings whether legal or equitable may be determined by the pleadings).

35. *Hawley v. Wallace*, 137 Minn. 183, 187, 163 N.W. 127, 129 (1917).

jury trial in civil commitment proceedings has existed for centuries, such inquiry into the nature and character of the proceedings is unnecessary in the present case. The constitutional right to a jury trial applies to all “cases at law,” regardless of whether the legislature has codified a new cause of action. The aforementioned analysis has been applied by the Minnesota Supreme Court as the basis for upholding the right to a jury trial in a variety of civil contexts.³⁶

The Minnesota Supreme Court has long recognized that the right to a jury trial guaranteed by the Minnesota Constitution is co-extensive with the right to a jury that existed at the time of its adoption in 1857:

The doctrine of this court . . . has uniformly been that the effect of this constitutional provision is merely to continue *unimpaired and inviolate the right of trial by jury as it existed in the territory at the time of the adoption of the constitution*; that it neither added to nor took away from that right³⁷

36. *Abraham v. County of Hennepin*, 639 N.W. 2d 342 (Minn. 2002) (OSHA claims); *Tyroll v. Private Label Chems., Inc.*, 505 N.W.2d 54, 57 (Minn. 1993) (subrogation claim) (citing *Breimhorst v. Beckman*, 227 Minn. 409, 433, 35 N.W.2d 719, 734 (1949)); *Hill v. Okay Constr. Co.*, 312 Minn. 324, 340, 252 N.W.2d 107, 118 (1977) (legal malpractice); *Smith v. Bailen*, 258 N.W.2d 118, 119 (Minn. 1977) (paternity); *Fiwka v. Johannes*, 287 Minn. 247, 250, 177 N.W.2d 782, 783 (1970) (negligence); *Landgraf v. Ellsworth*, 267 Minn. 323, 326, 126 N.W.2d 766, 768 (1964) (employment contract); *Roske v. Ilykanyics*, 232 Minn. 383, 389, 45 N.W. 2d 769, 774 (1951) (quasi-contract); *King v. Int'l Lumber Co.*, 156 Minn. 494, 495, 195 N.W. 450, 451 (1923) (landlord/tenant); *Williams v. Howes*, 137 Minn. 462, 463, 162 N.W. 1049, 1049 (1917) (the right to a jury trial is determined by the nature of the controversy described in the complaint); *Pierce v. Maetzold*, 126 Minn. 445, 451, 148 N.W. 302, 303 (1914) (action on an administratrix's bond); *Shipley v. Belduc*, 93 Minn. 414, 416, 101 N.W. 952, 953 (1904) (noting “the decisive test whether an action is triable to the court or to a jury is to be determined upon an examination of the complaint”); *St. Paul & Sioux City R.R. v. Gardner*, 19 Minn. 132, 137 (1872) (dispute in bailment proceeding was a case at law that required a jury trial); *Olson v. Aretz*, 346 N.W.2d 178, 181 (Minn. Ct. App. 1984) (legal malpractice). *Pearson* is the only case *contra*, likening civil commitment to an equitable action for “guardianship in probate court” to which a jury trial right does not attach. 205 Minn. 545, 557, 287 N.W. 297, 302 (1939), *aff'd*, 309 U.S. 270 (1940). However, the *Pearson* court includes no historical analysis or reference to Territorial Laws, which clearly created a right to a jury trial in probate court. *See infra* notes 40 & 43.

37. *Schmidt v. Schmidt*, 47 Minn. 451, 453, 50 N.W. 598, 599 (1891) (emphasis added). *See also* *Morton Brick & Tile Co. v. Sodergren*, 130 Minn. 252, 254, 153 N.W. 527, 528 (1915); *State ex. rel. Wilcox v. Gilbert*, 126 Minn. 95, 103, 147 N.W. 953, 957 (1914); *In re Peters*, 119 Minn. 96, 101-02, 137 N.W. 390, 392 (1912); *State v. Dist. Judge of Tenth Judicial Dist.*, 85 Minn. 215, 217-18, 88 N.W. 742, 743 (1902); *State ex. rel. Clapp v. Minn. Thresher Mfg. Co.*, 40 Minn. 213,

