A Brief History of the Criminal Jury in the United States

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Although the history of the criminal jury in England has been the subject of extensive and impressive scholarship,[1] and although the colonial American jury has attracted notable scholarly attention as well,[2] the history of the criminal jury in the

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[1] See J. S. Cockburn and Thomas A. Green, eds, *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800* (Princeton, 1988); Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800* (Chicago, 1985); R. H. Helmholz and Thomas A. Green, *Juries, Libel, & Justice: The Role of English Juries in Seventeenth- and Eighteenth-Century Trials for Libel and Slander* (UCLA, 1984); Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge* (Chicago, 1994); Sir Frederick Pollock and Frederic William Maitland, *The History of English Law: Before the Time of Edward I* (Cambridge, 1968) (reprint of 2d ed 1898); James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 47-182 (Augustus M. Kelley, 1969) (reprint of 1898 ed); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U Chi L Rev 1 (1983); John H. Langbein, *The Criminal Trial before the Lawyers*, 45 U Chi L Rev 263 (1978); John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution* and Thomas A. Green, *The English Criminal Trial Jury and the Law-Finding Traditions on the Eve of the French Revolution*, both in Antonio Padoa Schioppa, ed, *The Trial Jury in England, France, Germany: 1700-1900* 13, 41 (Duncker & Humblot, 1987); Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 Cornell L Rev 497 (1990).

[2] See William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (Harvard, 1975); Shannon C. Stimson, *The American Revolution in the Law: Anglo-American Jurisprudence Before John Marshall* (Princeton, 1990); John Phillip Reid, *In a Defiant Stance: The Conditions of Law in Massachusetts Bay, the Irish Comparison, and the Coming of the American Revolution* (Penn State, 1977); Bruce H. Mann, *Neighbors and Strangers: Law and Community in*

United States during the two hundred years following the enactment of the Bill of Rights has been the subject of astonishing scholarly neglect. With the exception of a useful "historical perspective" in a collection of essays on the contemporary jury[3] and a practitioner's historical encomium to the jury,[4] we have been unable to find anything resembling a general history of the American jury in the nineteenth and twentieth centuries. We hope that even a sketch of the jury's transformation during these centuries will be useful.[5]

Our central theme is that as the jury's composition became more democratic, its role in American civic life declined.[6] We suggest neither cause nor effect, merely irony.[7] Section I of this article briefly reviews the colonial background of the constitutional right to jury trial. Section II chronicles changes in the composition of the jury. Unpropertied white men, initially excluded from jury service, became jurors fairly rapidly. African-American men, members of other minority groups, and women were included only after long struggles. Section III describes the disappearance of the American jury's de jure power to decide issues of law. It concludes that abandonment of the jury's formal law-judging power should be seen as part of a continuing cycle of rejection and return to "book law." Section IV examines the radical curtailment of the role of the jury through the practice of plea bargaining.

We have not begun to address all of the important alterations in the criminal jury trial during the past two hundred years. Among the topics that we have not considered are: (1)

Early Connecticut 67-100 (North Carolina, 1987); John M. Murrin, *Magistrates, Sinners, and a Precarious Liberty: Trial by Jury in Seventeenth-Century New England*, in David D. Hall, John M. Murrin, and Thad W. Tate, eds, *Saints and Revolutionaries: Essays on Early American History* 152 (Norton, 1984).

[3] Harold M. Hyman and Catherine M. Tarrant, *Aspects of American Trial Jury History*, in Rita James Simon, ed, *The Jury System in America: A Critical Overview* 21 (Sage, 1975).

[4] Lloyd E. Moore, *The Jury: Tool of Kings, Palladium of Liberties* (Anderson, 2d ed 1988).

[5] Although we focus primarily on the criminal jury, we have drawn on literature concerning the civil jury when this literature seemed illuminating.

[6] Joan Hoff has advanced a similar thesis concerning the history of the legal status of women in the United States. She argues that by the time women gained new rights, the importance of these rights had often diminished. See Joan Hoff, *Law, Gender, and Injustice: A Legal History of U.S. Women* 3-9 (NYU, 1991).

[7] The evidence does not permit a stronger claim. In the absence of express declarations that more democratic juries should have fewer powers, it is unclear what data would establish a causal relationship between these two developments.

changes in the extent to which professional judges have channelled and controlled jury decisions by creating and applying rules of evidence, commenting on the evidence at trial, directing verdicts of acquittal, instructing juries, determining the length and conditions of jury deliberations, questioning jurors about their verdicts, and granting new trials; (2) the origin of the practice of impaneling a jury to hear only one case rather than a series of cases; (3) the role taken by jurors in the trial process, particularly through questioning witnesses; (4) the transformation of jury instructions from wide-ranging, informal addresses to standardized, written, technical, and frequently incomprehensible statements of the law;[8] (5) the expansion and contraction of the voir dire examination of prospective jurors;[9] (6) the appearance and disappearance of the "blue ribbon" jury; (7) the "incorporation" of the right to jury trial in the Fourteenth Amendment's Due Process Clause; (8) the authorization of juries of fewer than twelve and of nonunanimous verdicts in criminal cases; (9) the substitution of random methods of choosing jury venires for discretionary selection by public officials; and (10) the authorization of the bench trial as an alternative to jury trial.

Books remain to be written on these topics as well as on the topics that we have considered. The changes that have occurred in the criminal jury since ratification of the Sixth Amendment have been as dramatic and significant as earlier developments that have been studied more carefully. We would be pleased if our narrative were to help or provoke others to tell the story more fully.[10]

I. THE BACKGROUND OF THE SIXTH AMENDMENT

In 1791, the Sixth Amendment guaranteed every federal criminal defendant the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed." This Amendment was essentially redundant. Article III, § 2 of

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[8] For a discussion of this transformation, see Lawrence M. Friedman, *Crime and Punishment in American History* 245-47 (Basic, 1993).

[9] See id at 243-44.

[10] Harold Hyman and Catherine Tarrant wrote in 1975 that "research into American jury history has been far from adequate, systematic, or synthetic . . . . The result is that any attempt to survey jury history . . . is necessarily impressionistic, discursive, and tentative." These authors concluded, "Few areas of legal history need attention more." Hyman and Tarrant, *American Trial Jury History* at 24 (cited in note 3). See also Murrin, *Magistrates, Sinners, and a Precarious Liberty* at 153 (cited in note 2) ("[The jury] has almost completely eluded sustained scholarly attention.").

the Constitution had already provided, "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury."[11] The right to jury trial in criminal cases was among the few guarantees of individual rights enumerated in the Constitution of 1789,[12] and it was the only guarantee to appear in both the original document and the Bill of Rights.[13]

Even before the Declaration of Independence, the First Continental Congress's Declaration of Rights of 1774 had proclaimed the right to jury trial.[14] Twelve states had enacted written constitutions prior to the Constitutional Convention, and the only right that these twelve constitutions declared unanimously was the right of a criminal defendant to jury trial.[15]

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[11] In light of the Seventh Amendment's recognition of a right to jury trial in civil cases, the framers of the Bill of Rights may have thought it prudent to reiterate in an adjacent Amendment the right to jury trial in criminal cases.

Unlike Article III, § 2, the Sixth Amendment declared expressly that the jury must be impartial. It also added to Article III's requirement that the trial occur "in the State where the said Crimes shall have been committed" a further requirement that the jury be drawn from the "district wherein the crime shall have been committed." Anti-Federalists had criticized the language of Article III for its failure to confine vicinage more narrowly. See Francis H. Heller, *The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development* 25 (Kansas, 1951); Hyman and Tarrant, *American Trial Jury History* at 33-34 (cited in note 3).

[12] Apart from Article III's jury-trial guarantee, Article I prohibits both Congress and the states from enacting bills of attainder and ex post facto laws; it prohibits the states from impairing the obligations of contract; and it forbids suspension of the writ of habeas corpus except when the "public safety may require it." US Const, Art I, §§ 9-10. Article III, § 3 requires the testimony of two witnesses to the same overt act or a confession in open court as a prerequisite to a conviction for treason, and it declares that the punishment for treason may not include corruption of blood or forfeiture except during the lifetime of the person convicted. Article IV, § 1 requires each state to accord full faith and credit to the judgments of other states. Section 2 of Article IV provides that the citizens of each state must be accorded the privileges and immunities of citizens in the several states.

[13] Less explicitly, the First Amendment may have reiterated Article VI's prohibition of religious tests for office-holding. See *Torcaso v Watkins*, 367 US 488, 491-93 (1961).

[14] 1 *Journals of the Continental Congress: 1774-1789* 69 (Oct 14, 1774) (US GPO, 1904).

[15] Leonard W. Levy, *Bill of Rights*, in Leonard W. Levy, ed, *Essays on the Making of the Constitution* 258, 269 (Oxford, 2d ed 1987). Guarantee of the right to jury trial in America was in fact older than the first English settlement on this continent. James I's Charter to the Virginia Company in 1606 promised the colonists who would settle Jamestown a year later that they would enjoy all the rights of Englishmen, including the right to jury trial. See Hyman and Tarrant, *American Trial Jury History* at 24 (cited in note 3). Nevertheless, until the mid-eighteenth century, the use of juries seems to have been infrequent in Virginia. Then the number of jury trials in each Virginia county increased from about three or four per year to about twenty or thirty. A. G. Roeber, *Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680-1810* 128 (North Carolina, 1981).

At the Constitutional Convention, the desirability of safeguarding the jury may have been the most consistent point of agreement between the Federalists and Anti-Federalists. Alexander Hamilton wrote in Federalist 83:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.[16]

The framers' enthusiastic support for the jury stemmed in large measure from the role that juries had played in resisting English authority before the Revolution.[17] The most noted of the colonial cases was that of John Peter Zenger, a New York printer whose trial on charges of seditious libel occurred forty-one years before the drafting of the Declaration of Independence.[18]

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[16] Federalist 83 (Hamilton), in Clinton Rossiter, ed, *The Federalist Papers* 491, 499 (Penguin, 1961).

[17] Criminal jury trials in America became more frequent in the eighteenth century than they had been in the seventeenth century. Yet, especially in the seventeenth century, American colonies varied greatly in their use of criminal juries. Among the New England colonies, rights-conscious Rhode Island was at one extreme, routinely affording jury trials in all criminal prosecutions for offenses more serious than drunkenness. See Murrin, *Magistrates, Sinners, and a Precarious Liberty* at 167 (cited in note 2). At the other extreme, New Haven magistrates sought to replace English law with "the judiciall lawes of God" and effectively dispensed with jury trials until about 1665. Id at 170, 173.

Most New England colonies routinely employed juries in capital cases. Despite formal declarations that the right to jury trial extended "to all persons in Criminall cases," New England jury trials in non-capital cases were infrequent. (At common law, the category of capital crimes included all felonies, but some colonies excluded most of the property crimes punished as felonies in England while including crimes like adultery, public masturbation, and cursing or smiting a parent.) John Murrin observed, "In New England court records, one reads little about felonies and misdemeanors but a great deal concerning sin, evil, wickedness, filthiness, pollutions, and the like .... The proper response to sin in New England was confession and repentance, not denial of guilt." Even a defendant's request for a copy of his indictment was sometimes regarded as "smiteing at the authority of God." Id at 174, 188. Compare the twentieth-century plea bargaining practices described in the text accompanying notes 276-305. Although the use of juries in criminal cases in the New England colonies increased over time, use of the jury to resolve civil lawsuits in Connecticut became far less frequent in the eighteenth century than it had been in the seventeenth. Mann, *Neighbors and Strangers* at 67-100 (cited in note 2).

Outside of New England, juries were frequently used in seventeenth century Pennsylvania, West Jersey, and North Carolina, but not in Maryland, New Netherland, and Virginia. Murrin, *Magistrates, Sinners, and a Precarious Liberty* at 154.

[18] The surviving accounts of Zenger's trial are probably partisan, but whether fair or slanted, these accounts greatly influenced the founders' views of the jury. The primary sources are James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of The New York Weekly Journal* (Harvard, 1963); Stephen Botein, ed, *'Mr.*

Zenger's paper, *The New York Weekly Journal*, was the first journal of political criticism in America. After William Cosby, the newly appointed royal Governor of New York, removed Lewis Morris from his position as Chief Justice, Morris and his supporters established the journal and hired Zenger as its editor and printer.[19]

The paper directed most of its barbs toward Cosby and his cohorts. Zenger's complaints (including the objection that trials by jury were taken away when the governor pleased) would seem within the bounds of legitimate political criticism today, but in the eighteenth century they qualified as seditious libel, a criminal act. Despite Zenger's evident guilt, three separate grand juries refused to indict. In a widely condemned action, New York's Attorney General then filed an information charging Zenger with libel.[20]

Zenger was imprisoned for eight months before trial. James De Lancey, Morris's successor as Chief Justice, set bail at the unprecedented and unattainable sum of four hundred pounds sterling.[21] Shortly before the trial was to begin, Zenger's lawyers sought to disqualify De Lancey from conducting it. The lawyers objected that because De Lancey held his office "during pleasure" of the Crown, he lacked the independence required by English law.[22] De Lancey rejected the lawyers' requests that he disqualify himself—and also disbarred the lawyers. He appointed a Cosby supporter, John Chambers, to represent Zenger at trial.

Following Chambers's opening argument, a man "rose dramatically from his chair in the City Hall courtroom, and announced . . . that he would participate in Zenger's defense."[23] Riding to the rescue was Andrew Hamilton of Philadelphia, widely regarded as the foremost lawyer in the colonies and described

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Zenger's Malice and Falshood': Six Issues of the New York Weekly Journal, 1733-34 (American Antiquarian Society, 1985). We also rely on these secondary sources: Stanley N. Katz, *Introduction*, in Alexander, *A Brief Narrative* at 1; Stephen Botein, *Introduction*, in Botein, ed, *'Mr. Zenger's Malice and Falshood'* at 5; Paul Finkelman, *The Zenger Case: Prototype of a Political Trial*, in Michal R. Belknap, ed, *American Political Trials* 21 (Greenwood, 1981).

[19] Katz, *Introduction* at 4-8. Chief Justice Morris had ruled against Cosby in a financial dispute. Id at 4.

[20] Id at 17-19. At about the same time, the Governor's council ordered several issues of the *Journal* condemned and burned. Id at 18.

[21] Id at 18-19.

[22] Parliament, perhaps motivated both by the paucity of law-trained judges in the colonies and by its fear of judicial independence, had denied colonial judges the life tenure generally afforded English judges. Id at 18-21.

[23] Id at 22.

by a contemporary as "possessed of a confidence no terrors could awe."[24]

Hamilton conceded Zenger's publication of the papers but claimed that truth was a defense.[25] Under the "law on the books," this argument was unsound. The well-established rule was: The greater the truth, the greater the libel.[26] Chief Justice De Lancey responded, "A libel is not to be justified; for it is nevertheless a libel that it is *true*."[27]

Hamilton maintained that the issue was not for De Lancey to decide. It belonged to the jury. The Chief Justice disputed the point:

> [T]he jury may find that Zenger printed and published those papers, and leave it to the Court to judge whether they are libelous; you know this is very common; it is in the nature of a special verdict, where the jury leave the matter of law to the Court.[28]

Hamilton answered:

> I know . . . the jury may do so; but I do likewise know they may do otherwise. I know they have the right beyond all dispute to determine both the law and the fact, and where they do not doubt of the law, they ought to do so . . . . [L]eaving it to the judgment of the Court whether the words are libelous or not in effect renders juries useless . . . .[29]

Chief Justice De Lancey apparently acquiesced in Hamilton's position to a degree. Although he told the jurors that truth was no defense, he did permit them to return a general verdict. The announcement of Zenger's acquittal brought "three huzzas" from spectators in the courtroom.[30]

Accounts of the trial appeared in newspapers throughout the colonies and in the Zenger press's pamphlet, *A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York*

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[24] Id at 21. James Alexander, one of Zenger's original attorneys, apparently had retained Hamilton. Id. See also Alexander, *A Brief Narrative* at 61 (cited in note 18).

[25] Alexander, *A Brief Narrative* at 62; Katz, *Introduction* at 23 (cited in note 18).

[26] See William Hawkins, 1 *A Treatise of the Pleas of the Crown* 194 (Garland, 1978) (reprint of the 1716 original) ("[I]t is far from being a Justification of a Libel, that the Contents thereof are true . . . since the greater Appearance there is of Truth in any malicious Invective, so much the more provoking it is.").

[27] Alexander, *A Brief Narrative* at 69.

[28] Id at 78 (footnote omitted).

[29] Id (emphasis omitted).

[30] Id at 101.

Weekly Journal.[31] In the half-century between Zenger's trial and the ratification of the Sixth Amendment, this pamphlet was reprinted fourteen times.[32] More than any formal law book, it became the American primer on the role and duties of jurors.

Zenger's trial was not an aberration; during the pre-Revolutionary period, juries and grand juries all but nullified the law of seditious libel in the colonies. Hundreds of defendants were convicted of this crime in England during the seventeenth and eighteenth centuries,[33] but there seem to have been no more than a half-dozen prosecutions and only two convictions in America throughout the colonial period.[34] Grand juries were reluctant to indict and petit juries reluctant to convict.

Juries hindered the enforcement of other English laws as well.[35] One Massachusetts governor complained, "A Custom house officer has no chance with a jury,"[36] and another protested, "[A] trial by jury here is only trying one illicit trader by his fellows, or at least by his well-wishers."[37]

As juries exonerated those who resisted English colonial policy, they harassed those who enforced it. In one case, when an accused smuggler's ship was seized, the shipowner settled in an admiralty court (a nonjury court), paying five hundred pounds sterling to recover his vessel. The shipowner, Erving, then sued the customs officer, Cradock, who had seized his ship. In a civil trespass action, a jury awarded Erving one hundred pounds in excess of the amount that he had paid. An appellate court set aside the verdict on the ground that "the decree of the Court of Admiralty, where it had jurisdiction, could not be traversed and annulled in a court of common law."[38] Nevertheless, a second

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[31] Katz, *Introduction* at 26.

[32] Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 Harv L Rev 932, 946-47 (1919).

[33] Fredrick Seaton Siebert, *Freedom of the Press In England 1476-1776: The Rise and Decline of Government Controls* 365 (Illinois, 1952).

[34] Leonard W. Levy, *Emergence of a Free Press* 17 (Oxford, 1985); Harold L. Nelson, *Seditious Libel in Colonial America*, 3 Am J Legal Hist 160 (1959).

[35] See Reid, *In a Defiant Stance* at 27-40 (cited in note 2); John Phillip Reid, *In a Rebellious Spirit: The Argument of Facts, the Liberty Riot, and the Coming of the American Revolution* 30-33 (Penn State, 1979).

