

# Ancient Juries and Modern Judges: Originalism's Uneasy Relationship with the Jury

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## I. INTRODUCTION

The Supreme Court has shown an increasing enthusiasm for originalist methodology in the field of criminal procedure<sup>1</sup> and with respect to the jury trial in particular.<sup>2</sup> Gone are the days of unbounded balancing; recent

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<sup>1</sup> See, e.g., *Giles v. California*, 128 S. Ct. 2678, 2682–86 (2008) (rejecting California's version of the "forfeiture by wrongdoing" exception to the Sixth Amendment's confrontation requirement because it was not established in 1791); *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004) (using originalist methodology to interpret the Sixth Amendment's Confrontation Clause to exclude even reliable hearsay testimony).

<sup>2</sup> See, e.g., *Blakely v. Washington*, 542 U.S. 296, 301–02, 313–14 (2004) (using originalist methodology to hold that the Sixth Amendment jury trial right is violated whenever a judge imposes a sentence above a mandatory sentencing guideline range based upon facts that were not found by a jury beyond a reasonable doubt); *Apprendi v.*

adjudication of criminal procedure cases has begun, as has most other constitutional adjudication, with text and history.<sup>3</sup> Necessarily, the Court's efforts have been interstitial. The Court has told us, for example, what originalism mandates with respect to the allocation of sentencing authority between jury and judge,<sup>4</sup> but not what its new respect for originalism might portend for jury size,<sup>5</sup> decision rules,<sup>6</sup> peremptory challenges,<sup>7</sup> or the "fair cross section" requirement.<sup>8</sup> Such is the nature of case-by-case adjudication in an adversarial system. But as the Justices increasingly employ originalist methodology in this field, they will have to confront some tough questions about both the jury and originalism itself.

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New Jersey, 530 U.S. 466, 477–83, 490 (2000) (relying on original understanding to hold that the Sixth Amendment requires jury determination of all facts, other than prior conviction, that trigger a defendant's eligibility for punishment); *United States v. Gaudin*, 515 U.S. 506, 512–14 (1995) (relying on original understanding to determine that judges may not withhold any element of a crime from jury consideration).

<sup>3</sup> See generally Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005) (discussing the Supreme Court's recent use of originalism in criminal procedure cases); Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1516–18 (2006) (same).

<sup>4</sup> See, e.g., *United States v. Booker*, 543 U.S. 220, 238–39 (2005); *Blakely*, 542 U.S. at 313; *Apprendi*, 530 U.S. at 477–83, 490.

<sup>5</sup> Juries at the Founding universally consisted of twelve persons, yet the Supreme Court has since held that half that number will do. See *Williams v. Florida*, 399 U.S. 78, 86 (1970).

<sup>6</sup> Juries at the Founding decided cases by unanimous verdict. Yet, at least in state court, the Supreme Court has held that non-unanimous verdicts comport with the Constitution. See *Apodaca v. Oregon*, 406 U.S. 404, 410–11 (1972) (plurality opinion); *id.* at 366 (Powell, J., concurring in the judgment).

<sup>7</sup> The Court simply asserted in *Stilson v. United States* that "[t]here is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured." 250 U.S. 583, 586 (1919). The Court repeated this conclusion in *Swain v. Alabama*, 380 U.S. 202, 219 (1965). The *Swain* Court gave no further analysis, but took pains to say that the peremptory challenge was "nonetheless . . . 'one of the most important of the rights secured to the accused.'" *Id.* (quoting *Pointer v. United States*, 151 U.S. 396, 408 (1894)). *Stilson's* assertion has now become doctrine. See, e.g., *Gray v. Mississippi*, 481 U.S. 648, 663 (1987); *Batson v. Kentucky*, 476 U.S. 79, 91 (1986).

<sup>8</sup> *Taylor v. Louisiana*, 419 U.S. 522, 536 (1975). *But see Berghuis v. Smith*, 130 S. Ct. 1382, 1396 (2010) (Thomas, J., concurring) (suggesting that the fair cross-section requirement is "difficult to square with the Sixth Amendment's text and history" and expressing a willingness to reconsider the Court's jurisprudence in this area).