That this doctrine retains its vitality in the modern era is not subject to serious question. The Minnesota courts have consistently held that failure to provide a jury trial, guaranteed by the Minnesota Constitution, is reversible error.³⁸ Further, legislative enactments that grant the court discretion to deny the right to a jury trial, otherwise guaranteed by the Minnesota Constitution, are invalid.³⁹

Given the long history of the common law right to a jury in civil commitment cases, and the ubiquity of the right in state constitutions in the eighteenth and nineteenth centuries, a strong argument could be made that such a right must also have been part of the common law of the Minnesota Territory. However, such historical guesswork is not necessary since the right to a jury trial in civil commitment proceedings was actually codified in the Territorial Statutes of 1851 in a manner that parallels the ancient common law procedure of a Chancellor's Commission/jury trial procedure described above:

Sec. 17. The judge of probate of the county, has the care and custody of the person and property of idiots, lunatics, and other persons of unsound mind; . . . all of whom are known in the statute, as insane persons or habitual drunkards.

* * *

Sec. 22. The judge of probate must also issue a citation to the insane person or drunkard, to appear at the time and place specified, and show cause, if any he have, against the application

Sec. 23. At the time and place appointed . . . the judge of probate must attend, and draw and impanel [sic] a jury of six persons in the same manner as a jury is drawn and impaneled [sic] by a justice of the peace, for the trial of civil actions

Sec. 24. The judge of probate must preside at trial, and decide all questions of law arising therein; and the trial must be conducted in all respects like a trial in a civil action. . . .

Sec. 26. The inquisition of the jury must be in writing,

216, 41 N.W. 1020, 1021 (1889); *In re Peck*, 38 Minn. 403, 405, 38 N.W. 104, 106 (1888).

38. *See generally* *Landgraf v. Ellsworth*, 267 Minn. 323, 126 N.W.2d 766 (1964).

39. *Westerlund v. Peterson*, 157 Minn. 379, 388, 197 N.W. 110, 113 (1924).

and subscribed by the jury, or the foreman thereof, . . . the judge of probate must instruct the jury as to the form of the inquisition . . . but he can take no part in the deliberations of the jury, nor advise them

Sec. 27. If the jury finds . . . the conditions mentioned in section seventeen, the judge must immediately appoint one or more guardians . . . If the jury find . . . no sufficient reason for the appointment of guardians, the application must be dismissed.⁴⁰

The procedure established by the Territorial Laws provides a very close parallel to the procedure used at common law in the sense that an initial petition would be heard by a court of equity to make the initial determination whether there was a basis for the petition, and to provide immediate equitable relief to protect the subject of the petition, or others, should the situation warrant.⁴¹ Also, like the common law, an initial, temporary commitment could not be made indefinite without a jury verdict to determine the facts upon which the longer-term commitment was based.⁴²

The historical record seems quite clear. In the Minnesota Territories, the probate court was given original jurisdiction over civil commitment matters. Although probate matters often do not have a right to jury trial, the Territorial Laws made clear that a jury was required when the Probate Court took up long civil commitment matters.⁴³ Whether the reason for this apparent combination of equitable jurisdiction with the right to a jury was an early example of the modern trend toward minimizing the divide between law and equity in a general sense,⁴⁴ or resulted from an attempt to create a parallel to the common law system,⁴⁵ there can be no question that the right existed.⁴⁶ Thus, following an initial

40. REVISED STAT. OF THE TERRITORY OF MINN., Ch. 69, Art. III, §§ 17, 22-24, 26-27 (1851).

41. *See supra* notes 18-21 and discussion.

42. *See supra* Part II.

43. *See* REVISED STAT. OF THE TERRITORY OF MINN., Ch. 69, Art. III, § 23 (1851).

44. *See generally* Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); *see also* Beacon Theaters v. Westover, 359 U.S. 500 (1959).

45. *See supra* notes 18-21, 40 and discussion.

46. This commingling of equitable jurisdiction and the right to a jury trial on certain important issues can also be seen in the requirement that paternity matters, usually heard in association with marriage dissolution matters in a court of equity, also were accorded the right to a jury trial in the Territories, and have been protected in the Minnesota Constitution. *See* Smith v. Bailen, 258 N.W.2d 118, 220 (Minn. 1977).

emergency commitment, which *can* be decided by a court of equity alone, it would seem that indefinite, longer-term commitments *must* be decided by a jury under the Minnesota Constitution, even today.