[36] *Quincy's Massachusetts Bay Reports, 1761-1772* 557 n 4 (Little, Brown, 1865) (letter from Governor Francis Bernard to Lords of Trade, Aug 21, 1761), quoted in Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv L Rev 757, 777 (1994).

[37] Governor William Shirley, quoted in Stephen Botein, *Early American Law and Society* 57 (Knopf, 1983).

[38] Chief Justice Thomas Hutchinson, quoted in Reid, *In A Defiant Stance* at 31 (cited in note 2).

jury, defying instructions, again awarded damages to Erving. Erving relented only when Cradock was about to take the matter to the British royal council.[39]

The English responded to their difficulties with American juries partly by extending the jurisdiction of admiralty courts, a jurisdiction that before 1767 had been limited to maritime cases. The Townshend Acts of that year empowered these nonjury courts to enforce English revenue measures.[40] Parliament also permitted some English officials charged with crimes to be tried in England rather than America.[41] Moreover, resurrecting a statute enacted during the reign of Henry VIII (before there were American colonies or any thought of them), Parliament declared that colonists charged with treason would be tried in England.[42] Edmund Burke protested that an English venue would effectively deprive American defendants of their right to jury trial. Transporting American defendants across the Atlantic would, indeed, condemn them unheard: "[B]rought hither in the dungeon of a ship's hold . . . he is vomited into a dungeon on land, loaded with irons, unfurnished with money, unsupported by friends, three thousand miles from all means of calling upon or confronting evidence . . . ."[43]

In 1776, the Declaration of Independence listed as a grievance against George III his "depriving us . . . of the benefits of trial by jury." Fifteen years later, the Sixth Amendment promised the people of the United States what they already had been promised by the Constitution of 1787 and by their states—that in all criminal prosecutions they would enjoy the right to jury trial.[44]

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[39] This description of *Erving v Cradock* is drawn from Reid, *In a Defiant Stance* at 30-32.

[40] See Carl Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* 208 (North Carolina, 1960).

[41] Richard B. Morris, ed, *Encyclopedia of American History* 82 (Harper & Row, rev ed 1965) (describing the Administration of Justice Act of 1774, 14 Geo III, ch 39, § 1, 30 GB Stat 367, 368).

[42] Edmund Burke, Letter to the Sheriffs of Bristol, in 2 *The Works of The Right Honorable Edmund Burke* 189, 192 (Little, Brown, 9th ed 1889).

[43] Id at 192-93.

[44] Not only did the constitutions of the original states guarantee jury trial, but the "constitution of every State entering the Union thereafter . . . protected the right to jury trial in criminal cases." *Duncan v Louisiana*, 391 US 145, 153 (1968).

II. THE CHANGING COMPOSITION OF THE JURY

In 1835, Alexis de Tocqueville described the American jury in terms that the framers would have approved. The jury, he said, was "a political institution . . . one form of the sovereignty of the people . . . ."[45] Along with universal suffrage (a term used without any sense of irony to describe the enfranchisement of adult white men), the jury was a "means of making the majority prevail."[46] Tocqueville called the jury a "free school . . . in which each juror learns his rights," and he wrote that "juries teach men equity in practice."[47]

Academic convention divides constitutional provisions into two types. Some are structural—they allocate governmental power. Others guarantee individual rights. As Akhil Amar has emphasized, the Sixth Amendment fits easily within both categories.[48] Jury trial was a valued right of persons accused of crime, and it was also an allocation of political power to the citizenry.

In recent years, scholars have emphasized the elitism of the framers of the Constitution,[49] yet the framers established the most democratic nation-state in the world.[50] The jury was an important part of their experiment in democracy. Thomas Jefferson declared, "Were I called upon to decide whether the people

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[45] Alexis de Tocqueville, 1 *Democracy in America* 283 (Knopf, 1945).

[46] Id at 287.

[47] Id at 285, 284. The observations of another French visitor later in the century were similar:

> The Americans consider and value the jury otherwise than as a judicial institution; they think that the jury constitutes the best political school in a popular government. Its operation puts the people in repeated contact with the elite of democratic countries, the lawyers and magistracy. In this instructive business, [the juror] is initiated into the ideas of law and of justice; he develops respect for the laws and for the feeling of dignity and individual responsibility.

Horace Helbronner, *Le Pouvoir Judiciaire Aux États-Unis: Son Organisation et Ses Attributions* 10 (Imprimerie de A. Parent, 1872), translated in Hyman and Tarrant, *American Trial Jury History* at 40 (cited in note 3).

[48] Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L J 1131, 1183-85 (1991).

[49] See, for example, Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (Chicago, 1990).

[50] A few Native American governments may have been more democratic in some respects, particularly in the extent to which they permitted women to participate in governmental affairs. See Lewis Henry Morgan, *League of the Iroquois* (Citadel, 1962); Anthony F. C. Wallace, *The Death and Rebirth of the Seneca* 28-30 (Vintage, 1972); Elisabeth Tooker, *The League of the Iroquois: Its History, Politics, and Ritual*, in Bruce G. Trigger, ed, 15 *Handbook of North American Indians: Northeast* 418, 424-29 (Smithsonian, 1978).

had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative."[51]

The jury of 1791 seems democratic, however, only in the context of the times. Every state limited jury service to men; every state except Vermont restricted jury service to property owners or taxpayers; three states permitted only whites to serve; and one state, Maryland, disqualified atheists.[52]

A. Which White Men?

In England, although qualifications for jury service were less severe than those for sitting in the House of Commons or for hunting game, property-ownership requirements disqualified at least three-quarters of the adult male population from becoming jurors.[53] In America, however, where land was cheaper and more available, the story was different. Even before the triumph of universal suffrage, at least half and perhaps three-quarters of the white adult male population were qualified to vote.[54] Most,

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[51] Letter to the Abbé Arnoux, July 19, 1789, in Julian P. Boyd, ed, 15 *The Papers of Thomas Jefferson* 282, 283 (Princeton, 1958).

[52] This statement rests on our assumption that the states' requirements for jury service were at least as demanding as their qualifications for voting. We know of some early state jury-qualification statutes that duplicated voting requirements and of many others that added further qualifications. We know of none, however, that authorized people ineligible to vote to serve on juries.

At the time of the founding, every state except Vermont required that voters be either freeholders or taxpayers. The most liberal of the states (other than Vermont) were five that apparently allowed all adult male taxpayers to vote. See Eric Foner and John A. Garraty, eds, *The Reader's Companion to American History* 1044 (Houghton Mifflin, 1991). The freeholding requirements of the remaining seven states demanded the ownership of varying amounts of land. See Chilton Williamson, *American Suffrage: From Property to Democracy, 1760-1860* 12-13 (Princeton, 1960).

Three states—South Carolina, Georgia, and Virginia—denied the vote to African-Americans. Id at 15. In the eighteenth century, statutes in various American jurisdictions had declared Jews, Quakers, atheists, and/or Catholics ineligible to vote, but only Maryland's disqualification of atheists persisted in 1789. This last religious disqualification disappeared in 1826. Morris, *Encyclopedia of American History* at 165 (cited in note 41). See also Albert Edward McKinley, *The Suffrage Franchise in the Thirteen English Colonies in America* 475-76 (Penn, 1905).

[53] See P. J. R. King, *"Illiterate Plebeians, Easily Misled": Jury Composition, Experience, and Behavior in Essex, 1735-1815*, and Douglas Hay, *The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century*, both in Cockburn and Green, eds, *Twelve Good Men and True* at 254, 261; 305, 349, 357 (cited in note 1).

[54] See Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 199 (North Carolina, 1980). Adams's figures accord with material presented in the authoritative study of American voting qualifications, Chilton Williamson, *American Suffrage* at 20-39 (cited in note 52). Another scholar, however, has presented very different figures. McKinley, *The Suffrage Franchise* at 487-88 (cited in note 52).

though not all, of these voters were probably eligible for jury service as well.[55]

The Federal Judiciary Act of 1789 left the determination of juror qualifications in the federal courts to the states,[56] and state qualifications for jury service frequently matched those for voting. Many states, however, imposed additional requirements—both general requirements of intelligence, good character, and the like[57] and specific taxpaying and property-holding requirements.[58]

The early nineteenth century saw a rapid movement away from property qualifications and toward universal suffrage for white males,[59] yet the liberalization of voting requirements was not always accompanied by a similar liberalization of requirements for jury service. As this article will explain in greater detail, the reform of jury qualifications has often lagged behind the reform of qualifications for voting. In many states, unpropertied white men, African-Americans, and women did not serve on juries until considerably after they gained the vote.

In Georgia, a 1797 statute described qualified jurors as people qualified to vote,[60] and the adoption of universal suffrage

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[55] See note 52.

[56] An Act to establish the Judicial Courts of the United States § 29, 1 Stat 73, 88 (1789) ("[J]urors shall have the same qualifications as are requisite for jurors by the laws of the State of which they are citizens . . . .").

[57] For example, a Delaware act in 1811 commanded the sheriff to summon "sober, discreet and judicious freeholders, lawful men and of fair characters, and inhabitants of his bailiwick, to serve as petit jurors . . . ." An Act to Regulate the Summoning and Returning Juries § 4, 4 Del Laws 444, 447 (1811), codified at Rev Del Laws 118 (1829).

[58] Illinois entered the union in 1818 with a taxpaying requirement for jurors. See An Act Prescribing the Mode of Summoning Grand and Petit Jurors, and Defining Their Qualifications and Duties § 1 (1827), codified at Ill Rev Stat 378-79 (1833). Yet the state had no taxpaying or property-holding requirement for voters. Kirk H. Porter, *A History of Suffrage in the United States* 48-49 (Greenwood, ed, 1969). At the time they joined the union, Alabama, Kentucky, and Indiana permitted all adult white men to vote. Id at 50, 110. These states nevertheless required jurors to be property holders. See Digest of the Laws of the State of Alabama § 4 at 296 (Aiken, 1833); Act of Dec 17, 1796, in Digest of the Statute Laws of Kentucky (Morehead & Brown, 1834); Ind Rev Laws, ch 53 § 1 at 291 (1831).

[59] In 1777, Vermont became the first state to establish universal white male suffrage. Chilton Williamson, *Property, Suffrage and Voting in Windham*, 25 Vt Hist 135 (1957). The next state to adopt universal white male suffrage was Kentucky, which entered the Union without a taxpaying or a property-holding requirement in 1792. During the same year, New Hampshire abandoned its taxpaying requirement. Mississippi entered the Union in 1817 with a taxpaying requirement, but universal white male suffrage was the rule for states admitted to the Union thereafter. Although a few taxpaying requirements persisted into the twentieth century, North Carolina became the last state to abandon property qualifications for voting in 1856. Porter, *A History of Suffrage* at 110.

[60] An Act to Revise and Amend the Judiciary System § 27 (Feb 9, 1797), Digest of the

one year later[61] therefore established universal white-male eligibility for jury service as well. Connecticut, however, abandoned its freeholding requirement for voting in 1818[62] yet continued to require jurors to be freeholders until 1836.[63] New York repealed its property-holding requirement for voting in 1821 and abandoned its taxpaying requirement five years later.[64] The state nevertheless continued to impose a $250 property-holding requirement for jury service until 1967.[65] A federal court upheld this New York requirement against constitutional challenge in 1949.[66] Eventually, twentieth-century courts deprived the few remaining state taxpaying requirements of most of their bite by holding that these requirements could be satisfied by the payment of a sales tax on any purchase—or even by the payment of a federal tax.[67]

In 1946, the Supreme Court invoked its supervisory power over the administration of federal justice and struck down an exclusion of daily wage earners from jury service. The Court refused to "breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged."[68] By 1946, class-based qualifications like those accepted by the framers of the Constitution appeared inconsistent with the very concept of jury trial.[69]

Especially in the first half of the nineteenth century, formal qualifications offered no clear indication of who served on juries in fact. The members of a group eligible for jury service might never serve, for jurors were not randomly summoned from among those eligible. Instead, public officials called selectmen, supervisors, trustees, or "sheriffs of the parish" exercised what

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Laws of the State of Georgia 271, 278 (Marbury and Crawford, 1802).

[61] Porter, *A History of Suffrage* at 110.

[62] Id.

[63] An Act of June 2, 1836, 1836 Conn Pub Acts 5, ch 6.

[64] Porter, *A History of Suffrage* at 110.

[65] See An Act to Amend the Judiciary Law, in Relation to Qualifications of Jurors § 1, 1967 NY Laws 68, ch 49.

[66] *United States v Foster*, 83 F Supp 197, 208 (S D NY 1949). See *Gibson v Mississippi*, 162 US 565, 580 (1896) (upholding Mississippi's property-holding requirement). Later judicial rulings declared property-holding requirements like New York's unconstitutional. See *Clark v Ellenbogen*, 319 F Supp 623, 626 (W D Pa 1970), aff'd, 402 US 935 (1971); *Leggroan v Smith*, 498 F2d 168, 171 (10th Cir 1974).

[67] See *Clark*, 319 F Supp at 627.

[68] *Thiel v Southern Pacific Co.*, 328 US 217, 223-24 (1946).

[69] Without reaching the issue, the *Thiel* opinion intimated that all class-based exclusions from jury service were unconstitutional. Id. But see *People v Cerrone*, 867 P2d 143, 147 (Colo App 1993) (permitting the exclusion of hourly wage earners from service on a state-wide grand jury).

Tocqueville called "very extensive and very arbitrary" powers in summoning jurors.[70]

Just as formal eligibility for jury service did not always mean eligibility in fact, statutory disqualification did not always mean real disqualification. When qualified jurors failed to appear, statutes permitted court clerks or sheriffs to impanel unqualified "bystanders." In a number of jurisdictions, the nonappearance of qualified jurors and the use of bystanders was common.[71]

In cases in which aliens were parties, American courts occasionally impanelled juries *de medietate linguae*, juries composed half of Americans and half of countrymen of the alien party.[72] English law authorized this procedure, which had been devised initially to protect the interests of Jewish moneylenders and foreign merchants, for seven hundred years, from at least the end of the twelfth century until 1870.[73] In America, Chief Justice Marshall once employed it to select jurors in the case of an alien charged with piracy and murder.[74] Indeed, as recently as 1911, a French citizen accused of murder in Louisville, Kentucky, asserted his right to a jury *de medietate linguae*. The Kentucky Supreme Court discovered to its surprise that this sort of jury was still expressly authorized by statute and concluded that a Kentucky trial judge had authority to impanel one.[75]

Throughout the nineteenth century, objections that the jury was elitist were far less frequent than claims that jurors were unqualified. As early as 1803, St. George Tucker's influential

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[70] Tocqueville, 2 *Democracy in America* at 359-60 (cited in note 45).

[71] See, for example, David J. Bodenhamer, *The Pursuit of Justice: Crime and Law in Antebellum Indiana* 83-88 (Garland, 1986); Douglas Greenberg, *Crime and Law Enforcement in the Colony of New York, 1691-1776* 172-73 (Cornell, 1974).

[72] See Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of "de medietate linguae"* (unpublished 1994) (on file with U Chi L Rev); Constable, *The Law of the Other* (cited in note 1).

[73] The first statutory recognition of the jury *de medietate linguae* came in 1353, but the procedure had been used in various local courts long before. The right to it was confirmed by various charters. See Constable, *The Law of the Other* at 4-5, 18, 96-97, 145.

[74] See *United States v Cartacho*, 25 F Cases 312, 312-13 (D Va 1823). See also *Respublica v Mesca*, 1 US 73, 75 (Pa 1783) (granting a jury *de medietate linguae*); *People v M'Lean*, 2 Johnson 380, 380-81 (NY 1807) (same). But see *State v Antonio*, 11 NC 200, 206 (1825) (refusing to grant); *Richards v Commonwealth*, 38 Va 723, 731 (1841) (same). Compare Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 Mich L Rev 1611, 1695-1708 (1985) (arguing that an African-American, Native American, or Hispanic defendant should have a right to the inclusion of "racially similar" jurors).

[75] *Wendling v Commonwealth*, 143 Ky 587, 593, 137 SW 205, 208 (1911). The statute was permissive, however, and the trial court had not abused its discretion by denying the defendant's request. 137 SW at 206.

American edition of *Blackstone's Commentaries* reported that, "after the first day or two," juries hearing civil lawsuits in the rural areas of Virginia were "made up, generally, of idle loiterers about the court, . . . the most unfit persons to decide upon the controversies of suitors."[76] In criminal cases, jurors were summoned by deputy sheriffs whose lack of qualifications frequently "invite[d] the attempt . . . to corrupt them."[77]

Tucker reported a murder case in 1800 in which the judge halted the proceedings after discovering that a deputy sheriff had summoned jurors from a list of twenty-four prospects submitted by the defendant's father. In another case, eleven or twelve people who were in a courtroom awaiting trial on a charge of riot comprised most of the jury panel for the trial of another defendant charged with horse-stealing. The waiting defendants thus secured payment for some of their time in court.[78]

Tucker concluded that jurors frequently took bribes. Noting a "multiplicity" of "acquittals against positive evidence," particularly in homicide and malicious mayhem cases, he offered two alternate explanations: there was either "an infinite degree of perjury" on the part of witnesses or an "unpardonable disregard" of duty by jurors.[79]

In Kentucky in 1858, a critic described jurors as "miserable wretches."[80] A Georgia newspaper called them "vagabonds."[81] An observer in antebellum Indiana described jurors as "idle and dissolute persons" and as "[l]oafers and drunkards."[82] Touring the West after the Civil War, Mark Twain facetiously noted a case in which:

> [w]hen the peremptory challenges were all exhausted, a jury of twelve men was impaneled—a jury who swore they had neither heard, read, talked about nor expressed an opinion concerning a murder which the very cattle in the corrals . . . were cognizant of! . . . It actually came out after-

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[76] William Blackstone, 3 *Commentaries* App 64 (St. George Tucker, ed) (Birch and Small, 1803). We are grateful to Linda K. Kerber for this reference.

[77] Id at 66.

[78] Id at 66 n *.

[79] Id at 66-67.

[80] See Edward L. Ayers, *Vengeance and Justice: Crime and Punishment in the Nineteenth-Century American South* 113 (Oxford, 1984).

[81] Id.

[82] Bodenhamer, *The Pursuit of Justice* at 84 (cited in note 71). Despite this criticism, the Indiana legislature, hoping to reduce judicial expenses, made the use of bystander jurors easier. Id at 83-85.