The challenges are not hypothetical. Perhaps encouraged by the Court's recent embrace of originalism, criminal defendants,<sup>9</sup> and jurors themselves<sup>10</sup> have begun to press for the reinstatement of various features of the original jury. More can be expected. The jury of 2010 bears such faint resemblance to the jury of 1791,<sup>11</sup> that if the Court decides to seriously engage the project of restoring the original jury it will find itself very busy indeed.

Juries at the Founding comprised twelve<sup>12</sup> propertied<sup>13</sup> men. They were to be free of bias or interest in the case at hand, but were not necessarily strangers to the underlying facts or the parties. They were, in some cases, "kept without meat, drink, fire, or candle"<sup>14</sup> until they rendered a unanimous

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<sup>9</sup> See, e.g., Petition for Writ of Certiorari, *State v. Bowen*, 168 P.3d 1208 (Or. Ct. App. 2007) (No. 08-1117), at \*30-33, *cert. denied*, 130 S. Ct. 52 (2009) (arguing that the Supreme Court's turn to originalism counsels in favor of overruling *Apodaca v. Oregon* and reinstating the constitutional requirement of jury unanimity); Petition for Writ of Certiorari, *State v. Lee*, 964 So. 2d 967 (La. Ct. App. 2007) (No. 07-1523), *cert. denied*, 129 S. Ct. 130 (2008) (same).

<sup>10</sup> See *United States v. Luisi*, 568 F. Supp. 2d 106, 110, 123 (D. Mass. 2008) (dismissing juror who questioned the scope of Congress's authority under the Commerce Clause to ban the mere possession of narcotics and was unwilling to accede to the court's instruction regarding the constitutionality of the law).

<sup>11</sup> I will refer throughout this paper to 1791, the date of the Sixth Amendment's ratification, as the date against which to measure the jury trial right. The 1789 Constitution, of course, also explicitly protected the right to trial by jury. See U.S. CONST. art. III, § 2, cl. 3. There is little reason to believe, however, that the 1791 jury differed markedly from that of two years before, except with respect to the "vicinage" requirement, which was the express reason for the Amendment.

<sup>12</sup> *Williams v. Florida*, 399 U.S. 78, 91 (1970) ("[A]t common law the jury did indeed consist of 12.").

<sup>13</sup> Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 877 (1994) (In 1791, "every state except Vermont restricted jury service to property owners or taxpayers.").

<sup>14</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*375. Although the third volume of Blackstone's Commentaries deals expressly with civil procedure ("private wrongs"), the Supreme Court has noted that "Blackstone himself directs us" to consider that commentary with respect to the criminal jury trial. *Apprendi v. New Jersey*, 530 U.S. 466, 479-80 n.6 (2000) (citing 4 BLACKSTONE, *supra*, at \*343 ("The antiquity and excellence of this [jury] trial, for the settling of civil property, has before been explained at large")); see 3 BLACKSTONE, *supra*, at \*379 ("Upon these accounts the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And, if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened, when it is applied to criminal cases!"); 4 *id.* at \*343 ("And it will hold much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private

verdict;<sup>15</sup> that verdict could, as of right, reflect the jury's opinion of both the fact and the law.<sup>16</sup> This jury justice was mandatory—unwaivable by either prosecution or defense.<sup>17</sup>

Today, none of this is true. Criminal juries may now comprise six,<sup>18</sup> but not five<sup>19</sup> persons; in state courts, juries may render verdicts without unanimity.<sup>20</sup> Penniless women may serve; jurors may eat. The jury's domain is almost exclusively factual;<sup>21</sup> and the jury's judgment may be bypassed altogether.<sup>22</sup> The jury has undergone a radical transformation. The question is whether the Court's originalism can accommodate the change.