IV. THE DISAPPEARING RIGHT TO A JURY TRIAL

If the jury trial right in civil commitment proceedings was so clearly established in 1857, the question is: how could such a fundamental right have been overlooked for so long? The answer, if one can be found, must be in Minnesota Supreme Court jurisprudence in the years between 1857 and the *Pearson* opinion in 1939. The complete judicial record on this question amounts to only two cases: *Vinstad* (a 1926 case) and *Pearson* itself.

Ironically, in *Vinstad*,⁴⁷ the Minnesota Supreme Court upheld the use of a jury. In *Pearson*, the court interpreted *Vinstad* as holding that the right to a jury did *not* apply to civil commitments.⁴⁸ A close examination of these two cases seems to explain how this egregious error came to pass.

Both *Vinstad* and *Pearson* involved challenges to procedures in civil commitment proceedings authorized under statutes passed by the legislature in the early part of the twentieth century. In *Vinstad*,⁴⁹ the petitioner was civilly committed in 1921 under a statute that put commitment matters into the hands of an entity called the "Board of Control." This Board apparently was vested with statutory power to accept civil commitment petitions, which were then litigated in probate court.⁵⁰ The Petitioner was a woman who had been civilly committed under these procedures.

47. 169 Minn. 264, 211 N.W. 12 (1926). The petitioner was civilly committed as "feeble minded" in 1921, pursuant to sec. 8953-8972, G.S. 123 (ch. 344, Laws of 1917, as amended by ch. 77, Laws of 1919 and ch. 260, Laws of 1923).

48. 205 Minn. 545, 557, 287 N.W. 297 303 (1939), *aff'd*, 309 U.S. 270 (1940). In *Pearson*, the petitioner was civilly committed as a "psychopathic personality" pursuant to ch. 369, section 2, Laws of 1939 which provides that:

Except as otherwise herein or hereafter provided, all laws now in force or effect hereafter enacted relating to insane persons, to persons alleged to be insane, and to persons found to be insane, shall apply with like force and effect to persons having a psychopathic personality. . . .

See id. at 546-47, 287 N.W. at 298.

49. The commitment in *Vinstad* proceeded under Minn. G.S. ch. 344 (1917); Minn. G.St., ch. 77, (1919), neither of which mentioned the right to a jury trial recognized in the 1857 Minnesota Constitution.

50. *Vinstad*, 205 Minn. at 13, 287 N.W. at 264.

After four years of involuntary confinement, Ms. Vinstad, apparently acting *pro se*, petitioned the probate court to restore her capacity in 1925.⁵¹ The proceedings in probate court resulted in a denial of her petition.⁵² Under the statutory provisions then in effect, Ms. Vinstad appealed to district court for a trial *de novo*.⁵³ At trial, the district court judge exercised judicial discretion to impanel a jury to assist the court in making this weighty decision, and a special verdict was submitted to a jury.⁵⁴ The jury verdict was that Ms. Vinstad should be restored to her liberty and released from involuntary confinement.⁵⁵

The case reached the Minnesota Supreme Court when the Minnesota State Board of Control appealed the district court finding. The Board of Control argued that the district court lacked jurisdiction because the right of appeal from the probate court resided only in the State Board of Control. In addition, the Board of Control also objected to the use of a jury in the district court, because "original jurisdiction arose in the probate court," a court that is usually "not equipped with jurors."⁵⁶

The Minnesota Supreme Court rejected the argument that a civilly committed person lacked a right of appeal to the district court, which the court found was clearly set out in the relevant Minnesota statutes.⁵⁷ Once this issue was decided, the court addressed the district court's impaneling of a jury. The court agreed that probate court matters, as a general rule, did not implicate a right to a jury. There was no jury right because guardianship issues were within the original jurisdiction of the probate court, which was "not equipped with jurors, and as to which the constitutional guaranty of trial by jury does not apply. Nor is the question of guardianship triable by jury, as a matter of right, either in probate or district courts."⁵⁸

However, the issue before the court was a challenge to the discretionary use of the jury in the district court proceeding, which the State Board of Control argued was improper, and to which the court replied, "[i]n a district court, where a jury is available, the

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 13, 287 N.W. at 266.