> ward, that one of [the jurors] thought that incest and arson were the same thing.[83]

Twain is said to have observed, "We have a jury system that is superior to any in the world, and its efficiency is only marred by the difficulty of finding twelve men everyday who don't know anything and can't read."[84]

These witticisms and criticisms probably had some grounding. The names of over one-third of the people who served as jurors in Whitfield County, Georgia, in 1853 did not appear on county tax rolls or census lists. Moreover, the wealth of the jurors who were listed on the tax rolls was below the county's average.[85] In sixty percent of the criminal trials held in antebellum Marion County, Indiana, bystanders comprised a majority of all jurors.[86]

B. African-Americans

White men without much property, knowledge, or distinction thus made their way onto American juries. The path to equality

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[83] Mark Twain, *Roughing It* 342-43 (American, 1872). John T. Morse, Jr., described a case in which "[a]t last, after a long period and careful search, a dozen men were brought together, presumably the most unintelligent creatures in California, so exceptionably imbecile as to be unexceptionable." Quoted in Hubert Howe Bancroft, 38 *The Works of Hubert Howe Bancroft* 301 (History, 1890). In 1885, S. Stewart Whitehouse complained:

> [B]etter qualified classes of citizens do not serve as jurymen. By some peculiar way they fail to be drawn . . . , or if perchance drawn, manage to get excused. All lawyers know this to be a fact . . . . As a result there is generally left for this important public service but a residuum of stupid and incompetent species of the *genus homo*.
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> . . .
>
> It were as reasonable and proper in time of war to excuse our able-bodied men and draft none but cripples and puny-bodied unfortunates . . . .

S. Stewart Whitehouse, *Trial By Jury, As It Is and As It Should Be*, 31 Albany L J 504, 505-06 (1885).

[84] Quoted in Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U Chi L Rev 153, 154 (1989). Following the publication of this article, which reported the author's belief in the accuracy of the quotation despite his inability to locate it, a generous reader wrote him and supplied a citation, which Mr. Alschuler has lost. The frequent disparagement of jurors in nineteenth-century America continued a tradition that had begun long before in England. See id at 154 n 3; Langbein, 50 U Chi L Rev at 120 (cited in note 1); King, *"Illiterate Plebeians, Easily Misled"* at 256-58 (cited in note 53).

[85] Ayers, *Vengeance and Justice* at 113 (cited in note 80).

[86] Bodenhamer, *Pursuit of Justice* at 86 (cited in note 71). Most of these bystanders met Indiana property-holding requirements, but many did not. On the average, the property holdings of bystanders were less than those of regular jurors by almost four thousand dollars. Id at 87.

in the jury box was vastly more arduous for African-Americans and for women.[87] For them, the journey is still not complete.

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[87] The story of the progress of members of other racial and ethnic groups toward a place in the jury box is even sketchier than that of African-Americans. Nevertheless, because a denial of federal citizenship automatically precludes federal jury service, the development of the law of citizenship tells part of the story.

A historical description of national citizenship must focus separately on citizenship conferred by naturalization and that conferred by birth. The Naturalization Act of 1790 declared only "free white person[s]" eligible for naturalization. 1 Stat 103, ch 3, § 1. In 1827, Chancellor Kent noted that this Act apparently precluded the naturalization not only of "the inhabitants of Africa, and their descendants" but also of "the copper-colored natives of America" and "the yellow or tawny races of the Asiatics." James Kent, 2 *Commentaries on American Law* 38-39 (Little, Brown, 10th ed 1860).

During the early years of the republic, the federal citizenship of persons born within the United States remained cloudy, in large part because the relationship between the states and the federal government was uncertain. See generally James H. Kettner, *The Development of American Citizenship, 1608-1870* 213-32 (North Carolina, 1978). In *Dred Scott v Sandford*, 60 US 393 (1857), the Supreme Court declared that national citizenship was limited to whites who had been citizens of the original thirteen states in 1789, people who had been naturalized by Congress, and the descendants of both. Id at 406, 419.

The principle of "whites only" was invoked by courts to imply exclusions from political rights that legislatures had not enacted. In 1854, the California Supreme Court noted that a statute prohibited a "Black or Mulatto person, or Indian" from testifying in a case in which a white person was a party. *People v Hall*, 4 Cal 399, 399 (1854). Although the statute did not mention Asians, the court held that it precluded Chinese people from testifying as well. "The same rule which would admit [the Chinese] to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls." Id at 404.

Following the Civil War, the Fourteenth Amendment extended United States citizenship to "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof." Nevertheless, when the Naturalization Act was amended in 1870 to include people from Africa, Congressmen from western states ensured that it did not permit the naturalization of people from Asia. See Moritoshi Fukuda, *Legal Problems of Japanese-Americans: Their History and Development in the United States* 6-8, 10 (Keio Tsushin, 1980) (retaining the word "white," the statute also permitted the naturalization of "persons of African nativity and descent"). A series of state and federal decisions after 1870 construed the Act's reference to "white person[s]" to prevent the naturalization of people from China, Japan, Burma, Hawaii, and India. Id at 13-14.

Under the Fourteenth Amendment, people of oriental ancestry born in the United States were unquestionably citizens, but in 1872, Senator Henry Corbett opposed legislation to forbid racial discrimination in jury selection—legislation that Congress ultimately enacted as part of the Civil Rights Act of 1875. Corbett objected that under the proposal:

> [T]he State cannot exclude a Chinaman from the jury-box. It is a question now to be determined by the Senate of the United States whether they are willing to fill our jury-boxes with a people who are not accountable in any way to the Christian religion as recognized in this country. I believe that the only thing they recognize as an oath binding upon them is this: that you shall cut off the head of a chicken, and the Chinaman swears in the presence of that, or by that, that he will judge of the matter according to that oath.
>
> It seems to me, Mr. President, that we are extending this privilege a little too far. I think we are not prepared to allow our jury-boxes to be packed by twelve Chinamen, who can be bought and sold. If they were allowed in the jury-box, the man who imports them into this country by contract could sell them, and make them

Only three of the original thirteen states formally denied the vote to African-Americans,[88] and for a time free blacks did vote in noticeable numbers in both the North and the South.[89] By 1830, however, many states had disenfranchised blacks by law, and there was "no extensive Negro voting anywhere."[90] Indeed, by the time of the Civil War, only six states permitted African-Americans to vote.[91] One of these states, New York, had distinctive residency and property requirements for African-Americans.[92]

Perhaps, just as African-Americans sometimes voted, a few African-Americans served on juries in the early years of the Republic. So far as we are aware, however, the first African-Americans ever to serve on a jury in America were two who sat in Worcester, Massachusetts, in 1860. Their service was described as "the first of such instances" in the state's history,[93] and it was

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> do just as he should instruct them. You can go into any community where they reside, as I am credibly informed by intelligent lawyers who have had experience, and buy a Chinaman to testify just as you desire . . . .

Cong Globe, 42d Cong, 2d Sess at 898 (Feb 8, 1872).

Even after ratification of the Fourteenth Amendment, the Supreme Court held that Native Americans who retained their tribal membership were not citizens of the United States. *Elk v Wilkins*, 112 US 94, 109 (1884). These "unassimilated" Indians were excluded from federal juries until Congress declared them citizens in 1924. An Act to Authorize the Secretary of the Interior to Issue Certificates of Citizenship to Indians, 43 Stat 253, ch 233 (June 2, 1924), eventually codified at 8 USC 1401(b) (1988).

Of course the path to citizenship marked only part of the journey to the jury box. In some places, Mexican-Americans, although not disqualified from jury service, were excluded through the "key man" system and other discriminatory devices. See *Hernandez v Texas*, 347 US 475, 476 n 1, 480-81 (1954); *Castaneda v Partida*, 430 US 482, 484-88 (1977). For a description of the "key man" system in which court clerks and jury commissioners invited prominent civic and political leaders to nominate prospective jurors, see Jon M. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels* 86 (Ballinger, 1977).

[88] See note 52. With the exception of Tennessee, however, every Southern state that entered the Union after 1789 formally disqualified African-Americans from voting. John Hope Franklin, *From Slavery to Freedom: A History of the American Negroes* 217 (Knopf, 1947).

[89] See id (noting that blacks voted "to a considerable extent" in Maryland, New York, North Carolina, and Pennsylvania "for several years"); Roger Wallace Shugg, *Negro Voting in the Ante-Bellum South*, 21 J Negro Hist 357, 357-64 (1936) (North Carolina, Tennessee, and Louisiana).

[90] Franklin, *From Slavery to Freedom* at 218.

[91] The states were Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont. See *Oregon v Mitchell*, 400 US 112, 156 (1970) (Harlan concurring in part and dissenting in part).

[92] Id.

[93] See Leon F. Litwack, *North of Slavery: The Negro in the Free States, 1790-1860* 94 (Chicago, 1961). Litwack concluded that no Northern state had impaneled an African-American juror before these two jurors served in 1860. Even when the statutes of North-

sufficiently unusual to provoke comment elsewhere. An Indiana Congressman declared with astonishment that Massachusetts:

> would allow a white man to be accused of crime by a negro; to be arrested on the affidavit of a negro, by a negro officer; to be prosecuted by a negro lawyer; testified against by a negro witness; tried before a negro judge; convicted before a negro jury; and executed by a negro executioner; and either one of these negroes might become the husband of his widow or his daughter![94]

In 1864, Congress enacted legislation permitting African-Americans to testify in federal courts,[95] and at the end of the Civil War, it enacted legislation declaring the right of African-Americans to testify in state cases as well.[96] Opponents of these measures objected that permitting African-Americans to testify against whites would lead inevitably to the inclusion of African-Americans on juries. Proponents, however, disavowed this objective. Noting that women and children served as witnesses although they were ineligible for jury service, these legislators denied any connection between appearing as a witness and serving as a juror.[97]

After the War, African-American leaders in the South stressed the importance of integrating juries. At a political convention in North Carolina, the Reverend James W. Hood declared that the Negro deserved:

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ern states did not prevent African-Americans from serving, custom and prejudice did. Id.

[94] Id at 96-97.

[95] See An Act Making Appropriations for Civil Expenses of the Government § 3, 13 Stat 351, ch 210 (1864).

[96] Civil Rights Act of 1866 § 1, 14 Stat 27, ch 31. Prior to the Civil War, statutes in many jurisdictions had precluded African-Americans from testifying if a party to the case was white. See James Forman, Jr., *History and the Right to Jury Trial: From Abolition to Reconstruction* 46 n 121 (unpublished paper, Yale Law School, 1992) (on file with U Chi L Rev). The Ohio Supreme Court declared in 1846:

> No matter how pure the character, yet, if the color is not right, the man can not testify. The truth shall not be received from a black man, to settle a controversy where a white man is a party. Let a man be Christian or infidel; let him be Turk, Jew, or Mahometan; let him be of good character or bad; even let him be sunk to the lowest depths of degradation; he may be a witness in our courts if he is not black.

Jordan v Smith, 14 Ohio 199, 201 (1846), quoted in Forman, *History and the Right to Jury Trial* at 46 n 21.

[97] Cong Globe, 38th Cong, 1st Sess 40 (Feb 26, 1864) (statement of Senator Harlan); Cong Globe, 39th Cong, 1st Sess 941 (Mar 8, 1866) (Statement of Representative Wilson). See Forman, *History and the Right to Jury Trial* at 46-48.

> First, the right to testify in courts of justice, in order that we may defend our property and our rights. Secondly, representation in the jury box. It is the right of every man accused of any offence, to be tried by a jury of his peers . . . . Thirdly and finally, the black man should have the right to carry his ballot to the ballot box. These are the rights that we want—that we will contend for—and that, by the help of God, we will have . . . .[98]

During Reconstruction, African-Americans in some jurisdictions regularly served on juries. In 1867, the military commander of South Carolina declared every taxpayer or registered voter to be eligible for jury service. Since the military itself had registered virtually every adult African-American male, integrated juries became common in this district.[99] Two years later, the South Carolina legislature mandated not only that grand and petit juries be integrated but also that their racial composition duplicate the composition of the counties in which they sat.[100] As one observer described:

> The sensation is peculiar . . . to see a Court in session, where former slaves sit side by side with their old owners on the jury, where white men are tried by a mixed jury, where colored lawyers plead, and where white and colored officers maintain order.[101]

Almost one-third of the citizens called for grand jury service in New Orleans between 1872 and 1878 were African-Americans—a percentage that matched the percentage of African-Americans in the population of Orleans Parish generally.[102]

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[98] Leon F. Litwack, *Been in the Storm So Long: The Aftermath of Slavery* 505 (Vintage Books, 1980) (emphasis omitted).

[99] Joel Williamson, *After Slavery: The Negro in South Carolina During Reconstruction, 1861-1877* 329 (North Carolina, 1965).

[100] Id at 334.

[101] Id at 329-30, citing NY Times 5 (June 14, 1869). A federal judge, Alexander Rives, noted in 1878 that he had "always ordered mixed juries" and had "not discovered that harm has resulted from it . . . ." Charles Fairman, 7 *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88* pt 2, 442 (Macmillan, 1987), quoting a statement reported in *The Richmond Dispatch* (Dec 12, 1878).

[102] Drew L. Kershen, *The Jury Selection Act of 1879: Theory and Practice of Citizen Participation in the Judicial System*, 1980 U Ill L F 707, 756.

Some Southern jurisdictions, however, kept African-Americans from jury service even during Reconstruction.[103] In 1876, a newspaper for African-Americans in Savannah observed:

> There is not a single instance on record where a colored juror has served upon any jury in this city or county. We have been told for eight years past, the names of colored men have been in the jury box, and these boxes have been exhausted time and again, and not one colored man's name has ever been drawn.[104]

The years following the Civil War saw four notable legal developments that affected the criminal jury. In 1868, the Fourteenth Amendment declared that no state could enact or enforce any law abridging the privileges or immunities of citizens of the United States. The amendment also forbade any state to deny to any person the equal protection of the laws. Two years later, the Fifteenth Amendment declared that "the right to vote shall not be abridged by the United States or by any State on account of race, color, or previous condition of servitude." The Federal Civil Rights Act of 1875 provided that "no citizen . . . shall be disqualified for service as a grand or petit juror in any court of the United States, or of any State on account of race."[105] And four years later, the Federal Jury Selection Act of 1879 reversed the course of earlier congressional action, facilitated discriminatory jury selection in the federal courts, and brought Reconstruction in the jury box to an end.[106]

Although the Supreme Court has concluded that racial discrimination in jury selection violates the Fourteenth Amendment rights of those excluded from jury service,[107] this reading of the amendment probably does not reflect the "original understanding." Neither the Equal Protection Clause nor the Privileges and Immunities Clause was understood at the time of its enactment to extend political rights (like the right to vote and the right to serve on juries) to African-Americans.[108]

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[103] See Edmund L. Drago, *Black Politicians and Reconstruction in Georgia: A Splendid Failure* 40-41, 96-97 (Louisiana State, 1982).

[104] Colored Tribune (June 3, 1876), quoted in Forman, *History and the Right to Jury Trial* at 93 (cited in note 96) (emphasis omitted).

[105] 18 Stat 335, 336, ch 114, § 4, codified at 18 USC § 243 (1988).

[106] 21 Stat 43, ch 52, § 2 (1879).

[107] *Powers v Ohio*, 499 US 400, 407-08 (1991).

[108] See David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* 384 & n 118 (Chicago, 1985); *Oregon v Mitchell*, 400 US 112, 152 (1970) (Harlan concurring in part and dissenting in part).

Evidence of this fact appeared in the Fourteenth Amendment itself. Section 2 provided that if a state denied the vote to any adult male, excluding Indians not taxed, those excluded would not be counted as part of the state's population in allocating representation in Congress. This provision gave a minor spur to the enfranchisement of African-Americans while confirming that authority to resolve the issue remained with the states. Even more clearly, the enactment of a subsequent amendment to afford African-Americans the vote revealed an understanding that the Fourteenth Amendment itself had not done so.[109]

Separate drafts of the Fifteenth Amendment passed by the House and the Senate extended not only the right to vote but also the right to hold office to African-Americans. When the amendment emerged from a conference committee, however, the office-holding provisions were gone. Senator Edmunds suggested that although Republican incumbents were willing to afford African-Americans the opportunity to vote Republican, they were unenthusiastic about the prospect that African-American candidates might run against them.[110] The Fifteenth Amendment extended the vote to African-Americans but did not confer other political rights upon them—including the right to serve on juries.[111]

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[109] See *Mitchell*, 400 US at 152 (Harlan concurring in part and dissenting in part) (reviewing other evidence as well). To the framers of the Fourteenth Amendment, equal protection of the laws apparently did not mean what many assume that it means today—equal treatment by the government in every respect. It meant equal legal *protection* from civil wrongs.

If this reading of the clause seems odd, consider the status of women and aliens. Only ratification of the Nineteenth Amendment in 1920 afforded women the vote, and it seems unlikely that the framers of the Fourteenth Amendment meant this Amendment to do for women what the Nineteenth Amendment did a half-century later. See *Minor v Happersett*, 88 US 162, 170-71 (1874) (holding that although women could be citizens, their citizenship did not entitle them to vote). Aliens—also "persons" within the meaning of the Equal Protection Clause—cannot vote or serve on juries today.

Congress apparently hesitated to enfranchise African-Americans at the time of the Fourteenth Amendment because many Northern states were unwilling to do so. Republicans, however, confident that African-American voters would support their party, secured ratification of the Fifteenth Amendment two years later. Leonard W. Levy, Kenneth L. Karst, and Dennis Mahoney, eds, 2 *Encyclopedia of the American Constitution* 725-26 (Macmillan, 1986).

[110] Cong Globe, 40th Cong, 3d Sess 1626 (Feb 26, 1869). See Earl M. Maltz, *Civil Rights, the Constitution, and Congress, 1863-1869* 154 (Kansas, 1990).

[111] Some supporters of the Fifteenth Amendment argued, however, that the Amendment conferred the right to hold public office by implication. These supporters maintained that the "right to elect to office carries with it the inalienable and indissoluble and indefeasible right to be elected." See Alan P. Grimes, *Democracy and the Amendments to the Constitution* 57 (Lexington Books, 1978) (quoting Representative Butler). See also Amar, 100 Yale L J at 1203 n 313 (cited in note 48).

Beginning in 1871, immediately following the ratification of the Fifteenth Amendment, Senator Charles Sumner and other Republicans sought federal legislation prohibiting state discrimination in jury selection as well as in other official state actions.[112] These Republican legislators did not dispute the general understanding that the Fourteenth Amendment extended only "civil" rights and not "political" or "social" rights to African-Americans. They nevertheless claimed that the Fourteenth Amendment provided authority for legislation requiring the integration of state juries. In their view, discrimination in jury selection did not violate the right of African-Americans to serve on juries but did violate the right of African-American litigants to the equal protection of the laws. They contended that the procedural rights of criminal defendants and other litigants were "civil," not "political," so that these rights were protected by the Fourteenth Amendment.[113] Sumner and the others who took this view recognized that whites and blacks were not equally free of bias toward black litigants. These legislators were not color-blind, and they foresaw that all-white juries would be instruments of racial oppression. Senator Edmunds declared:

> Where would be the value of declaring that a colored man should have equal rights of trial by jury and equal rights of judgment by his peers, if you are to say that the jurors are

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[112] See Michael W. McConnell, *Originalism and the Desegregation Decisions* (unpublished paper on file with U Chi L Rev). Congress had authorized African-Americans to serve on juries in the District of Columbia in 1869. See An Act for the Further Security of Equal Rights in the District of Columbia, 16 Stat 3, ch 3 (Mar 18, 1869).