Wholesale rejection of the modern jury seems improbable. Not even the purest originalist would likely claim that *all* attributes of the jury trial were fixed in the late eighteenth century—that juries must forever consist of twelve hungry men.<sup>23</sup> It must be, instead, that some aspects of late eighteenth century jury trials were and are amenable to legislative or judicial alteration, even absent constitutional amendment.<sup>24</sup>

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property.”); *id.* at \*344 (“What was said of juries in general, and the trial thereby, in *civil* cases, will greatly shorten our present remarks, with regard to the trial of *criminal* suits; indictments, informations, and appeals.”); *see also* Charles Clay Doyle & Clement Charles Doyle, *Wretches Hang That Jury-Men May Dine*, 28 JUST. SYS. J. 219, 219–20 (2007); Mark Schmeller, *Twelve Hungry Men* 20 (2010) (unpublished manuscript) (on file with author) (“It is difficult to estimate with much certainty how often jurors were starved, but if the volume of criticism is any indication, the practice had become *more* common by the late eighteenth century.”).

<sup>15</sup> JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 179 (1994) (“[B]y the eighteenth century, it was agreed that verdicts had to be unanimous.”); *id.* at 180 (discussing the “[u]nquestioned acceptance of the concept of unanimous verdict”).

<sup>16</sup> *See infra* note 47.

<sup>17</sup> *See infra* note 51.

<sup>18</sup> *Williams v. Florida*, 399 U.S. 78, 86 (1970).

<sup>19</sup> *Ballew v. Georgia*, 435 U.S. 223, 245 (1978).

<sup>20</sup> *Apodaca v. Oregon*, 406 U.S. 404, 410–11 (1972) (plurality opinion); *id.* at 366 (Powell, J., concurring in the judgment).

<sup>21</sup> *See infra* notes 39–46 and accompanying text. It is true, of course, that juries retain the *power* to acquit against the law, *see, e.g.*, *United States v. Dougherty*, 473 F.2d 1113, 1130 (D.C. Cir. 1972), but modern juries do not retain that *right*, *id.* at 1132.

<sup>22</sup> *See Singer v. United States*, 380 U.S. 24, 36 (1965); *Patton v. United States*, 281 U.S. 276, 298 (1930).

<sup>23</sup> Schmeller, *supra* note 14.

<sup>24</sup> Precedent dictates, for example, that the limitation of jury service to men is unconstitutional, *see Taylor v. Louisiana*, 419 U.S. 522, 533 (1975), although some would dispute that conclusion as an original matter.

At the same time, however, not *everything* about jury trials can be up for grabs. The phrase “trial by jury” must have some fixed content or it is scarcely a constitutional command. Surely, for example, it would not suffice to place some number of children or computers in a box and call them the “jury”; or to allow even twelve adults to judge a wrestling match between prosecution and defense and call that a “trial.” For an originalist, something about “trial” and “jury” must remain constant from the late eighteenth century until today. The tough part is deciding just what. We must be untethered from the arcane jury practices of the eighteenth century while at the same time preserving intact the constitutional right to trial by jury.<sup>25</sup>

The Supreme Court has, at times, hinted its recognition of the problem. Its originalist criminal jury trial opinions have disavowed any “suggest[ion] that trial practices cannot change in the course of centuries,”<sup>26</sup> while at the same time warning “that the jury right could be lost not only by gross denial, but by erosion.”<sup>27</sup> The trick, then, is to figure out just which attributes of the founding generation’s jury trial were constitutionalized, and which were left subject to legislative or judicial change. This is no easy task, and the Court’s originalist jurisprudence has given us few tools with which to undertake it.

This Essay explores the puzzles occasioned by the growing tension between the Court’s originalism and the modern jury. Part I explores in greater detail the sharp contrasts between the jury of the founding generation and the jury of today, focusing particularly on the jury’s right to decide upon questions of law. Having sketched the landscape, Part II examines the Court’s recent case law applying originalist methodology to the contemporary jury. It concludes that the Court has thus far treated the question of the transformed jury as involving a binary choice: the jury either has all the attributes of the Founding-era jury or it is largely malleable, open almost entirely to legislative alteration. The Court’s originalism thus far has suggested no tools for sorting the constitutionalized aspects of the original jury from any that may remain open to change.<sup>28</sup>

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<sup>25</sup> A similar problem has challenged the Supreme Court in its construction of the Seventh Amendment right to a civil jury trial. The case law is nicely summarized in Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L. Q. 687, 695–704 (2004).