55. *Id.* at 13, 287 N.W. at 264.

56. *Id.* at 13, 287 N.W. at 266.

57. *Id.* at 13, 287 N.W. at 264.

58. *Id.*

court, in any action or proceeding triable to the court, may send an issue of fact to a jury for a special verdict. It was within the discretion of the court to do so in the instant case.”⁵⁹

The holding with respect to the use of the jury in *Vinstad* merely upheld the discretion of the district court to use a jury, if the court chose to do so. The language that refers to the right to a jury in probate court matters was dicta, and did no more than state the general proposition that probate court is usually a court of equity, in which a jury is not available.

However, the court in *Vinstad* was not called upon to rule on whether the right to a jury existed in probate court commitment matters under the Laws of the Minnesota Territory or Art. 1, sec. 4 of the Minnesota Constitution. In its *dicta* regarding the *right* to a jury trial, as opposed to judicial discretion to use a jury if the district court chose, the Minnesota Supreme Court failed to recognize that the right to a jury under the Minnesota Constitution does not depend on the general nature of the court that has jurisdiction over a particular question. This error was compounded by the court some fifteen years later in *Pearson*, when the *Vinstad* right to a jury trial *dicta* was converted into binding Minnesota Supreme Court precedent.⁶⁰

In *Pearson*, the statute in question provided for civil commitment proceedings, which included: original jurisdiction in the probate court, judicial power to exclude the public from the hearing, discretionary appointment of counsel, witness subpoena power, and the right of appeal to district court.⁶¹ However, the statute did *not* include a right to a jury trial in probate court, and was silent as to the right to a jury in the district court appeal.⁶² The court rejected serious consideration of the jury trial issue, by citing *Vinstad*:

If the relator has a right to a jury trial, it is because such was provided at common law when our constitution was adopted. While no one has contended that ‘psychopathic personalities’ were confined and treated at common law, the claim has been made that the issue of idiocy was, in early times, decided by a jury. The other view is that if

59. *Id.*

60. State ex. rel. Pearson v. Probate Court of Ramsey County, 205 Minn. 545, 287 N.W. 297 (1939), *aff’d*, 309 U.S. 270 (1940).

61. *Id.* at 547, 287 N.W. at 298 (citing 3 Mason Minn. 1938 St., Supp. 8992-166, 8992-167, 8892-169 & 8992-170).

62. Ch. 369, sec. 2 (1939).

such ever was the case, the practice had been abandoned before our constitution was adopted. That we are committed to the latter belief appears quite unequivocally from the language of this court in *Vinstad v. State Board of Control*⁶³

The assertion by the court, that the right to a jury in civil commitment matters had “been abandoned before our constitution was adopted”⁶⁴ is supported by nothing more than the reference to *Vinstad* in the quotation above. The court did not note that a jury was used in *Vinstad*, nor that the discussion of the right to a jury in that case was dicta, and was, itself, not supported by reference to anything other than general probate court/equity concepts. This is the doctrinal foundation upon which the Minnesota Supreme Court rejection of the right to a jury trial in civil commitment matters has rested without meaningful challenge for more than sixty years.

The Minnesota Supreme Court did not purport to examine the jury trial right that existed in Minnesota Territory in either *Vinstad* or *Pearson*. Neither case claims to have made any historical analysis at all, much less any reference to the Territorial Laws of Minnesota. Thus, the rejection of the right to a jury trial exists because of the court’s apparent innocence of any awareness of the right to a jury trial existing in the Territorial Laws of Minnesota.⁶⁵ Had the court been made aware that the Territorial Laws required probate courts to impanel a jury, it could not have ruled as it did and remain faithful to the method of interpreting the right to a jury in the 1857 constitution that has been consistently applied in every other case that has come before the court. Similarly, the opinion of the United States Supreme Court, which upholds the standards for civil commitment under that Minnesota statute, made no inquiry into Territorial Law,⁶⁶ and there is no record that any court has addressed the issue since 1940.⁶⁷

63. *Pearson* at 557, 287 N.W. at 303.

64. *Id.*

65. See *supra* note 40 and accompanying text.

66. *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940).

67. Although no published opinions discuss the jury trial issue, at least one unpublished opinion, *In re Anderson*, 1998 WL 727734 (Minn. Ct. App. Oct. 20, 1998) relied on *Pearson*.