[113] See, for example, Cong Globe, 42d Cong, 2d Sess 845 (Feb 6, 1872) (statement of Senator John Sherman):

> It does seem to me, not that it is the right of a man to serve on a jury, but that it is the right of all men to have a fair law and rule by which men of their own race and color may serve on a jury. It is the right of the accused and not the right of the trier . . . .

The opponents of racial discrimination in jury selection occasionally advanced a claim that focused on the rights of the excluded jurors themselves. They declared that, unlike the right to vote or to hold office, the right to serve on juries was *not* a political right. Jurors in England once had been witnesses summoned to report on developments in their communities. The right to jury service might therefore be characterized as a civil right analogous to the right to testify. See 2 Cong Rec 948, 43d Cong, 1st Sess (Jan 27, 1874) (remarks of Senator Sumner); 3 Cong Rec 1866, 43d Cong, 2d Sess (Feb 27, 1875) (remarks of Senator Edmund). Almost a decade before it outlawed racial discrimination in state jury selection, Congress had prohibited state courts from refusing the testimony of African-Americans. See the Civil Rights Act of 1866, 14 Stat 27, ch 31.

> to be composed of the Ku Klux Klan . . . ? You are to put him into the hands of his enemies for trial.[114]

The likelihood that white jurors would discriminate against African-American defendants and other African-American litigants was crucial to the argument that mandating the integration of state-court juries would be constitutional. Yet Republicans were also concerned that all-white juries would refuse to convict white defendants who committed crimes against African-Americans and white Republicans.[115] An epidemic of violence against these groups had prompted the Ku Klux Klan Act of 1871. This act required every juror hearing a prosecution under the act to swear that he had "never, directly or indirectly, counselled, advised, or voluntarily aided" a conspiracy of the sort that the act proscribed.[116] Senator Sherman, a supporter of the act, after reciting a series of atrocities in the South, complained that "from the beginning to the end in all this extent of territory no man has ever been convicted or punished for any of these offenses, not one."[117] Sherman offered as supporting evidence the statements of several Southern judges. One, for example, said:

> In nine cases out of ten the men who commit the crimes constitute or sit on the grand jury, either they themselves or their near relatives or friends, sympathizers, aiders, or abettors; and if a bill is found it is next to impossible to secure a conviction upon a trial at the bar. I have heard of no instance in North Carolina where a conviction of that sort has taken place.[118]

The complaints of federal authorities concerning Southern jury nullification following the Civil War resembled the complaints of Southern authorities concerning Northern jury nullification before the War[119] and the complaints of English

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[114] Cong Globe, 42d Cong, 2d Sess 900 (Feb 8, 1872).

[115] See Forman, *History and the Right to Jury Trial* at 28-46 (cited in note 96). The material in this and the following paragraph is derived mostly from Forman's paper.

[116] 17 Stat 13, 15, ch 22, § 5 (1871). The membership oath of the Ku Klux Klan reputedly required members to obtain places on juries and to vote in favor of fellow members no matter what the evidence. See Cong Globe, 42d Cong, 1st Sess 158 (Mar 18, 1871) (statement of Senator Sherman).

[117] Cong Globe, 42d Cong, 1st Sess 157-58 (Mar 18, 1871).

[118] Id at 158, quoting Judge Russel.

[119] The Fugitive Slave Act of 1793, 1 Stat 302, provided for the return of an escaped slave upon proof of title before a magistrate, but some Northern states passed personal liberty laws giving alleged runaways the right to trial by jury. See Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North, 1780-1861* 73 (Johns Hopkins,

authorities concerning jury nullification in the colonial period.[120] Southern juries, however, appeared to be nullifying laws against personal violence rather than laws requiring cooperation in returning escaped slaves or paying duties imposed by an unrepresentative government.[121] As an African-American commentator said of a later period, the problem was "not so much that the negro fails to get justice before the Courts" as that "too often . . . the . . . white man . . . escapes it."[122]

1974). Henry B. Stanton told the American Anti-Slavery Society in 1839, "Give the panting fugitive this inestimable right in every northern State, and he is safe . . . ." Id. The Supreme Court held the Pennsylvania personal liberty law unconstitutional, however, in *Prigg v Pennsylvania*, 41 US 536, 624-25 (1842).

After *Prigg*, some states provided remedies to alleged fugitive slaves through the writ of habeas corpus and the writ *de homine replegiando* (a complex procedure that allowed access to a jury). See Morris, *Free Men All* at 10-12, 76-79, 169-70. This practice ended when the Supreme Court held that state courts lacked the power to interfere with federal orders enforcing the Fugitive Slave Act. *Ableman v Booth*, 62 US 506, 523-26 (1859). See also Morris, *Free Men All* at 145-46, 178-80.

Anti-slavery forces sought unsuccessfully to include a right to jury trial in the Fugitive Slave Law of 1850, 9 Stat 462. One senator opposed to providing jury trials argued that, even apart from the likelihood that Northern jurors would refuse to return runaway slaves, the delay and expense of jury proceedings would make it nearly impossible for slave owners to recover their property. Cong Globe, 31st Cong, 1st Sess, App 1584 (Aug 19, 1850) (statement of Senator Mason).

Especially in the years following 1850, abolitionists denounced Congress's failure to authorize jury trials in fugitive-slave proceedings. They observed that although the Constitution required the return of fugitive slaves, it said nothing about the use of juries to determine the status of people alleged to be fugitives. These abolitionists decried the hypocrisy of using juries to determine the ownership of cows, oxen, and acres of land but not the ownership of human beings. They argued that when the right to jury trial extended to every twenty-dollar lawsuit for civil damages, depriving a person of liberty without affording her the right to a hearing before a jury was unconscionable. See Forman, *History and the Right to Jury Trial* at 6-10, 16-24 (cited in note 96).

The Fugitive Slave Act of 1850, part of the Compromise of 1850, not only authorized fugitive-slave proceedings before a magistrate, 9 Stat 462, ch 60, § 4, but also permitted the agents of slaveholders to seize fugitives without judicial oversight. Id at 463, ch 60, § 6. Abolitionists sometimes responded by rescuing recaptured runaways. In some jurisdictions, it proved impossible for prosecutors to secure convictions of the rescuers from juries sympathetic to the anti-slavery cause. Leonard W. Levy, *Judgments: Essays on American Constitutional History* 312 n 48 (Quadrangle Books, 1972). See also Morris, *Free Men All* at 148-58; Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* 175-225 (Yale, 1975).

[120] See text accompanying notes 35-44.

[121] Discussing whether jury nullification is justified, Herbert Wechsler once said, "What's sauce for the goose depends on whose ox is being gored." Quoted by H. Richard Uviller in *Proceedings of the Fifty-Third Judicial Conference of the District of Columbia Circuit*, 145 FRD 149, 180 (1992).

[122] William H. Thomas, "The Negro and Crime" 7 (speech at the Southern Sociological Congress, Nashville, May 7-10, 1912), quoted in Ayers, *Vengeance and Justice* at 179 (cited in note 80) (emphasis omitted). See generally William C. Heffernan, *Comments: The Majoritarian Threat Posed by the Jury*, 25 Crim L Bull 79 (1989).

As Michael McConnell has observed, the claim that Congress could forbid state jury discrimination generated "serious qualms among constitutionally scrupulous members [of Congress] generally sympathetic to the civil rights cause."[123] Senator Matthew Carpenter, for example, favored federal legislation outlawing racially segregated public schools but opposed legislation forbidding discriminatory jury selection. In Carpenter's view, the Fourteenth Amendment empowered Congress to desegregate the schools but not to end discrimination in the jury box.[124]

After five years of legislative wrangling, compromise, and defeat, Senator Sumner's position prevailed. The Civil Rights Act of 1875 forbade disqualification from jury service on the basis of race and made it a crime for any state or federal official to discriminate on racial grounds in selecting jurors.[125]

Two years earlier, a West Virginia statute had disqualified African-Americans from jury service.[126] In enacting this statute, the state legislature had not flouted federal requirements; to the contrary, its discriminatory legislation seemed likely to be upheld.[127] In 1880, however, the Supreme Court held the statute unconstitutional in *Strauder v West Virginia*.[128] Endorsing the claim of Senators Sumner and Sherman and other legislators, the Court concluded that the statute violated, not the right of Afri-

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Southern juries' toleration of violence against African-Americans has not been the only evidence suggesting that the framers may have been mistaken in envisioning jurors as the natural defenders of individual liberties. What the framers saw as the jurors' civil libertarianism was also the self-interested majority sentiment of colonists opposed to a particular undemocratic government. Perhaps this conjunction was aberrational; in later years, when civil libertarianism and majority sentiment were less closely linked, individual rights may have been less valued in the jury box. Jurors may in fact be less likely than legal professionals to protect community pariahs, be they freedmen, carpetbaggers, landlords, the phone company, fat people, abusive spouses, escaped convicts, immigrants, gays and lesbians, or Rodney King.

[123] McConnell, *Originalism* at 75 (cited in note 112).

[124] Id at 75 n 279. Carpenter asked, "Can we fix the qualifications for serving as a juror in a State court any more than we can fix the qualification for serving upon the bench of a State court?" Cong Globe, 42d Cong, 2d Sess 760 (Feb 1, 1872).

[125] 18 Stat 335, 336, ch 114, §4 (1875), originally codified at 8 USC § 44 (1925), currently codified at 18 USC § 243 (1988).

[126] 1872-73 W Va Acts 102, ch 47, § 1 (1873).

[127] See Alfred Avins, *The Fourteenth Amendment and Jury Discrimination: The Original Understanding*, in Civil Rights: Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong, 2d Sess 615, 641 (1966) (rejecting the Supreme Court's conclusion in *Ex parte Virginia*, 100 US 339 (1880), and arguing that "federal laws banning jury discrimination in state courts are in excess of Congress' constitutional power to enact").

[128] 100 US 303 (1880).

can-Americans to serve on juries, but the right of African-American defendants to equal protection of the laws.[129]

The defendant in *Strauder* had been indicted and tried for the murder of his wife during the two years between enactment of the West Virginia statute and the passage of the Civil Rights Act of 1875. His trial by an all-white jury therefore did not violate the federal statute. In a companion case to *Strauder*, however, the Court upheld the constitutionality of Congress's 1875 prohibition of racial discrimination in jury selection.[130]

By the time of the *Strauder* decision, the temper of Congress had changed, and Reconstruction was almost at an end. During the Civil War, Congress had enacted measures requiring federal jurors to swear their past and future loyalty to the United States and disqualifying most men who fought for the Confederacy from federal jury service.[131] Congressional Democrats resented this exclusion, and they also resented the perceived "packing" of jury boxes by Republican officials.[132] A Congressman from Ohio complained that the people selected as jurors in his state were usually "ignorant and prejudiced colored men." A Senator from Alabama claimed that federal marshals appointed only African-Americans and Northern whites. An Alabama Representative maintained that federal jurors were frequently Republican government employees. And a Senator from Tennessee protested that federal marshals exacted promises from jurors to decide in favor of the government.[133]

Complaints of this sort led to the Federal Jury Selection Act of 1879.[134] The federal courts previously had borrowed jury-selection procedures from the courts of the states in which they sat.[135] In place of these procedures, the 1879 Act authorized federal courts to employ either of two different mechanisms for selecting venires. Both mechanisms seemed likely to nullify in

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[129] Id at 308-10.

[130] *Ex parte Virginia*, 100 US 339, 344-49 (1880).

[131] An Act Defining Additional Causes of Challenge for Grand and Petit Jurors, 12 Stat 430, ch 103, §§ 1-2 (June 17, 1862). Section 1 of the Act (Confederate service disqualification) was repealed by the Act to Enforce the Provisions of the Fourteenth Amendment, 17 Stat 13, 15, ch 22, § 5 (Apr 20, 1871). When Congress codified all federal statutes in the Revised Statutes of 1874, however, it included § 1, apparently by mistake. There was great confusion about whether § 1 was still in force. See Kershen, 1980 U Ill L F at 712-15 (cited in note 102).

[132] See Kershen, 1980 U Ill L F at 717-21.

[133] Id at 733, citing 9 Cong Rec 783, 2035-36, 1901, and 1791 (1879).

[134] 21 Stat 43, ch 52, § 2 (1879).

[135] See text accompanying notes 56-58.

practice what the act reaffirmed in theory—that no citizen could be disqualified from jury service on account of race, color, or previous condition of servitude.

Rather than permit federal officials to use state procedures to select potential jurors, the Act first permitted these officials to draw prospective jurors from the pools actually used by the state courts. Alternatively, the Act authorized the selection of federal jury pools by two officials, each of whom would supply half the names. One of these officials would be the clerk of the federal court; the other, a judicially appointed commissioner who "shall be . . . a well-known member of the principal political party . . . opposing that to which the clerk may belong . . . ."[136] Federal courts continued to select potential jurors through these mechanisms until the Federal Jury Selection and Service Act of 1968 declared that federal jury panels must be "selected at random from a fair cross-section of the community . . . ."[137]

In *Strauder* and the Civil Rights Act of 1875, the Supreme Court and Congress had effectively (if indirectly) recognized the right of African-Americans to serve on juries. Yet the right remained unenforced for most of a century.[138] Booker T. Washington observed at the end of the nineteenth century, "In the whole of Georgia & Alabama, and other Southern states not a negro juror is allowed to sit in the jury box in state courts."[139] A 1910 study found that African-Americans rarely served on juries in Florida, Louisiana, Mississippi, Missouri, South Carolina, and Virginia—and that they never served in Alabama and Geor-

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[136] 21 Stat 43, ch 52, § 2.

[137] Pub L No 90-274, § 101, 82 Stat 53, 54, codified at 28 USC § 1861 (1988). The 1968 Act also provided that "[n]o citizen shall be excluded . . . on account of race, color, religion, sex, national origin, or economic status." Pub L No 90-274, § 101, 82 Stat 54, codified at 28 USC § 1862 (1988).

[138] See Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 Tex L Rev 1401, 1414, 1432-33 (1983). The exclusion of African-Americans from Southern juries may have been partly responsible for the increased number of African-Americans incarcerated in this region. In five Southern states in 1865, only 150 blacks and 150 whites were imprisoned. Thirty years later, the number of white prisoners remained the same, but the number of African-American prisoners had grown to 1500. Ayers, *Vengeance and Justice* at 180 (cited in note 80) (graph). Some Republicans complained that "the courts of law are employed to reenslave the colored race." Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* 594 (Harper and Row, 1988).

[139] Quoted in Schmidt, 61 Tex L Rev at 1406.

gia.[140] Of the period from the end of Reconstruction to the New Deal, Benno Schmidt has written:

> [T]he systematic exclusion of black men from Southern juries was about as plain as any legal discrimination could be short of proclamation in state statutes or confession by state officials.[141]

One contemporary observer in Georgia reported that the names of freedmen seemed to be "nailed to the bottom" of the boxes from which venires were drawn.[142] As late as the mid-twentieth century, the Supreme Court was required to declare unconstitutional such flagrantly discriminatory devices as the color-coding by race of tickets placed in the box for jury selection[143] and selection from among the friends and acquaintances of white jury commissioners.[144]

In 1940, the Carnegie Foundation study of the Negro in America supervised by Gunnar Myrdal discovered that African-Americans frequently served on juries in larger Southern cities and in Southern federal courts. Nevertheless, "the vast majority of rural courts in the Deep South . . . made no pretense of putting Negroes on jury lists, much less calling or using them in trials."[145]

In the summer of 1955 in Money, Mississippi, Emmett Till, a fourteen-year-old African-American visitor from Chicago, accepted a dare to speak to a white woman. "Bye, Baby," he said. Several days later, Till's mangled body was discovered in the Tallahatchie River. Roy Bryant, the husband of the white woman, and J. W. Milam, the woman's brother, were charged with Till's murder. The principal evidence against them was the testimony of an African-American, Mose Wright. Following the defendants' acquittal by an all-white jury, they sold their story to a journalist for $4,000. Bryant and Milam explained that they

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[140] Gilbert Thomas Stephenson, *Race Distinctions in American Law* 253-72 (AMS Press, 1969).

[141] Schmidt, 61 Tex L Rev at 1406. The exclusion of African-Americans from jury service was of course only one part of a pervasive regime of racial subordination, a regime that included equally flagrant abrogation of the Fifteenth Amendment right of African-Americans to vote.

[142] Foner, *Reconstruction* at 595 (cited in note 138).

[143] See *Avery v Georgia*, 345 US 559, 562-63 (1953).

[144] See *Cassell v Texas*, 339 US 282, 290 (1950); *Hill v Texas*, 316 US 400, 402 (1942).

[145] Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* 549-50 (Harper and Row, 2d ed 1962), quoting Arthur Raper, *Race and Class Pressures* 79, 80 (1940) (unpublished manuscript prepared for Myrdal's study).

had meant merely to frighten Till but "had" to kill him when he refused to beg for mercy. The incident focused the nation's attention on both Southern racism and Southern juries.[146]

In 1957, Jack B. Weinstein surveyed lawyers in Northern and Southern cities. The lawyers reported that although African-Americans did serve on petit juries, they had never been known to serve on grand juries in San Francisco and St. Paul.[147] In Chicago, prosecutors and defense attorneys had only recently abandoned their agreement to use peremptory challenges to dismiss all African-American jurors.[148]

The Supreme Court has consistently held that the Constitution does not require random jury selection. For example, in 1970 the Court upheld the constitutionality of an Alabama requirement that jurors be "generally reputed to be honest and intelligent and . . . esteemed in the community for their integrity, good character and sound judgment."[149] Nevertheless, beginning in 1935, in cases in which blacks had not within memory served on a county's grand or petit juries, the Court has permitted inferences of unconstitutional discrimination to be drawn from inadequately explained disparities between the composition of jury panels and county populations.[150] The Court's statistical standards have grown increasingly demanding.[151]

Even when jury panels were lawfully chosen, one form of undisguised discrimination against African-Americans persisted until 1986. In 1965, in *Swain v Alabama*,[152] the Supreme Court afforded prosecutors and defense attorneys virtually unrestricted

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[146] See Juan Williams, *Eyes on the Prize: America's Civil Rights Years, 1954-1965* 39-57 (Viking, 1987).