<sup>26</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000); see also *id.* at 500 n.1 (Thomas, J., concurring) (“Of course the Fifth and Sixth Amendments did not codify common-law procedure wholesale.”).

<sup>27</sup> *Id.* at 483 (quoting *Jones v. United States*, 526 U.S. 227, 247–48 (1999) (internal quotation marks omitted)).

<sup>28</sup> The Supreme Court’s 1970 decision in *Williams v. Florida* did suggest such a sorting mechanism. 399 U.S. 78, 99–100 (1970). As we shall see, however, *Williams* was a decidedly unoriginalist opinion. See *infra* notes 189–209 and accompanying text. And

Part III then asks whether originalism has the tools to accommodate the changed jury. It explores devices that originalism usually uses to make room for change and concludes that none proves satisfactory. Given that conclusion, Part IV considers whether, despite the Court's recent enthusiasm for originalist approaches to criminal procedure, the prospect of returning us to the original jury presents originalists with "medicine . . . too strong to swallow."<sup>29</sup> It concludes that some parts of the original jury could fairly be restored. Twelve-person juries, reaching unanimous verdicts, present themselves as obvious candidates. But others, particularly the law-finding powers of the jury, are probably off the table—at least for now. The jury's radical transformation did not occur in a vacuum. It was accompanied by, and symptomatic of, other monumental changes in American ideas about justice and law—ideas that rest uncomfortably with the founding generation's celebration of jury justice. Those ideas, developed over centuries, are unlikely to be displaced by a Court decision thrusting them back upon us; and recognizing this, the Court is unlikely to so decide. That is not to say that the original jury will never be restored; but if that is to occur, its restoration, like its decline, will require a broader shift in the way Americans think about juries, justice, and law.

## II. THE JURY OF THEN AND NOW

The Constitution is obsessed with juries. So important were juries to the founding generation that the Constitution secures their presence four separate times: the Seventh Amendment guarantees the right to trial by jury in civil cases; the Fifth Amendment guarantees the right to indictment or presentment by a grand jury for infamous crimes; Article III ensures that the trial of criminal cases "shall be by jury"; and then the Sixth Amendment secures the criminal jury trial right a second time.

Accolades for the jury—criminal, civil, and grand—abound in the historical record of the Founding Period.<sup>30</sup> And that love for the jury still has

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the result of the Court's reasoning was to adopt the view that juries were almost completely subject to legislative alteration—a process which the Court later had to end by drawing its own arbitrary lines around the jury trial right. *See Ballew v. Georgia*, 435 U.S. 223, 245–46 (1978) (Powell, J., concurring in the judgment) ("As the opinion of Mr. Justice Blackmun indicates, the line between five- and six-member juries is difficult to justify, but a line has to be drawn somewhere . . .").

<sup>29</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989).

<sup>30</sup> Alexander Hamilton famously 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

great cultural resonance.<sup>31</sup> But what, precisely, does the Constitution mean when it promises a “trial, by . . . jury”?<sup>32</sup> This straightforward question turns out to be surprisingly hard. And it is particularly hard for an originalist, or more precisely, for an originalist judge.

One cause of the difficulty lies in the dramatic differences between the jury of today and that of the Founding Era. Mutations in the original jury—and our understanding of its role—have left today’s jury seeming, at best, like the original jury’s distant cousin, and not at all like its twin. The changes are both structural and operational, affecting the jury’s architecture as well as its aims.

To see this, we might begin with a rough sketch of the modern jury.<sup>33</sup> The jury of today can constitutionally comprise as few as six persons.<sup>34</sup> In state court, jurors are not constitutionally compelled to reach a unanimous verdict.<sup>35</sup> They are chosen through a variety of methods, the aim of which is to produce a jury that represents a “fair cross-section of the community,”<sup>36</sup> and is yet a stranger to the local persons and events on trial. Selection methods strive for a certain brand of impartiality. It is impartiality understood not simply as disinterestedness—that is, as not standing directly to benefit from a verdict in the case—but as ignorance. As described by one

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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.

THE FEDERALIST NO. 83, at 456 (Alexander Hamilton) (Gaunt, Inc. ed., 2003). Thomas Jefferson called the jury system “the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.” 7 THE WRITINGS OF THOMAS JEFFERSON 82 (Lipscomb & Bergh eds., 1903).