V. CONCLUSION

It seems plain that a terrible mistake has been made in Minnesota, which has resulted in Minnesota diverging from long-standing common law principles, and from almost all other states with respect to the fundamental right to be judged by a jury before the government can deprive people of their liberty. This mistake occurred because the Minnesota Supreme Court rejected the right to a jury under the Minnesota Constitution in *Pearson* without examination of the right as it existed in 1857. In light of the unbroken line of cases, which hold that the right to a jury that existed in Minnesota Territory in 1857 and which liberally interpret the right to a jury being retained in modern causes of action, there can be little doubt that the current court will soon be called upon to correct this serious long-standing denial of a fundamental right.

The current court has several choices: (1) accept the unchangeable historical record and recognize the previously ignored right to jury trial; or (2) continue to reject the right to a jury trial by: (a) finding an historical record that discounts the provisions of the Territorial Laws; (b) distinguishing the type of civil commitment addressed in the Territorial Laws from those presently in use; or (c) rejecting 160 years of its own doctrine which has clearly established that the jury trial right in the Territories exists unchanged in the 1857 Minnesota Constitution.

There is only one course of action that is doctrinally consistent, and which reflects the integrity worthy of the court: in the near future, the Minnesota Supreme Court must hold that all those currently being held against their will in civil confinement will have to be released, or jury trials will have to be held for those who do not waive their right to challenge their continuing confinement. Furthermore, in the very near future, it will be necessary for all new civil commitment proceedings to be held before juries, if the right is not waived.

Of course, the right to a jury trial in these civil commitment proceedings will arise only when the State seeks to extend temporary, short-term civil confinement into long-term indefinite confinement. This means that initial commitment proceedings under current statutes will not change appreciably.⁶⁸ However,

68. Although precise figures are not available as of this writing, some 2,000 persons are presently being civilly confined in Minnesota and none have had jury trials or been given the opportunity to waive the right. Some significant portion of

before an indefinite, long-term commitment can be ordered by a court, a jury of at least six persons will have to be impaneled in a procedure that mirrors other civil causes of action in which a jury trial is required.

While there is no certainty that juries will reach different conclusions than probate court judges on the same facts, it is clear that the decision to bring a petition seeking indefinite, long-term civil commitment will have much different consequences for county attorneys, defense counsel, and the trial court. Jury trials in both the criminal and civil context usually require commitment of greater resources for all parties than those generally associated with bench trials. The decision to seek indefinite commitment will be far more costly and complicated for all parties concerned. In addition, the impaneling of a jury adds an element of unpredictability into the decision-making process that gives defense counsel a means to encourage opposing counsel to resolve contested matters to avoid an unexpected jury verdict. Perhaps most importantly, all parties will likely benefit from a more careful preparation and presentation of the evidence and judicial rulings in the conduct of the proceedings and opportunities to exercise unreviewable discretion will be reduced. It is also likely that post-commitment procedures, which require additional jury findings to *continue* indefinite confinement, will result in post-confinement jury procedures far more exacting than those currently in place.

For more than sixty years, persons facing involuntary civil commitment have been deprived of the right to a jury trial, which is enjoyed by all criminal defendants facing confinement. In spite of a long common law history upholding the right to a jury trial whenever the liberty of a person is at issue, and an unbroken line of Minnesota Supreme Court cases that holds that the right to a civil jury trial, which existed in the Minnesota Territories, remains unchanged in the Minnesota Constitution, the Minnesota Supreme Court rejected the right to a jury trial in civil commitment proceedings in *Pearson*. Notwithstanding that opinion, it is quite clear that the Minnesota Territorial Laws required juries to be impaneled before the liberty of anyone could be taken by the State of Minnesota. As a result, it is likely that the Minnesota Supreme Court will soon be faced with overturning *Pearson* and returning

these persons may be confined against their will, and are likely to seek release. Telephone Interview with Ms. Fran Bly, Director, State Operated Services Support Division, Minnesota Department of Human Services (Feb. 19, 2003).

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Minnesota to a civil commitment procedure employing jury trials that were required under the common law, and which exist in nearly every other state. The right to a jury trial in civil commitment proceedings is likely to be reestablished in Minnesota in the very near future.