[147] Weinstein's study is described in Jack Greenberg, *Race Relations and American Law* 328-29, 405-12 (Columbia, 1959). In many places, grand jurors were selected by commissioners and judges in a more informal manner than petit jurors, and in some places, service on a grand jury was something of a social honor. See, for example, Robert A. Carp, *The Harris County Grand Jury—A Case Study*, 12 Houston L Rev 90, 93-97 (1974).

[148] Greenberg, *Race Relations and American Law* at 406-07.

[149] *Carter v Jury Commission of Greene County*, 396 US 320, 331, 335-37 (1970). See also *Turner v Fouche*, 396 US 346, 354-55 (1970) (upholding a Georgia law allowing jury commissioners to eliminate anyone found not "upright" and "intelligent").

[150] See *Norris v Alabama*, 294 US 587, 591-93 (1935). *Norris* was the second prosecution of one of the Scottsboro boys. For the story of the first prosecution, see *Powell v Alabama*, 287 US 45 (1932). See also Dan T. Carter, *Scottsboro: A Tragedy of the American South* (Louisiana State, 1969); James Goodman, *Stories of Scottsboro* (Pantheon, 1994).

[151] See *Turner*, 396 US at 357-60; *Alexander v Louisiana*, 405 US 625, 629-32 (1972); *Castaneda v Partida*, 430 US 482, 488 n 8, 495-98 (1977).

[152] 380 US 202 (1965).

discretion to eliminate African-Americans through the use of peremptory challenges. In *Swain*, an all-white jury in Talledega County, Alabama, had convicted a nineteen-year-old black man of raping a seventeen-year-old white woman and had sentenced him to death. Since at least 1950, no African-American had served on a civil or criminal jury in Talledega County, and in *Swain*, the prosecutor used six peremptory challenges to remove from the jury panel the only six African-Americans eligible to serve.[153]

In an opinion by Justice White, the Supreme Court affirmed the defendant's conviction and sentence. It recognized that the use of peremptory challenges "for reasons wholly unrelated to the outcome of the particular case . . . [simply] to deny the Negro the [ ] right and opportunity to participate in the administration of justice" would be unconstitutional, but the Court held that the prosecutor's exclusion of all potential African-American jurors did not establish the proscribed motivation.[154]

In 1986, the Court overruled *Swain* in *Batson v Kentucky*, holding that a prosecutor's use of peremptory challenges to eliminate African-Americans on the basis of race (even for strategic, trial-related reasons) violated the Equal Protection Clause.[155] The enforcement mechanism created by the Court was cumbersome, however, and the decision left a number of apparent loopholes.[156] In 1991, the Court closed one of these loopholes, holding that a defendant need not be a member of the same race as an excluded juror to challenge this juror's exclusion.[157] In 1992, the Court closed another, holding that the exclusion of African-Americans by defense attorneys as well as by prosecutors violated the Equal Protection Clause.[158] Other apparent loopholes remain, however, and the history of efforts to secure an equal place in the jury box for Americans of African descent is not yet concluded.[159]

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[153] Id at 205-07.

[154] Id at 224, 226.

[155] 476 US 79, 97 (1986).

[156] See Alschuler, 56 U Chi L Rev at 167-211 (cited in note 84).

[157] See *Powers v Ohio*, 499 US 400, 416 (1991).

[158] See *Georgia v McCollum*, 112 S Ct 2348, 2354-56 (1992).

[159] For example, *Batson*'s requirement of nondiscrimination is satisfied by the articulation of a plausible nonracial reason for exclusion, *Batson*, 476 US at 97, and the invention of such a reason does not seem difficult. One federal court has upheld the exclusion of an African-American juror for failing to maintain eye contact with a prosecutor, see *United States v Cartlidge*, 808 F2d 1064, 1070-71 (5th Cir 1987), while another has upheld the exclusion of an African-American for staring at the prosecutor too long. See *United States v Mathews*, 803 F2d 325, 330-31 (7th Cir 1986). Still another court has accepted the explanation that the government struck a prospective juror because he strongly favored civil rights. See *United States v Payne*, 962 F2d 1228, 1233 (6th Cir 1992).

C. Women

Long after *Strauder v West Virginia* held the exclusion of African-American men from jury service unconstitutional, the statutory exclusion of women persisted. Linda K. Kerber is preparing a history of American women's halting progress toward equal citizenship in voting, in military service, and on juries,[160] and Kerber has shared some of her research with us. The remainder of this Section is, in essence, a preview of part of her important work.

Even before the ratification of the Nineteenth Amendment in 1920, women voted and served on juries in several states.[161] The first jury service by women in America (and, indeed, in any common law jurisdiction) occurred in the Wyoming Territory in 1870. This landmark brought a congratulatory telegram from the King of Prussia to President Grant, but the territory's new chief justice brought an end to Wyoming's experiment in equality in the courtroom within two years.[162] Women continued to vote in

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Devices other than the peremptory challenge also may effectively exclude African-Americans from jury service. One such device attracted international attention when, on April 29, 1992, a jury composed of ten whites, one Hispanic, and one Asian-American failed to convict any of four white Los Angeles police officers of misconduct despite the fact that most of those officers had been videotaped kicking and beating Rodney King, an African-American suspect, as he lay on the ground. A change of venue from Los Angeles County to Ventura County, California, almost certainly accounted for the absence of any African-Americans on the jury. See Timothy P. O'Neill, *Wrong Place, Wrong Jury*, NY Times 23 (May 9, 1992); David Margolick, *As Venues Are Changed, Many Ask How Important a Role Race Should Play*, NY Times 7 (May 23, 1992). The Ventura County jury's action triggered two days of rioting in Los Angeles that cost fifty-eight lives and nearly a billion dollars in property damage. See Seth Mydans, *After the Riots*, NY Times A20 (May 14, 1992); Neal R. Peirce, *Look Homeward, City of Angels*, 24 Natl J 1250 (May 23, 1992).

Mayor Tom Bradley of Los Angeles voiced the sentiment of many Americans when he said of the videotape, "We saw what we saw, and what we saw was a crime." Bill Boyarsky, *Ashes of a Mayor's Dream*, LA Times B2 (May 1, 1992). For a thoughtful debate concerning the merits of the jury's verdict, see Roger Parloff, *Maybe the Jury was Right*, Am Lawyer 7 (June, 1992); Terence Moran, *For Simi Valley Jurors, Cop Credibility was a Given*, NJ L J 17 (June 15, 1992); Roger Parloff, *That Jury in California Still May Have Been Right*, NJ L J 15 (July 6, 1992).

A federal court jury composed of nine whites, two African-Americans, and one Hispanic later convicted two of the officers involved in the beating of violating Rodney King's civil rights. See Jim Newton, *Racially Mixed Jury Selected for King Trial*, LA Times A1 (Feb 23, 1993); Jim Newton, *Koon, Powell Get 2½ Years in Prison*, LA Times A1 (Aug 5, 1993).

[160] See Linda K. Kerber, *"A Constitutional Right to be Treated Like . . . Ladies": Women, Civic Obligation and Military Service*, 1993 U Chi L Sch Roundtable 95.

[161] Kerber lists Utah, Washington, Kansas, and New Jersey. In some states, women voted but did not serve on juries.

[162] Grace Raymond Hebard, *The First Woman Jury*, 7 J Am Hist 1293, 1301-04, 1325-26 (1913). A cartoon depicting the first women jurors was accompanied by the jingle,

Wyoming, and when the territory was admitted to statehood in 1890, the state constitution proclaimed both that "male and female citizens . . . shall equally enjoy all civil, political and religious rights and privileges"[163] and that "political rights and privileges . . . shall be without distinction of race, color, sex, or any circumstance or condition whatsoever . . . ."[164] Nevertheless, women did not again serve on juries in Wyoming until the 1940s.[165]

Just as the Fifteenth Amendment afforded African-Americans the vote without guaranteeing them the right to serve on juries, the Nineteenth Amendment enfranchised women and did no more. In many states, jury-qualification statutes described jurors in part as "electors." Once the Nineteenth Amendment had made women "electors," they therefore became jurors as well.[166] In 1925, however, the Illinois Supreme Court balked at this straightforward reading of the state's jury-qualification statute. The court observed that when the Illinois General Assembly had used the words "legal voters" and "electors" in 1874, those words included only men. If the General Assembly now wished to include women, it would be required to say so.[167] The legislature did say so—fourteen years later.[168]

In other states, jury qualification statutes did not use the shorthand term "electors." Instead, they duplicated the suffrage qualifications and so described jurors in part as "men." In these states, new legislation was needed to enable women to serve on juries. In 1930, the Executive Secretary of the League of Women Voters complained that "Getting the word 'male' out of jury

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"Baby, baby, don't get in a fury; Your mamma's gone to sit on a jury." Id at 1313.

[163] Wyo Const of 1889, Art VI (Suffrage), § 1 (Equal Rights).

[164] Id at Art I (Declaration of Rights), § 3 (Equal Political Rights). See also Hebard, 7 J Am Hist at 1337 (describing a "woman's convention" that lobbied for passage of these constitutional provisions).

[165] See *McKinney v State*, 3 Wyo 719, 30 P 293, 295 (1892) (holding that only women litigants have standing to object to the exclusion of women from juries; stating in dicta that the right to vote does not include the right to serve on juries; and refusing to decide whether or not jury duty is a "right or privilege").

[166] Kerber reports that by 1923, eighteen states and the territory of Alaska permitted women to serve on juries.

[167] See *People v Barnett*, 319 Ill 403, 150 NE 290, 290-92 (1925). See also *Commonwealth v Welosky*, 276 Mass 398, 177 NE 656, 658, 661 (1931) (holding that despite the enfranchisement of women, the phrase "person qualified to vote" in a state jury-qualification statute referred to men alone).

[168] An Act to Amend Section 1 of An Act Concerning Jurors, 1939 Ill Laws 691, codified at Ill Rev Stat ch 78, § 1 (1941).

statutes is requiring something like a second suffrage campaign—laborious, costly and exasperating."[169]

As the word "male" came out of jury statutes, something else sometimes came in. A 1949 Massachusetts statute exempted a woman from serving in any case in which the presiding judge had reason to believe that she would "likely . . . be embarrassed by hearing the testimony or by discussing [it] in the jury room."[170] A 1921 Oregon statute provided that "in all cases in which a minor under the age of eighteen years is involved, either as defendant or as complaining witness, at least one-half the jury shall be women . . . ."[171]

The most frequent form of special treatment for women was an exemption from jury service that women could claim on the basis of sex alone. Kerber reports that the first New York statute permitting women to serve on juries also permitted exemptions to be claimed by, among other people, "[a] clergyman . . . officiating as such," "[a] practicing physician . . . having patients requiring his daily professional attention," "a duly licensed embalmer," "[a]n attorney . . . regularly engaged in the practice of law," and "[a] woman."[172] In some states, women were not required to claim their exemption; they served on juries only if they registered at the courthouse or took other steps to volunteer.[173]

In *Hoyt v Florida*, the Supreme Court considered the constitutionality of a jury system in which women served only if they volunteered, but men were drafted.[174] The year was 1961; John F. Kennedy was President; and the egalitarian Warren Court declared without dissent, "woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State . . . to conclude that a woman should be

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[169] Gladys Harrison, *Re-Fighting an Old Battle*, NY Herald Trib Mag 10 (Feb 9, 1930). For a summary of the arguments offered against permitting women to serve on juries, including the argument that hearing unseemly evidence in court and being sequestered with men would threaten women's purity, see Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U Cin L Rev 1139, 1166-68 (1993).

[170] An Act Regulating Jury Lists and Making Women Liable to Serve as Jurors, 1949 Mass Acts and Resolves 306, ch 347, § 2.

[171] An Act Relating to Juries, 1921 Or Laws 513, 515, ch 273, § 10. See also R. Justin Miller, *The Woman Juror*, 2 Or L Rev 30, 38-39 (1922). Remarkably, the same statute permitted women to claim an automatic exemption from jury service. 1921 Or Laws 514, § 6 (11).

[172] An Act in Relation to the Qualifications and Exemption of Women as Jurors, 1937 NY Laws 1171, 1172, ch 513, § 3.

[173] See, for example, *Taylor v Louisiana*, 419 US 522, 525 (1975) (striking down such a provision).

[174] 368 US 57 (1961).

relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities."[175] The Burger Court effectively overruled *Hoyt* in 1975.[176]

The last major legal barrier to equal participation in jury service for women has been the peremptory challenge. In the early 1970s, a training manual for Dallas prosecutors declared, "I don't like women jurors because I can't trust them. They do, however, make the best jurors in cases involving crimes against children. It is possible that their 'women's intuition' can help you if you can't win your case with the facts."[177] In 1994, in *J. E. B. v T. B.*,[178] the Supreme Court held that the equal protection clause forbids the use of peremptory challenges to exclude prospective jurors on the basis of gender.[179]

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[175] Id at 62. Kerber notes that Florida's Attorney General had argued that women's special responsibilities persisted despite the availability of TV dinners.

[176] *Taylor*, 419 US at 537.

[177] Jon Sparling, *Jury Selection in a Criminal Case* (unpublished, undated manuscript on file with U Chi L Rev), quoted in Alschuler, 56 U Chi L Rev at 210 (cited in note 84).

[178] 114 S Ct 1419 (1994).

[179] *J. E. B.* was a paternity action in which the plaintiff's lawyer had secured an all-woman jury by challenging men. Reflection on the case suggests how lawyers may sometimes evade the *J. E. B.* ruling in the same way that they sometimes evade its precursor, *Batson v Kentucky*, 476 US 79 (1986), see note 159, and how even well-intentioned lawyers may find compliance with the Court's decision difficult. Imagine that a lawyer in a paternity action believes, as the plaintiff's lawyer in *J. E. B.* apparently did, that women jurors are more likely to favor her position than men jurors, and suppose that this lawyer lacks any clearer basis for exercising peremptory challenges. Then consider how this lawyer is likely to use her strikes in the post–*J. E. B.* period.

The lawyer may (1) conclude that, lacking any salient basis for challenge other than gender, she will decline to exercise her peremptory strikes; (2) employ a mental quota system and strike one woman for every man to avoid discrimination on the basis of gender; (3) employ a different mental quota system and strike two women for every three men to avoid *evident* discrimination on the basis of gender; or (4) strike some or all of the same prospective jurors whom she would have struck before *J. E. B.* (that is, the jurors whom she truly wants to strike) while attempting to explain her strikes on a basis other than gender. For example, if the lawyer selects the least well-dressed men—the ones without neckties—she may report that her strikes were based entirely, primarily, or partly on the prospective jurors' dress or class. Declaring that the strikes were based *partly* on dress or class would even be true; and unless an unkempt, unexcused woman remained on the panel, a stronger statement might be credible. Imagining which of these options (or others) the lawyer would be likely to choose provides a test of one's view of human (or perhaps just lawyers') nature. To demand genuine gender-blindness in a case like *J. E. B.*, however, as the Supreme Court apparently did, is probably to demand the impossible.

III. THE DISAPPEARANCE OF THE JURY'S AUTHORITY TO DECIDE ISSUES OF LAW

A. The Separation of Law and Fact in England

In 1628, Chief Justice Coke described the basic division of authority between English judges and juries: Judges do not answer questions of fact; juries do not answer questions of law.[180]

Coke's declaration did not entirely settle the issue. Twenty-one years after his pronouncement, John Lilburne, on trial for treason, requested permission to address the jury on issues of law. The presiding justice, Lord Keble, cited Coke and denied Lilburne's request. Lilburne, the most prominent of the "Levellers," then denounced Keble and other English judges as "Norman intruders."[181] He declared, "The jury by law are not only judges of fact, but of law also . . . ."[182]

Lilburne cited no authority for this proposition, and according to a prominent historian of the English jury, Thomas A. Green, there was none.[183] Lilburne in fact asserted several apparently nonexistent rights during his trial, and Lord Keble ridiculed his pro se representation: "You have spent a little time, but you have done yourself no good; I thought you had understood the law better than I see you do."[184]

Lilburne, however, had done himself a great deal of good. The jury acquitted him in less than an hour. Bonfires, the ringing of church bells, and much eating and drinking marked the public celebration of his acquittal. Shortly after Lilburne's victory, a medal appeared bearing the names of the jurors in his case and Lilburne's portrait. The medal was inscribed, "John Lilburne, saved by the power of the Lord and the integrity of his jury, who are judge of law as well as fact."[185]

Two years later, Parliament ordered Lilburne's banishment, and two years after that, Lilburne defied Parliament by return-

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[180] Sir Edward Coke, 1 *The First Part of the Institutes of the Laws of England* Lib 2, Cap 12 § 234 at 155(b) (Hargrave and Butler, 16th ed 1809) ("Ad questionem facti non respondent judices . . . ad questionem juris non respondent juratores."). Coke invoked this formula on several occasions, once erroneously attributing it to Bracton's thirteenth century treatise. The formula apparently took shape in the sixteenth century. See James B. Thayer, *"Law and Fact" in Jury Trials*, 4 Harv L Rev 147, 148-49 (1890).

[181] Green, *Verdict According to Conscience* at 173 (cited in note 1). It had, after all, been only 583 years since the Norman Conquest.

[182] Id.

[183] Id at 175.

[184] Id at 174.

[185] Id at 175-76.

ing to London. Placed on trial for this act, Lilburne again argued that the jury should judge both law and fact. He pleaded that his banishment and indictment were invalid. Once more a jury acquitted. Shortly after his acquittal, Lilburne became a Quaker. His views of the jury's law-finding powers were championed by Quakers and others in the decades that followed, but they never gained official acceptance.[186]

B. The Authority of American Juries to Judge Both Fact and Law

In England, although juries may have often disregarded the instructions of judges, they never acquired de jure authority to do so. In America following the Revolution, however, the authority of juries to resolve legal issues was frequently confirmed by constitutions, statutes, and judicial decisions.

When and how American juries gained their authority to resolve questions of law is obscure.[187] Indeed, the question of the jury's authority to decide legal questions seems barely to have been noticed until it arose in eighteenth-century political cases in which juries defied English authority.[188] When, however, Andrew Hamilton declared during the Zenger trial that juries "have the right . . . to determine both the law and the fact," he insisted that this authority was "beyond all dispute."[189] Hamilton's position probably reflected established practice in at least some colonies.

In England during the American colonial period, judges considered themselves the members of a learned profession, and others, including jurors, generally perceived them in this way too. Few trained lawyers and little law were to be found in the colonies, however,[190] and the American jury's power to resolve

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[186] Id at 192-99. In 1771, Edmund Burke ridiculed the claim—still asserted in libel cases—that jurors should judge questions of law. Burke thought it preposterous for a juror to tell a judge, "You are so grossly ignorant, that I, fresh from my hounds, from my plough, my counter, or my loom, am fit to direct you in your own profession." Burke, *Speech on the Powers of Juries in Prosecutions for Libels*, in 7 *Works of Edmund Burke* at 105, 119 (cited in note 42).