<sup>31</sup> According to a 2008 Harris Poll, Americans, by a factor of two to one, would trust a jury more than a judge to arrive at a fair verdict in a case. See *Just Under Three in Five Americans Believe Juries Can be Fair and Impartial Most of the Time*, HARRIS INTERACTIVE (Jan. 21, 2008), <http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Just-Under-Three-in-Five-Americans-Believe-Juries-2008-01.pdf>. A 2004 Harris Poll found that 84% of Americans believe that “jury duty is an important civic duty that should be fulfilled, even if it happens to be inconvenient.” *Jury Service: Is Fulfilling Your Civil Duty a Trial?*, HARRIS INTERACTIVE, 5 (July 2004), <http://www.abanet.org/media/releases/juryreport.pdf>.

<sup>32</sup> U.S. CONST. amend. VI.

<sup>33</sup> The sketch is rough indeed, describing only a few of the modern and original juries’ dissimilarities. Prominently excluded here are questions regarding jury selection, particularly as they relate to race and sex. These questions, while unquestionably important, deserve article-length treatment of their own.

<sup>34</sup> *Williams v. Florida*, 399 U.S. 78, 86 (1970).

<sup>35</sup> *Apodaca v. Oregon*, 406 U.S. 404, 410–11 (1972) (plurality opinion); *id.* at 366 (Powell, J., concurring in judgment).

<sup>36</sup> *Taylor v. Louisiana*, 419 U.S. 522, 536 (1975).

federal judge, the minds of ideal modern jurors would be “empty.”<sup>37</sup> The ideal jury would comprise jurors “who do not know and are not in a position to know anything of either [the] character [of the parties or the witnesses] or events [on trial] . . .” Empty minds, in this sense, ensure that “the jury . . . like the court itself, is an impartial organ of justice.”<sup>38</sup> The idealized modern jury thus acts as a blank slate upon which litigants may sketch their versions of the facts.

The facts are the focus because today’s ideal jurors are finders of fact only. The handbook given to trial jurors serving in all United States District Courts is illustrative. It describes the role of judge and jury as follows:

The judge in a criminal case tells the jury what the law is. The jury must determine what the true facts are. On that basis the jury has only to determine whether the defendant is guilty or not guilty as to each offense charged. What happens thereafter is not for the jury’s consideration, but is the sole responsibility of the judge.<sup>39</sup>

We tell modern jurors that their only domain is factual; that they are to accept the law as articulated by the judge; and that they are not to worry about whether the law is fair or just—either in general, or as applied to the parties before the court.

This division of labor between the modern jury and judge is so complementary that the federal juror handbook tells jurors that they and the judge are a team.<sup>40</sup> Conjuring images of Henry Ford’s assembly line, with each worker doing his part to build a great American car, the handbook tells jurors that “through . . . teamwork . . . judge and jury . . . working together in a common effort, put into practice the principles of our great heritage of

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<sup>37</sup> ABRAMSON, *supra* note 15, at 17 (quoting *United States v. Parker*, 19 F. Supp. 450, 458 (D.N.J. 1937), *aff’d*, *United States v. Parker*, 103 F.2d 857 (3d Cir. 1939)).

<sup>38</sup> *Id.*

<sup>39</sup> Handbook for Trial Jurors Serving in the United States District Courts 2, available at <http://www.nynd.uscourts.gov/pdf/trialhandbook.pdf>. The point is emphasized again and again. *See id.* at 1 (“Jurors must follow only the instructions of law given to them by the trial judge in each particular case.”); *id.* at 4 (“The juror takes an oath to decide the case ‘upon the law and the evidence.’ The law is what the judge declares the law to be.”); *id.* at 5 (“The verdict is reached without regard to what may be the opinion of the judge as to the facts, though as to the law the judge’s charge controls.”); *id.* (“In both civil and criminal cases, it is the jury’s duty to decide the facts in accordance with the principles of law laid down in the judge’s charge to the jury.”).