[187] A statute of the Plymouth Colony in 1623 declared that "all criminal *facts* . . . should [be tried] by the verdict of twelve Honest men to be Impanelled by Authority in forme of a Jury upon their oaths." Quoted in Murrin, *Magistrates, Sinners, and a Precarious Liberty* at 157 (cited in note 2) (emphasis added).

[188] In the main, American colonists seemed substantially less interested in the powers of juries in the seventeenth century than in the eighteenth, when juries took a more active political role. See notes 15, 17.

[189] See text accompanying note 29.

[190] See, for example, John M. Murrin, *The Legal Transformation: The Bench and Bar*

questions of law may have arisen largely from this circumstance. In the absence of law books and law-trained judges, jurors may have seemed about as well suited to resolve legal issues as anyone else.[191]

The Earl of Bellomont reported to the English Government in 1699 that judges in colonial Rhode Island "give no directions to the jury nor sum up the evidence to them."[192] Rhode Island judges apparently began offering instructions on the law only in about 1833.[193] The judges formerly had been employed "not for the purpose of deciding causes . . . but merely to preserve order, and see that the parties had a fair chance with the jury."[194]

In civil cases in seventeenth-century Connecticut, the customary division of authority between judge and jury was recognized in form but disregarded in fact.[195] Bruce H. Mann's study of these cases concluded:

> There is no indication that judges instructed juries on the law to apply, although by the end of the century judges may have made a general charge to identify for the jury the questions they were to consider . . . . There were no issues to be "framed" for the jury because the entire dispute was within the province of the jury.[196]

In Massachusetts, although judges sometimes did offer jurors their views of the law, jurors were entitled to disregard these views, and they often did.[197] Indeed, until the early nineteenth century, the trial bench in Massachusetts typically consisted of at

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of Eighteenth-Century Massachusetts, in Stanley N. Katz and John M. Murrin, eds, *Colonial America: Essays in Politics and Social Development* 540 (Knopf, 3d ed 1983).

[191] Moreover, Americans seemed suspicious of professional lawyers even when few lawyers were to be found in the colonies. The Massachusetts Body of Liberties of 1641 prohibited anyone from accepting a fee to assist another in court. Although the legislature omitted this provision from its Code of 1648, it later, in 1663, prohibited any "usual and Common Attorney in any Inferior Court" from serving in the legislature. Id at 541-42.

[192] Quoted in Amasa M. Eaton, *The Development of the Judicial System in Rhode Island*, 14 Yale L J 148, 153 n * (1905).

[193] Amasa Eaton drew this conclusion from a statement made by the trial judge to the jury in the murder trial of Ephraim K. Avery in 1833: "Until the statute, passed within a few years, making it the duty of the presiding judge to charge the jury upon the law, no court in this state had adopted the practice of instructing the jury . . . ." Eaton explained that prior to 1833 the judge, "if a layman," was unlikely to instruct the jury because "he did not know how to." Id.

[194] Daniel Chipman, quoted in Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 Harv L Rev 582, 591 (1939).

[195] Mann, *Neighbors and Strangers* at 70 (cited in note 2).

[196] Id at 74, 85.

[197] See Nelson, *Americanization of the Common Law* at 3, 13-35 (cited in note 2).

least three judges. When these judges offered conflicting opinions of the law, jurors had little choice but to resolve legal issues for themselves.[198]

Nine of the eleven judges who sat on the Superior Court of Massachusetts between 1760 and 1774 had not practiced law, and six of these nine had no legal training.[199] Chief Justice Thomas Hutchinson of Massachusetts confessed in 1771, "I never presumed to call myself a Lawyer . . . . The most I could pretend to was when I heard the Law laid on both sides to judge which was right."[200]

The first lawyer ever to serve on the Vermont Supreme Court took his seat in 1787.[201] A few years earlier, only one of the three justices of the Superior Court of New Hampshire had any legal training; the other judges of this court were a clergyman and a physician.[202] Immediately after the Revolution, the Supreme Court of New Jersey consisted of one judge, a layman.[203] From 1814 to 1818 a blacksmith sat on the highest court of Rhode Island, and from 1819 to 1826 a farmer was the court's chief justice.[204]

Even when capable and knowledgeable lawyers appeared on the bench, they sometimes had limited access to law. Chancellor James Kent said of his early judicial service in New York, "There

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[198] Id at 3.

[199] Id at 33.

[200] Letter of Thomas Hutchinson to John Sullivan, March 29, 1771, quoted in L. Kinvin Wroth and Hiller B. Zobel, *Introduction*, in L. Kinvin Wroth and Hiller B. Zobel, eds, 1 *Legal Papers of John Adams* xli (Belknap, 1965).

[201] Lawrence M. Friedman, *A History of American Law* 126 (Simon and Schuster, 2d ed 1985).

[202] Roscoe Pound, *The Spirit of the Common Law* 113 (Marshall Jones, 1921).

[203] John Whitehead, *The Supreme Court of New Jersey*, 3 Green Bag 401, 402 (1891).

[204] Pound, *The Spirit of the Common Law* at 113. In New York in 1763, fifty-nine percent of the justices of the peace had no legal training, and some were illiterate. Greenberg, *Crime and Law Enforcement* at 175 (cited in note 71). In early eighteenth-century Massachusetts:

> the regular practice of law fell to a host of "pettifoggers" whose conduct easily confirmed the province's direst fears that life for the lawyers would mean death for the law. In Hampshire County, an ex-tailor, Cornelius Jones, outraged the court with his unmatched talent for postponing the execution of justice. In York County, the few regular attorneys were in some cases barely literate . . . . Lack of numbers among the skilled and lack of skill among the numbers who practiced law left a vacuum which gentlemen amateurs often filled in individual cases, perhaps most often as favors for their friends. A few ministers accepted occasional cases for members of their congregations.

Murrin, *The Legal Transformation* at 544 (citations omitted) (cited in note 190).

were no reports or state precedents . . . . We had no law of our own and nobody knew what [it] was."[205]

Although the authority of American juries to judge questions of law may have arisen from haphazard practice at a time when most judges lacked legal training, this power of the jury became a symbol of trust in the public's sense of justice. A farmer justice of the New Hampshire Supreme Court instructed a jury to use common sense rather than the common law, saying that "[a] clear head and an honest heart are [worth] more than all the law of the lawyers."[206] In 1771, John Adams called it "an Absurdity to suppose that the Law would oblige [jurors] to find a Verdict according to the Direction of the Court, against their own Opinion, Judgment, and Conscience."[207]

C. The Contest Over the Jury's Authority to Decide Issues of Law

Following the Revolution, John Adams's view of the jury was increasingly challenged. John Langbein has written:

> In the first decades of American independence there occurred a titanic struggle about the character of American law . . . . Arrayed on one side were people who were hostile to lawyers and to legal doctrine. They viewed the legal system as serving an essentially arbitral function: Ordinary people, applying common sense notions of right and wrong, could resolve the disputes of life . . . . Opposing this vision of folk law were those who understood that the intrinsic complexity of human affairs begets unavoidable complexity in legal rules and procedures. With legal complexity comes legal professionalism.[208]

No issue focused the struggle between professional and popular justice more sharply than the power of the jury to resolve questions of law. Both sides scored victories on this issue from the early days of the Republic through the end of the nineteenth century. It was only during the second half of this century in fact

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[205] Quoted in Pound, *The Spirit of the Common Law* at 113. Kent's claim may have been exaggerated, see John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 Colum L Rev 547, 571 n 117 (1993), but written opinions and law reports were rare in late eighteenth- and early nineteenth-century America. See id at 571-84.

[206] See Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* 115 (Oxford, 1971).

[207] Wroth and Zobel, eds, 1 *Legal Papers of John Adams* at 230 (cited in note 200).

[208] Langbein, 93 Colum L Rev at 566 (cited in note 205) (footnote omitted).

that the champions of legal professionalism gained clear ascendancy.

The United States Supreme Court's last jury trial occurred early in its history, before the end of the eighteenth century.[209] In 1794 (in the second of the Court's three jury trials), a special jury was impanelled to hear part of the proceedings in *Georgia v Brailsford*.[210] Chief Justice John Jay secured the approval of his fellow justices for the charge that he delivered to the *Brailsford* jurors.[211] This charge declared, "[I]t is presumed that juries are the best judges of the facts; it is, on the other hand, presumable, that the court are the best judges of the law . . . ."[212] Jay emphasized, however, that jurors could disregard this presumption: "It must be observed, that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy."[213]

Chief Justice John Marshall's charge to the jury in the treason trial of Aaron Burr in 1807 declared:

> The jury have now heard the opinions of the court on the law of the case. They will apply that law to the facts and will find a verdict of guilty or not guilty as their own consciences may direct.[214]

By 1835, sentiment had changed sufficiently that Justice Joseph Story, sitting as a trial judge, could expressly reject a lawyer's argument that "the jury are the judges of the law as well as of the fact." On this question, Story declared that he had maintained "a decided opinion during [his] entire professional career."[215] Although Story recognized that the jury's general verdict was "compounded [both] of law and of fact," he denied:

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[209] Hampton L. Carson, 1 *The History of the Supreme Court of the United States* 169 n 1 (Ziegler, 3d ed 1902).

[210] 3 US 1 (1794).

[211] Charles Warren, 1 *The Supreme Court in United States History* 104 (Little, Brown, 1923).

[212] 3 US at 4.

[213] Id.

[214] Quoted in *Sparf and Hansen v United States*, 156 US 51, 67 (1895) (emphasis omitted). Marshall's statement that the jurors "will find a verdict . . . as their own consciences may direct" could be interpreted as a statement of fact rather than as a statement of the jurors' legal authority. The jurors who heard Marshall's instructions, however, were unlikely to have parsed his language so closely. In view of the impeachment of Justice Samuel Chase by the House of Representatives two years earlier, see text accompanying notes 217-221, Marshall may have chosen his language with care.

[215] *United States v Battiste*, 24 F Cas 1042, 1043 (D Mass 1835).

> that in any case, civil or criminal, [jurors] have a moral right to decide the law according to their own notions, or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court.[216]

The Supreme Court Justice whose views (together with the opposition they engendered) marked the changing role of the jury most dramatically was Samuel Chase. In 1805, Chase was impeached by the House of Representatives and tried by the Senate. Although most Senators voted to convict him, the vote fell short of the two-thirds needed to remove him from office. One of the charges against Chase was that, while trying cases as a Circuit Justice, he had endeavored "to wrest from the jury their indisputable right to hear argument, and determine upon the question of the law, as well as on the question of fact, involved in the verdict they are required to give."[217]

Chase's response to this charge was ambiguous. He noted initially that he had never attempted "to abridge or . . . obstruct" the jury's power to return a general verdict, a power which he called "a sacred part of our legal privileges."[218] Chase then added:

> [I]t is the duty of the jury to govern themselves by the laws of the land over which they have no dispensing power, and their right to expect and receive from our court all the assistance which it can give for rightly understanding the law. To withhold this assistance in any manner whatever, to forbear to give it in that way which may be most effectual for preserving the jury from error and mistake, would be an abandonment or forgetfulness of duty . . . .[219]

Chase's language rejected the view that jurors may properly base their verdicts on personal inclinations rather than "the laws of the land," but it did not reveal who would resolve questions

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[216] Id.

[217] Articles of Impeachment, Art I, § 3, in *Report of the Trial of the Hon. Samuel Chase* App 3 (Butler and Keating, 1805) ("*Chase Trial*"). See also 24 F Cas at 1043.

[218] *Chase Trial* at App 12. On the jury's power to return a general verdict, see the text accompanying notes 245-46.

[219] *Chase Trial* at App 12 (punctuation modernized).

concerning the law in cases of dispute. Chase's reference to the court's legal opinion as "assistance" (rather than as the court's "charge," "instruction," or "direction") suggests that he was unwilling to challenge too directly what the House of Representatives had called indisputable: the authority of the jury to resolve questions of law.[220] The Senate's vote on the charge that Chase had deprived juries of their authority to resolve questions of law was far short of that needed to remove the Justice from office. Only 16 of 34 Senators voted for conviction.[221] Before very long, the jury's "indisputable" authority to resolve legal questions was frequently disputed in state courts, state legislatures, and state constitutional conventions. Developments in Massachusetts reveal the attention devoted to the issue:

- In 1808, the state legislature declared the right of juries to judge law and fact in criminal cases.[222]

- In 1820, a state Constitutional Convention rejected, on grounds of redundancy, a proposal to declare jurors the judges of law and fact. The proposal, it was said, would merely "establish what was now the law of the land."[223]

- In 1836, the state legislature repealed its 1808 statute that allowed juries to judge questions of law.[224]

- In 1845, Chief Justice Lemuel Shaw's opinion for the Supreme Judicial Court in *Commonwealth v Porter* declared that juries have no authority to resolve questions of law.[225]

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[220] Seven years earlier, in debate preceding the passage of the Sedition Law of 1798, Congressman Robert Goodloe Harper declared, "It was well known that, in this country, the jury were always judges of the law as well as the fact, in libels, as well as in every other case." 8 Annals of Cong 2135 (July 9, 1798), quoted in Howe, 52 Harv L Rev at 586 (cited in note 194).

[221] *Chase Trial* at App 62.

[222] An Act Regulating the Selections, Empanelling, and Services of Jurors, 4 Mass Laws 382, 389-90, ch 139, § 15 (1808), quoted in Howe, 52 Harv L Rev at 606 (cited in note 194).

[223] *Journal of Debates and Proceedings in the Convention of Delegates Chosen to Revise The Constitution of Massachusetts, 1820-21* 539-42 (Boston Daily Advertiser, 1853), quoted in Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 Yale L J 170, 175 (1964).

[224] The Repealing Act, 13 Mass Laws 582, 608, ch 7 (1836), cited in Howe, 52 Harv L Rev at 606 n 94.

[225] 51 Mass (10 Metcalf) 263, 285-86 (1845).

- In 1853, a draft constitution proposed by a state convention reiterated the right of jurors to judge both law and fact.[226] When another provision of the proposed constitution proved controversial, however, the voters failed to ratify it.[227]

- In 1855, the legislature reasserted the position it had taken in 1808, declaring once again the right of jurors to resolve questions of law.[228]

- Later in 1855, the Supreme Judicial Court largely nullified the legislature's enactment, interpreting it merely as a codification of the jury's power to return a general verdict.[229]

By 1851 at least nine states had declared in constitutions or statutes the authority of juries to resolve questions of law: Connecticut, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Pennsylvania, and Tennessee.[230] In at least six additional states—Maine, New Hampshire, New York, Rhode Island, Vermont, and Virginia—the authority of jurors to resolve legal questions had been established either by judicial decision or by practice.[231]

After 1850, however, most of the courts that passed upon the question concluded that judges rather than jurors should settle questions of law. Between 1850 and 1931, the courts of at least eleven states (Connecticut, Georgia, Illinois, Louisiana, Maine, Massachusetts, New York, Pennsylvania, Tennessee, Vermont, and Virginia) rejected the view that juries should judge issues of law as well as fact.[232]

The event that most clearly marked the end of the American jury's power to judge legal questions was the United States Supreme Court's 1895 decision in *Sparf and Hansen v United*

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[226] 3 *Debates and Proceedings of the Massachusetts Constitutional Convention of 1853* 430-31, 499-500, 504 (White & Potter, 1853), cited in Howe, 52 Harv L Rev at 608-09.

[227] Howe, 52 Harv L Rev at 609.

[228] Id.

[229] *Commonwealth v Anthes*, 71 Mass (5 Gray) 185, 187 (1855).

[230] Howe, 52 Harv L Rev at 596-613, 614 n 125-26.

[231] Id at 590-96, 596 n 57. Prior to the Civil War, debate about the jury's law-judging authority took place against a background of Northern resistance to the enforcement of federal laws supporting slavery. See note 119.

[232] Howe, 52 Harv L Rev at 592-613.

States.[233] As Justice Harlan's opinion for the Court acknowledged, federal courts in earlier decades often told jurors that they were to judge both law and fact.[234] The Court nevertheless held that jurors must be bound by judicial instructions concerning the law. Even at the end of the nineteenth century, the issue was controversial; two justices filed a spirited and lengthy dissent from the Court's decision.[235]

Today the constitutions of three states—Georgia, Indiana, and Maryland—provide that jurors shall judge questions of law as well as fact.[236] In all three states, however, judicial decisions have essentially nullified the constitutional provisions.[237] The unambiguous rule in other American jurisdictions is that questions of law are for the court to decide. Juries must "take their law" as the trial judge declares it.[238]

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[233] 156 US 51 (1895).

[234] Id at 89. See, for example, *United States v Wilson*, 28 F Cases 699, 712 (E D Pa 1830) ("You have the power to decide on the law as well as the facts of this case, and are not bound to find according to our opinion of the law . . . ."). See also 52 Harv L Rev at 589 nn 32-33 (offering a lengthy list of citations to similar instructions).

[235] *Sparf and Hansen*, 156 US at 110-83 (Gray and Shiras dissenting).

[236] See Ga Const, Art 1, § I, ¶ 11 ("In criminal cases . . . the jury shall be the judges of the law and the facts."); Ind Const, Art I, § 19 ("In all criminal cases whatever, the jury shall have the right to determine the law and the facts."); Md Const, Decl of Rts, Art 23 ("In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.").

The Oregon Constitution contains this confusing provision: "In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law . . . ." Or Const, Art I, § 16. See generally *Fauvre v Roberts*, 309 Or 691, 791 P2d 128, 130-31 (1990) (en banc).

[237] See, for example, *Sparks v State*, 91 Md App 35, 603 A2d 1258, 1277 (1992) ("[C]ase law has made it clear that curious constitutional relic has, through the interpretive process, been shrivelled up to almost nothing."); *Conklin v State*, 254 Ga 558, 331 SE2d 532, 543 (1985) (quoting the statement of *Berry v State*, 105 Ga 683, 31 SE 592, 592 (1898), that the constitutional language makes jurors judges of law only in the sense that they are "absolutely and exclusively" the judges of fact). In all three states, a judge may direct a verdict of acquittal when the evidence is insufficient as a matter of law to support the defendant's conviction. In all three states, moreover, judges give instructions to jurors on the law. In Maryland, the court informs the jury that its instructions are advisory only when legal issues are genuinely in dispute, *Medley v State*, 52 Md App 225, 448 A2d 363, 365-66 (1982), and the jury's role is limited to resolving the specific legal dispute presented to it. *Stevenson v State*, 289 Md 167, 423 A2d 558, 564-66 (1980). In both Georgia and Indiana, the court tells the jury of its power to resolve questions of law only when requested to do so by one of the parties. *Reddick v State*, 11 Ga App 150, 74 SE 901 (1912); *Bridgewater v State*, 153 Ind 560, 55 NE 737, 739 (1899). Even then, the court apparently adds that the jury is bound to accept the law laid down by the presiding judge. *Moyers v State*, 58 Ga App 237, 198 SE 283 (1938); *Carman v State*, 272 Ind 76, 396 NE2d 344, 346 (1979).

[238] See Mortimer R. Kadish and Sanford H. Kadish, *Discretion to Disobey: A Study of Lawful Departures from Legal Rules* 50 (Stanford, 1973).

D. What Was the Issue?

Protagonists in the controversy over the jury's authority to resolve legal questions shared much common ground. For one thing, no one disputed "the principle of noncoercion of jurors"—a principle that Chief Justice Vaughan's ruling in *Bushell's Case* had established in England in 1671.[239]

This landmark case grew out of criminal charges filed against William Penn, later the founder of Pennsylvania and an influential architect of American law.[240] Following his public preaching of Quaker doctrine, Penn was charged with participating in an unlawful assembly and disturbing the peace. The facts were not seriously in dispute, and the case turned on whether Penn's ability to foresee the audience's tumultuous response to his preaching was sufficient to establish his guilt. The jury refused to convict, influenced perhaps by the popular sentiment that jurors should judge questions of law as well as fact (a sentiment generated in part by the trials of John Lilburne a generation earlier[241]). The court then fined the jurors for disregarding the evidence and the court's instructions. One of the jurors, Edward Bushell, was imprisoned for refusing to pay the fine. He filed for a writ of habeas corpus, and in a ruling that effectively ended longstanding controversy over the issue, Chief Justice Vaughan declared that judges could neither punish nor threaten to punish jurors for their verdicts.[242]

No one in America more than a century later challenged *Bushell's Case*, and as Americans debated whether jurors should decide questions of law, the ability of jurors to disobey judicial instructions without fear of official reprisal was not in doubt. Similarly, nineteenth-century disputants agreed that judges could neither direct verdicts of conviction in criminal cases nor reverse jury acquittals.[243] They agreed, too, that judges should

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[239] Vaughan 135, 124 Eng Rep 1006 (1671).

[240] Penn's contribution was especially great in shaping American religious liberty and a humane American criminal law. See William Wistar Comfort, *William Penn, 1644-1718: A Tercentenary Estimate* 172-73 (Pennsylvania, 1944).

[241] See text accompanying notes 181-86.

[242] See Thomas A. Green's account of *Bushell's Case* in *Verdict According to Conscience* at 200-264 (cited in note 1) and John H. Langbein's account in 45 U Chi L Rev at 298 n 105 (cited in note 1) (emphasizing the doubtful character of Vaughan's claim that no verdict could be declared contrary to the evidence because the jurors might know of evidence not presented in court; as Langbein noted, the "self-informing character of the jury" had disappeared long before 1671).

[243] See Kadish and Kadish, *Discretion to Disobey* at 46 (cited in note 238). The Supreme Court has repeatedly recognized the finality of acquittals under the Constitution's

not require juries to return "special verdicts" in criminal cases—verdicts that would resolve factual questions posed by the court and enable the court to determine the legal consequences of the facts found by the juries. Because special verdicts apparently would have forced juries into too narrow a factfinding role, the inscrutable "general verdict" of guilty or not guilty—a verdict that usually makes it impossible to know whether the jurors have judged the facts, the law, or the position of the planets—remained unquestioned.[244] Finally, the protagonists on both sides agreed that judges should offer jurors instructions on the law. In short, the principal point of difference throughout the century-long dispute was whether judges should describe their instructions as mandatory or advisory.

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provision against double jeopardy. See *United States v Ball*, 163 US 662, 669-71 (1896); *Kepner v United States*, 195 US 100, 129-30 (1904); *United States v Scott*, 437 US 82, 90-91 (1978).

[244] When a federal district court required a special verdict in the case of Benjamin Spock and other Vietnam-era war protestors, the United States Court of Appeals for the First Circuit held that this procedure violated the defendants' constitutional right to jury trial. *United States v Spock*, 416 F2d 165, 183 (1st Cir 1969). Other courts, however, have held the special verdict constitutional in the absence of indications of judicial pressure. See *United States v O'Looney*, 544 F2d 385, 392 (9th Cir 1976).

Anglo-American history's most prominent departure from the use of general verdicts in criminal cases came in the case of *Regina v Dudley and Stephens*, 14 Queen's Bench Dec 273 (1884), a case holding that shipwrecked sailors may not kill and eat the cabin boy no matter how hungry they are. Baron Huddleston encouraged the jury to return a special verdict in this case because customary procedures would not have yielded the verdict he sought. See A. W. Brian Simpson, *Cannibalism and the Common Law: The Story of the Tragic Last Voyage of the* Mignonette *and the Strange Legal Proceedings to Which It Gave Rise* 208-10 (Chicago, 1984). Despite the use of a special verdict in *Dudley and Stevens* and occasionally in other common law prosecutions, the authorities generally agreed that "the jury can [ ] insist on returning a general verdict." Kadish and Kadish, *Discretion to Disobey* at 52. Whether juries had the same power to insist on returning general verdicts in libel cases was a subject of dispute. In 1792, however, Fox's Libel Act declared that in seditious libel prosecutions, "the jury . . . may give a general verdict of guilty or not guilty upon the whole matter put in issue . . . ." The Libel Act of 1792, 32 Geo 3, ch 60, § 1. See Kadish and Kadish, *Discretion to Disobey* at 47.

Although judges could not require juries to return special verdicts, jurors themselves might elect to do so. In Massachusetts in 1667, Bethjah Bullojne was accused of committing adultery (a capital offense) with Peter Turpin. The jury found Bullojne guilty only "of lieing in bed with Peter Turpin." The court told the jury to retire once more and to return a general verdict on the charge of adultery, but the jury instead returned with this special verdict: "If by lawe Bethjah Bullojne lying in bed wth Peter Turpin be adultery wee find her Guilty: If by lawe Bethjah Bullojne lying in bed wth Peter Turpin be not adultery wee find her not guilty." The court then sentenced Bullojne to stand on the gallows with a rope around her neck and to receive ten stripes or else pay a fine of ten pounds. This sentence was the most lenient imposed for adultery in Massachusetts until 1686. See Murrin, *Magistrates, Sinners, and a Precarious Liberty* at 191 (cited in note 2).

Twentieth-century American juries, formally bound by mandatory instructions, undoubtedly disregard these instructions more than occasionally; and early nineteenth-century juries, formally permitted to disregard advisory instructions, undoubtedly followed these instructions with considerable frequency. Calling judicial instructions mandatory or advisory does not determine how often the instructions are followed. In that sense, the primary significance of the disappearance of the jury's de jure power to resolve issues of law may be symbolic. Undisputed procedures—the general verdict, the principle of noncoercion of jurors, and the inability to direct verdicts of conviction—ensured both nineteenth- and twentieth-century American juries the practical power to "acquit against instructions."[245] The general verdict and the principle of noncoercion of jurors frequently ensured the power to "convict against instructions" as well.[246]

Moreover, the customary phrasing of the issue—whether judges or juries should resolve questions of law—tended to mask the question most at issue. This phrasing suggests that the issue was simply which of two agencies would perform a task that one or the other had to complete. Jurors, however, are unlikely to judge law in the same way that judges do. The issue that divided judges, legislators, and the drafters of state constitutions was not primarily which agency would perform a task, but what task it would perform.

A juror instructed to resolve questions of law for herself probably would not hire a law clerk, learn to use LEXIS, spend hours in a law library, or even (as nonlawyer judges often do) consult a statute book or desk manual.[247] She probably would

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[245] See *Horning v District of Columbia*, 254 US 135, 138 (1920) (Holmes) ("[T]he jury has the power to bring in a verdict in the teeth of both law and facts.").

[246] It bears emphasis that the ability of jurors to disregard instructions may disadvantage defendants rather than aid them.

[247] Ironically, if a juror were to do any of these things, her use of "extraneous" materials might subject the jury's verdict to impeachment. See, for example, *Tanner v United States*, 483 US 107, 118-20 (1987) (holding that the abuse of alcohol, marijuana, and cocaine by federal jurors throughout a trial could not lead to impeachment of the jury's verdict, but only because the alcohol, marijuana, and cocaine were not "outside" influences).

Even after abandonment of the jury's law-judging role, nonlawyer judges in American municipal courts, county courts, and justice-of-the-peace courts resolve questions of law. Abandonment of the jury's de jure authority to resolve legal questions did not reflect a judgment that deciding legal questions is always such specialized work that only lawyers can do it. See Doris Marie Provine, *Judging Credentials: Nonlawyer Judges and the Politics of Professionalism* xi-xii (Chicago, 1986) (noting that approximately 13,000 nonlawyers serve as judges in forty-three states). See also Linda J. Silberman, *Non-*

not consider it her duty to do sufficient research to determine whether the trial judge's charge had misstated the law. Instead, this juror probably would view the court's instruction as an invitation to do what John Marshall invited jurors to do in the case of Aaron Burr—to "find a verdict of guilty or not guilty as [her] own conscience[ ] may direct."[248]

There are, in short, two kinds of "law judging": "law finding" and "law intuiting."[249] Initially, the distinctiveness of these kinds of decision making and their relationship to the responsibilities of judge and jury might not have been evident, nor even existent. In colonial America, so long as basic requirements of impartiality and fair procedure were observed, the identity of the agency charged with resolving questions of law might not have mattered much. This agency—whether judge, jury, or someone else—would have consulted what was known of the relevant positive law (typically not much) and then would have attempted to fill the interstices of this law (typically large) with Solomon-like wisdom and common sense. Which body was assigned the task would not have greatly affected the nature of the task to be performed.

As the volume of accessible positive law increased, however, the tension between the two kinds of law judging probably increased as well, and institutional arrangements could not have adapted quickly. On occasion, jurors may have been asked to resolve technical issues of law. Lawyers sometimes disputed these questions before jurors in more or less the same fashion that they would have before judges.[250] Still, an entry in John Adams's diary revealed his sense that "jury law" and "lawyers' law" were not, in 1771, very different:

> The general Rules of Law and common Regulations of Society, under which ordinary Transactions arrange themselves, are well enough known to ordinary Jurors. The great Principles of the Constitution, are intimately known, they are sensibly felt by every Briton—it is scarcely extravagant to

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Attorney Justice in the United States: An Empirical Study (Institute of Judicial Administration, 1979).

[248] See text accompanying note 214.

[249] See National Commission on Law Observance and Enforcement, *Report on Criminal Procedure* 26-27 (US GPO, 1931) ("In a number of jurisdictions juries are made judges of the law in criminal cases . . . . The juror is made judge of the law not to ascertain what it is, but to judge of its conformity to his personal ideals . . . .").

[250] See Nelson, *Americanization of the Common Law* at 3 (cited in note 2).

> say, they are drawn in and imbibed with the Nurses Milk and first Air.[251]

By the time of the nineteenth-century contests over the jury's authority, however, it was evident that "judge law" and "jury law" were distinct. Protagonists on both sides of the issue recognized that judges would study their books while jurors would, as Adams wrote in the same diary entry, consult "their own Opinion, Judgment and Conscience."[252]

"Jury law" was not book law. Over the course of the nineteenth century, as American society grew more diverse and jury membership more inclusive (and as the legal issues presented to the courts grew more complicated), the belief that jurors' consciences would yield sound, shared, consistent answers to legal questions undoubtedly faded. A declining sense that principles of natural justice are "drawn in and imbibed with the Nurses Milk and first Air" surely contributed to the abandonment of the jury's law-judging authority.[253]

E. Some Possible Interpretations

While the question of the jury's authority to resolve questions of law may have been primarily of symbolic significance, the symbolism concerned the sorts of issues that define a legal system. The disappearance of the American jury's authority to resolve questions of law remains subject to various interpretations.

To members of the Critical Legal Studies movement, public choice theorists, and Marxists, this development may seem the

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[251] *Diary Notes on the Right of Juries*, Feb 12, 1771, in Wroth and Zobel, eds, 1 *Legal Papers of John Adams* at 228, 230 (cited in note 200).

[252] Id.

[253] Debates reminiscent of the struggle over the jury's law-judging role recurred in the 1960s and 1970s when anti-war activists argued that judges should inform jurors of their "right to acquit . . . without regard to the law and the evidence." See in particular the exchange between Judge Leventhal and Chief Judge Bazelon in *United States v Dougherty*, 473 F2d 1113, 1130-47 (DC Cir 1972).

Even today, President Adams has his followers. The Fully Informed Jury Association, a Montana-based group founded in 1989, has taken as its principal aim the overturning of the Supreme Court's ruling in *Sparf and Hansen*. See text accompanying notes 233-35. It also has persuaded state legislators to introduce bills that would require judges to inform jurors of their "historical, constitutional, and natural right" to adjudge questions of law. According to the New York Times, the group has attracted the support of a "strange coalition" including Operation Rescue, some members of the National Rifle Association, anti-logging environmentalists, tax protestors, advocates of the legalization of marijuana, and bikers opposed to mandatory helmet laws. See Katherine Bishop, *Diverse Group Wants Juries to Follow Natural Law*, NY Times B16 (Sept 27, 1991); Dick Dahl, *Group Aims for 'Conscientious' Juries*, Mass Lawyers Weekly 35 (Mar 4, 1991).

product of the American legal profession's economic self-interest (as well, perhaps, as its elitism, political power, and contrived claims of expertise). Morton J. Horwitz, for example, has described the "subjugation of juries" as part of an implicit bargain between the legal profession and commercial interests—one in which lawyers made judicial proceedings more responsive to commercial concerns and merchants permitted the bar to restrict the use of extra-legal dispute-resolution mechanisms such as arbitration.[254]

But the displacement of jurors by judges in resolving legal issues is equally subject to a simpler and more benign explanation. Jurors initially resolved legal issues at a time when lawbooks and legal professionals were in short supply. Although some people resisted displacement of the jury's power after real "law" became available, most consumers of governmental dispute-resolution services preferred the guidance of legal rules to the uncertainties of ad hoc community judgments. Commercial interests may have valued the greater certainty offered by professional law, but they were not alone.

There may be elements of truth in both hypotheses[255]—and in others as well. We have suggested that a declining faith in natural law, the greater diversity of the jury's composition, and the increasing complexity of American life played parts in the story.[256] In addition, Forrest McDonald has noted that, in the colonial era, American juries were the governmental bodies most representative of their communities. With independence, state legislatures and other agencies probably represented the whole society better. More democratic lawmaking left little legitimate role for the jury's law-intuiting (and law-defying) functions. The democratic purposes initially served by colonial juries came to be better served by other institutions.[257]

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[254] See Morton J. Horwitz, *The Transformation of American Law, 1780-1860* 140-59 (Harvard, 1977).

[255] That is, the legal profession may have sought to further its economic interests through the political process, and it may have succeeded because it offered the public something valuable in return.

[256] See text accompanying note 253.

[257] See Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 41 (Kansas, 1985). Compare *Duncan v Louisiana*, 391 US 145, 188 (1968) (Harlan dissenting) ("We no longer live in a . . . colonial society. Judges enforce laws enacted by democratic decision, not by regal fiat. They are elected by the people or appointed by the people's elected officials, and are responsible not to a distant monarch alone but to reviewing courts, including this one.").

A more cynical hypothesis than McDonald's is that American leaders favored anti-authoritarian juries so long as these leaders were resisting the British establishment. The

Loss of the jury's authority to resolve questions of law can also be seen as part of a recurring cycle of rejection and return to law. Roscoe Pound observed in 1913:

> Legal history shows a constant movement back and forth between wide judicial discretion . . . and strict confinement of the magistrate by detailed rules . . . . From time to time . . . reversion to justice without law becomes necessary in order to bring the administration of justice into touch with new moral ideas or changed social or political conditions.
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> . . .
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> . . . [E]ven the American colonists, who from bitter experience knew the relation of hard and fast legal rules to liberty, were wont to pursue an ideal of a rude natural justice dispensed without rule by a jury or by a plain man. Extravagant powers are conceded to juries in many jurisdictions because the application of rough standards of justice and the appeal to the emotions involved in these powers are strongly approved by the public . . . . There are other reasons for this than intrinsic advantages of such an administration of justice. One reason is a wide-spread popular belief that any one is competent to administer justice . . . . Another is, perhaps, that exaltation of incompetency and distrust of special competency in special fields which seems to be an unhappy by-product of democracy.
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> . . .
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> . . . When, in certain periods of legal development, some reversion to justice without law has been necessary, . . . an evolution of new rules has always followed hard upon its heels.[258]

The cry that professional law has failed is a usual concomitant of revolutionary movements. At a moment of revolutionary triumph, the law on the books is always that of the *ancien régime*, and lawyers generally have been the messengers of that law.[259] A revolutionary must often be tempted to proclaim, "The first thing we do, let's kill all the lawyers."[260] Developments in

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leaders had less use for anti-authoritarian juries once these leaders had become the establishment themselves.

[258] Roscoe Pound, *Justice According to Law*, 13 Colum L Rev 696, 699, 701, 706 (1913) (footnotes omitted).

[259] Which is not to say that *all* lawyers have been the messengers of that law.

[260] See William Shakespeare, *Henry VI Part II*, 4.2.86-87.

the United States and elsewhere in the years since Pound's observation illustrate his thesis.

As a result of Che Guevara's leadership and prompting, the Cuban government established numerous lay tribunals empowered to judge both law and fact following the Revolution of 1958. The jurisdiction of these community courts was limited to minor disputes, and like the neighborhood courts of other socialist countries, they appear to have operated largely as socialist theory suggested they should. The lay people who judged the cases also swept the courtrooms, and although the central government supplied these judges with copies of an outdated code, the judges were encouraged not to use it. Law could proceed—not from the top of a hierarchy down—but upward from the people of a neighborhood. Both in principle and in practice, the community courts relied primarily upon education, mediation, and persuasion rather than the use of coercive sanctions to resolve disputes.

Writers on the political left visited the Cuban community courts and described their proceedings enthusiastically,[261] yet today these courts are gone.[262] The people subject to their jurisdiction apparently did not like them much. Courts operating without law asserted jurisdiction over every aspect of a person's life about which someone else complained. The "public/private distinction" (a distinction now disfavored by some American legal scholars[263]) had faded.[264] Well-intentioned rhetoric in support of informal justice had become a formula for tyranny. In abolishing the community courts, Fidel Castro confessed that these courts had been a revolutionary excess.[265] Some aspects of the community courts' procedures do, however, persist in today's professionally staffed Cuban courts.[266]

A more dramatic illustration of law's banishment and return came when the authors of the Cultural Revolution in China concluded that the nation would be better off without any lawyers at all. Today, the lawyers whom the Red Guards took from their

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[261] See, for example, James Brady, *The Revolution Comes of Age: Justice and Social Change in Contemporary Cuba*, in Colin Sumner, ed, *Crime, Justice, and Underdevelopment* 248 (Heinemann, 1982).

[262] See Luis Salas, *The Emergence and Decline of the Cuban Popular Tribunals*, 17 L & Society Rev 587 (1983).

[263] See, for example, Gary Peller, *The Metaphysics of American Law*, 73 Cal L Rev 1151 (1985).

[264] See Salas, 17 L & Society Rev at 604-606.

[265] Id at 607.

[266] Id at 610.

families and sent to the rice paddies are back, drafting new codes and structuring joint ventures.[267]

A less "foreign" example was provided by the American juvenile-court movement of the early twentieth century. In place of fact-finding juries in boxes and law-finding judges on perches, parental figures in living-room settings could consider the best interests of the child. In a juvenile system in which the goal was helping rather than punishing, adversary battles over the commission of specified criminal acts and elaborate procedural safeguards seemed unnecessary.[268] A half-century later, however, most observers of the juvenile courts sighed with relief when decisions like *In re Gault*[269] and *In re Winship*[270] brought substantially more lawyer's law to juvenile proceedings.

So it was, to some extent, following the American revolution. The romanticization of popular, informal justice illustrated by John Adams's remarks about the jury gave way over time to a more mature, less exuberant acceptance of lawyer's law.

As Roscoe Pound observed, the issue reappears frequently. With evident agony, some scholars on the left have recognized the dangers of informal justice;[271] and after an initial period of widespread scholarly enthusiasm, other scholars have voiced concern about the procedural informality of mediation and other forms of alternative dispute resolution.[272] Even as these writers have voiced their approval of lawyer's law, however, others have proclaimed that "law is male"[273] and that a female "ethic of

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[267] See Beverly G. Baker, *Chinese Law in the Eighties: The Lawyer and the Criminal Process*, 46 Albany L Rev 751, 753-64 (1982); Frankie Fook-Lun Leung, *The Re-Emergence of the Legal Profession in the People's Republic of China*, 6 NY L Sch J Intl & Comp L 275 (1985).

[268] See Anthony M. Platt, *The Child Savers: The Invention of Delinquency* 137-75 (Chicago, 2d ed 1977).

[269] 387 US 1 (1967).

[270] 397 US 358 (1970).

[271] See, for example, Richard L. Abel, *Introduction*, in Richard L. Abel, ed, 2 *The Politics of Informal Justice: Comparative Studies* 1-13 (Academic Press, 1982). See also Richard Delgado, *Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction Have a Corollary?*, 23 Harv CR-CL L Rev 407 (1988).

[272] See, for example, Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 Yale L J 1545 (1991); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 Buff L Rev 441 (1992); Diane P. Wood, *Court-Annexed Arbitration: The Wrong Cure*, 1990 U Chi Legal F 421; Richard Delgado, et al, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 Wis L Rev 1359.

[273] See Frances Olsen, *The Sex of the Law*, in David Kairys, ed, *The Politics of Law: A Progressive Critique* 453 (Pantheon, rev ed 1990); Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 Notre Dame

care" must replace a male "ethic of rights."[274] These scholars argue that a more contextualized, ad hoc system of dispute resolution must replace our current system of administering justice through rules. They sometimes write as though they had invented the issue and as though it had no history.

Our conclusion is not that an "ethic of rights" is superior to an "ethic of care," that law is preferable to discretion, that the professional administration of justice is sounder than the popular administration of justice, or that boys are better than girls. *Bleak House*,[275] most jury instructions, and the hearsay rule remind us of the cumbersome, self-serving law that lawyers are likely to produce when left to their own devices. The lesson may be, however, that pushing the tiller hard from lawyer's law steers a dangerous course. A mature legal system must blend law and discretion, rights and care, and the professional and popular administration of justice.

Our own legal system, we think, is schizophrenic. It has far too much lawyer's law in the courtroom and not nearly enough in the backdoor proceedings that effectively resolve most cases. The story of this system and its radical departure from the framers' design is the subject of the final Section of this article.

IV. The Repeal of the Sixth Amendment by the Courthouse Crowd[276]

John Langbein has asked whether hippopotamuses are to be found in New York City. The answer is yes. Some live in the Bronx Zoo.[277] Langbein also has asked whether jury trials are to be found in America. Again the answer is yes. The courts provide specimens for public examination each year. There are even enough jury trials to keep a cable television network on the air.

L Rev 886 (1989).

[274] See, for example, Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 Yale L J 1373 (1986). The terms "ethic of care" and "ethic of rights" are Carol Gilligan's. See Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 17-19 (Harvard, 1982).

[275] Charles Dickens, *Bleak House* (Oxford, 1966).

[276] For the most part, this Section is derived from Albert W. Alschuler, *Plea Bargaining and Its History*, 79 Colum L Rev 1 (1979). Although the Section adds some new data, we have included it mostly to round out the story of the American criminal jury in the nineteenth and twentieth centuries and to place the other Sections of this article in perspective. Readers interested in a fuller scholarly development should consult the 1979 article.

[277] John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 Harv J L & Pub Pol 119, 121 (1992).

Nevertheless, one statistic dominates any realistic discussion of criminal justice in America today. Ninety-three percent of the defendants convicted of felonies in state courts plead guilty.[278] The percentage of convictions by guilty plea is still higher in misdemeanor cases.[279] Moreover, nearly half of the convictions in the cases that go to trial are the products of trials before judges sitting without juries.[280]

The Constitution declares that "[t]he Trial of all Crimes, except in Cases of Impeachment; shall be by Jury . . . ."[281] It also declares that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."[282] Langbein suggests that Americans should replace the word "all" in these two constitutional provisions with the words "virtually none." Our system of criminal dispute resolution differs enormously from the one that the Sixth Amendment was designed to preserve.[283]

At the time the Sixth Amendment was enacted, bench trials in serious criminal cases were unknown. Nonjury trials became permissible in the federal courts only in 1930.[284] Indeed, the Supreme Court declared in 1874 that a defendant could not "be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men."[285]

Even in 1791, a defendant could plead guilty. Far from encouraging guilty pleas in felony cases, however, the courts actively discouraged them. Shortly before the American Revolution, Blackstone's *Commentaries* observed that courts were "very backward in receiving and recording [a guilty plea] . . . and will generally advise the prisoner to retract it . . . ."[286] Statements

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[278] Richard Solari, *National Judicial Reporting Program, 1988* 47, Table 4.2a (US Dept of Justice, Bureau of Justice Statistics, 1992). In the seventy-five largest counties, ninety-four percent of all felony convictions are by plea. Id at Table 4.2b.

[279] See, for example, Malcolm Feeley, *The Process is the Punishment* 9 (Russell Sage, 1979) (Although every defendant in the lower criminal court of New Haven, Connecticut, had a right to jury trial, not a single defendant in a sample of 1640 cases invoked the right.).

[280] Patrick A. Langan and John M. Dawson, *Felony Sentences in State Courts, 1988* 1 (US Dept of Justice, Bureau of Justice Statistics, 1990).

[281] US Const, Art III, § 2.

[282] US Const, Amend VI.

[283] See Langbein, 15 Harv J L & Pub Pol at 119-20 (cited in note 277).

[284] See *Patton v United States*, 281 US 276, 298-99 (1930).

[285] *Insurance Co. v Morse*, 87 US 445, 451 (1874). See also *Thompson v Utah*, 170 US 343, 349 (1898).

[286] William M. Blackstone, 4 *Commentaries* *329. More than any other law book, the *Commentaries* shaped American legal consciousness. One year before the Declaration of

declaring the reluctance of courts to accept guilty pleas appeared in American treatises throughout the nineteenth century.[287]

John Beattie surveyed English court records at about the time of the American Constitution and concluded, "Virtually every prisoner charged with a felony insisted on taking his trial, with the obvious support and encouragement of the court. There was no plea bargaining in felony cases in the eighteenth century."[288]

The earliest reported American guilty-plea case reveals that practices on the American side of the Atlantic were no different. In Massachusetts in 1804, a twenty-year-old black man was accused of raping a thirteen-year-old white girl, breaking her head with a stone, and throwing her body into the water, thereby causing her death. When the defendant pleaded guilty to indictments for rape and murder:

> The Court informed him of the consequence of his plea, and that he was under no legal or moral obligation to plead guilty; but that he had a right to deny the several charges, and put the government to the proof of them. He would not retract his pleas; whereupon the Court told him that they would allow him a reasonable time to consider of what had been said to him: and remanded him to prison. They directed the clerk not to record his pleas, at present.[289]

When the defendant was returned to the courtroom, he again pleaded guilty:

> Upon which the Court examined, under oath, the sheriff, the jailer, and the justice [who had conducted the preliminary

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Independence, Edmund Burke remarked in Parliament that nearly as many copies of Blackstone had been sold on the American as on the English side of the Atlantic. Edmund Burke, *Speech on Conciliation with the Colonies*, in 2 *Works of Edmund Burke* at 99, 125 (cited in note 42).

[287] See, for example, John Frederick Archbold, *Pleading and Evidence in Criminal Cases* 73-74 (New York, 1st Am ed 1824); John C. B. Davis, *The Massachusetts Justice: A Treatise upon the Powers and Duties of Justices of the Peace* 232 (Warren Lazell, 1847). See also *Hallinger v Davis*, 146 US 314, 324 (1892) ("The [trial] court refrained from at once accepting [the defendant's] plea of guilty, assigned him counsel, and twice adjourned, for a period of several days, in order that he might be fully advised of the truth, force and effect of his plea of guilty."); *Green v Commonwealth*, 94 Mass (12 Allen) 155, 175-76 (1866) (noting the "well settled practice" of receiving guilty pleas with "great reluctance & caution").

[288] J. M. Beattie, *Crime and the Courts in England, 1660-1800* 336-37 (Princeton, 1986). See also id at 446-47.

[289] *Commonwealth v Battis*, 1 Mass (1 Williams) 95, 95-96 (1804) (emphasis omitted).

> examination of the defendant] as to the *sanity* of the prisoner; and whether there had not been tampering with him, either by promises, persuasions, or hopes of pardon, if he would plead guilty. On a very full inquiry, nothing of that kind appearing, the prisoner was again remanded, and the clerk directed to record the plea on both indictments.[290]

The report concluded that the defendant "has since been executed."[291] In the only other American decision prior to the Civil War to discuss the guilty plea extensively, the persuasion of the court was successful, and the defendant withdrew his plea.[292]

Raymond Moley's 1928 study, *The Vanishing Jury*,[293] reported the percentage of felony convictions "by jury" and "by confession" in New York State for an eighty-eight year period beginning in 1839. At the outset of this period, only twenty-five percent of the state's felony convictions were by guilty plea. In Manhattan and Brooklyn, the figure was even smaller, fifteen percent. Moley charted a gradual increase in this figure to about eighty percent statewide by the turn of the century, then to ninety percent by 1926.[294] In the years following Moley's study, the figure continued to grow. It is ninety-six percent today.[295]

As cases of plea bargaining began to reach appellate courts in the decades following the Civil War, the overwhelming reaction was one of disapproval.[296] Nevertheless, plea bargaining apparently became the dominant method of resolving even serious cases in urban America at the end of the nineteenth century and the beginning of the twentieth—a time when the bondsman, the ward politician, the newspaper reporter, the jailer, and the fixer exerted an everyday influence on the administration of criminal justice.[297] Various crime commissions demonstrated in the 1920s that plea bargaining had become common, and many of the commissions indicated that the use of this route to conviction had increased in the immediately preceding decades. For the first time, the practice came to the attention of the public. Again the general reaction—of scholars, the press, and the crime commis-

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[290] Id at 96.

[291] Id.

[292] See *United States v Dixon*, 1 DC (1 Cranch) Cir Ct Rpts 414 (DC 1807).

[293] 2 S Cal L Rev 97 (1928).

[294] Id at 108.

[295] New York State Division of Criminal Justice Services, *1990 Crime and Justice Annual Report* 162 (Bureau of Criminal Justice Statistical Services, 1991).

[296] See Alschuler, 79 Colum L Rev at 19-24 (cited in note 276).

[297] Id at 24-26.

sions themselves—was disapproval.[298] The Supreme Court did not uphold the constitutionality of plea-bargained waivers of the right to jury trial until 1970.[299]

American criminal procedure has become an administrative process rather than the adjudicative process it once was. Nevertheless, when jury trial was routine, it was a reasonably summary procedure.[300] As recently as the 1890s, a felony court apparently could conduct a half-dozen jury trials in a single day.[301]

The intervening century has seen a proliferation of procedures in contested cases and, as a result, an inability to bring many contested cases to trial. In 1990, the longest criminal jury trial in American history came to an end two years and nine months after it began. This trial did not involve financial machinations of great complexity or an army of white collar defendants; the defendants were members of a preschool staff charged with sexually abusing children at their school. Of the two defendants whose cases reached the jury, one had spent five years in pretrial detention and the other two years. The preliminary hearing in the case had lasted eighteen months. The trial jury heard 124 witnesses; and after paring down the charges, the judge permitted sixty-five allegations of molestation and conspiracy to go to the jury. The jury acquitted one defendant but failed to reach agreement on the other. When a retrial later the same year produced a second hung jury, the prosecutor dismissed all remaining charges. The McMartin Preschool case ruined some lives and cost the taxpayers over $14 million.[302]

Although this case was the product of atypical blunders,[303]

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[298] Id at 26-32.

[299] See *Brady v United States*, 397 US 742, 753 (1970) ("[W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary."); *Santobello v New York*, 404 US 257, 260 (1971) ("If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.").

[300] See Langbein, 45 U Chi L Rev 263 (cited in note 1) (describing English practice); Alschuler, 79 Colum L Rev at 40-41 (cited in note 276).

[301] Friedman, *Crime and Punishment* at 245 (cited in note 8) (describing practice in Leon County, Florida, but noting that trials in Almeda County, California, were longer). Compare Hyman and Tarrant, *American Trial Jury History* at 26 (cited in note 3) (reporting that in colonial Virginia "felony trials were held in one day").

[302] Lois Timnick, *Buckey Jury Deadlocks; Mistrial is Declared; McMartin: D.A. Reiner Says He Won't Seek a Third Trial. Longest Criminal Case in History Comes to an End*, LA Times A1 (July 28, 1990); Bruce Buursma, *LA Child Abuse Case Ends in Acquittals*, Chi Trib C1 (Jan 19, 1990).

[303] See Paul Eberle and Shirley Eberle, *The Abuse of Innocence: The McMartin Pre-*

over-proceduralization has infected the American jury trial. Prolonged, privacy-invading jury selection procedures, cumbersome rules of evidence, the repetitive cross-examination of witnesses, courtroom battles of experts (who sometimes are called "saxophones" because they play tunes for those who pay them), jury instructions that all the studies tell us jurors do not understand, and more, have made trials inaccessible for all but a small minority of defendants.

Lawyers extol our trial procedures on Law Day and at bicentennial celebrations. They tell us later that the courts would be swamped if we used them. "Practical necessity" requires pressing the overwhelming majority of defendants to abandon their day in court.

Robert H. recently spent six months in an Atlanta jail without any formal charges filed against him and without ever appearing in court or seeing a lawyer. On the day that he met the public defender who represented him, the public defender advised him to plead guilty. Robert's was one of thirty felony cases in which this public defender made court appearances that day—and one of more than five hundred cases that she handled during the year. Robert followed her advice.

The authorities later realized that Robert H. was not guilty of the charge to which he had pleaded guilty; through a bureaucratic error, they had confused him with someone else. Despite Robert H.'s innocence, however, the public defender may not have given him bad advice. She told him that, if he pleaded guilty, he could go home that day; and if he wanted a trial, he could have one—after waiting in jail for perhaps another year.[304] Someone should tell Robert H. about America's recent celebration of the Bicentennial of the Bill of Rights.

If Paul Lewis Hayes can be located in a Kentucky prison, someone should tell him about the Bicentennial too. Hayes was a repeat offender charged with uttering a forged $88 check. The prosecutor offered to permit him to plead guilty in exchange for the recommendation of a five-year sentence. Hayes replied that he was innocent and that he wanted a jury trial. The prosecutor then carried out a threat that he had made during the negotiations. He returned to the grand jury and obtained an indictment under the Kentucky Habitual Criminal Act. Hayes was convicted

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school Trial (Prometheus, 1993).

[304] Monroe Freedman, *For the Poor, Criminal Defense a Matter of Third World Justice*, Legal Times 34 (Feb 11, 1991).

at trial, and the court imposed the life sentence that the Habitual Criminal Act demanded. In *Bordenkircher v Hayes*, the United States Supreme Court upheld the penalty that Hayes had incurred by exercising his Sixth Amendment right.[305]

The Constitution told Paul Hayes that he had a right to jury trial. The courthouse regulars (including the Supreme Court) told him that the exercise of this right was a crime. It was in fact a more serious crime than uttering a forged check. Uttering a forged check was "worth" only five years' imprisonment. The crime of standing trial before a jury was "worth" imprisonment for life.

CONCLUSION

The American right to jury trial now resembles the hippopotamus in New York City. As John Langbein observes, it's a goner. Unpropertied white men, African-Americans, the members of other minority groups, and women have taken their places in the concert hall, but the orchestra has disbanded. The protagonists on both sides of the nineteenth-century battle over the authority of judge and jury to resolve questions of law have suffered resounding defeat. Today prosecutors are the judges of law and fact.

Jefferson thought the jury an even more vital instrument of democracy than the popular election of legislators.[306] Tocqueville called the jury a form of sovereignty of the people and a school in which citizens learn their rights.[307] Only a shadow of this communitarian institution has survived into the urbanized America of the late twentieth century.

One of us recently received a summons for jury duty, then spent a day with dozens of his fellow citizens in a jury room with two television sets playing on different channels. One of our fellow citizens, a taxi driver, reported that he had purchased a dress shirt for the occasion. Neither this taxi driver nor anyone else, however, was called from the jury room to offer his wisdom on matters of importance to the community. Perhaps some of the people who waited all day in this jury room ended the experience with the sense of gratification (or inspiration) to which a citizen who participates in public affairs is entitled. The final sentence of

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[305] 434 US 357, 364-65 (1978).

[306] See text accompanying note 51.

[307] See text accompanying notes 45-47.

the information sheet that we received upon reporting for duty reminded us that we should. It read:

> Please be assured that even if you do not serve on a trial, just by being available you have made it necessary for all parties appearing in court to revert to a bench trial, settle by agreement, plea bargain, voluntarily dismiss, etc., thereby saving the court's time, and making it possible for our system of justice to work.[308]

[308] *Juror Information, Circuit Court of Cook County*, Doc No CCL-0524 (1993).