<sup>40</sup> *Id.* at 1.

freedom.”<sup>41</sup> Thus, the handbook tells new jurors, “in a very important way, jurors become a part of the court itself.”<sup>42</sup>

The idealized modern jury, then, concerns itself only with the facts and, in partnership with the judge, administers the system of justice. Although jurors retain the *power* to render verdicts in conflict with the judge’s instructions on the law,<sup>43</sup> modern juries lack the *right* to acquit against the evidence;<sup>44</sup> and it is likely many jurors never even know of their nullification power—we never tell them.<sup>45</sup> Indeed, we come very close to telling them the opposite.

The jury’s main check on government, then, lies in its power to keep the government honest about the facts. It does this in a number of ways. For one, juries protect against government abuse. In criminal trials, grand juries ensure that prosecutors cannot proceed entirely on trumped up charges; petit juries ensure that government carries its burden of proof beyond a reasonable doubt. In this way, modern juries ensure that factually innocent individuals cannot be railroaded. Juries also buffer even honest governmental understandings of the facts, providing, among other things, lay insights into the context of alleged crime and the psychology, demeanor, and expression of testifying witnesses. But, however valuable juries may be in determining the facts, their service is optional; a criminal defendant thinking his lot better with the judge may waive trial by jury so long as the court and prosecutor agree.<sup>46</sup>

One does not have to spend very long with the historical materials to encounter a jury starkly at odds with the one described here. The jury of the Founding Era comprised precisely twelve persons—almost always white, male, and propertied, and not-infrequently hungry. The idealized jury of that

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Directed verdicts of conviction are forbidden in criminal cases, see *Sparf v. United States*, 156 U.S. 51, 105 (1895) (“[I]t is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offence charged or of any criminal offence less than that charged.”), and the court cannot set aside an acquittal. *Id.* (“In a civil, case the court may set aside the verdict . . . upon the ground that it is contrary to the law as given by the court, but in a criminal case, if the verdict is one of acquittal, the court has no power to set it aside.”) (quoting *United States v. Taylor*, 11 F. 470 (C.C.D. Kan. 1882) (internal quotation marks omitted)).

<sup>44</sup> See *id.* at 102; see also *United States v. Dougherty*, 473 F.2d 1113, 1130–33 (D.C. Cir. 1972).

<sup>45</sup> See *United States v. Wiley*, 503 F.2d 106, 107 n.4 (8th Cir. 1974) (collecting cases holding that defendants are not entitled to a jury instruction on nullification).

<sup>46</sup> See *Singer v. United States*, 380 U.S. 24, 36 (1965); *Patton v. United States*, 281 U.S. 276, 298 (1930).

time was to be impartial, but in the sense of being disinterested, not unaware; juror knowledge of the facts and, most importantly, the witnesses, was believed to be an aid to justice. Jury verdicts were unanimous.

Furthermore, the jury of the founding generation had powers and rights that went beyond the fact-finding power of the modern jury. The Founders' jury also had the right to judge the law,<sup>47</sup> a right that criminal juries would not lose until well into the nineteenth century.<sup>48</sup> And its role was most decidedly not to be on the judge's "team." Juries, instead, were prized for

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<sup>47</sup> This is the dominant scholarly position. See, e.g., ABRAMSON, *supra* note 15, at 75; AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 97–103 (1998); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 142 (1997); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 21 (1975) [hereinafter NELSON, *AMERICANIZATION*]; Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 66 (2003); Marc DeWolfe Howe, *Juries as Judges of the Criminal Law*, 52 HARV. L. REV. 582, 589 (1939); Larry D. Kramer, *The Pace and Cause of Change*, 37 J. MARSHALL L. REV. 357, 359 (2004); William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 904–17 (1978) [hereinafter Nelson, *Eighteenth-Century*]; William E. Nelson, *The Province of the Judiciary*, 37 J. MARSHALL L. REV. 325, 325–28 (2004) [hereinafter Nelson, *Province*]; Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 173–74 (1964–65). But important voices have taken a more critical view. See Stanton D. Krauss, *An Inquiry Into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 116–21 (1998) (Although “the conventional wisdom is that . . . juries acquired the right to determine the law as well as the facts in colonial times and . . . retained it in criminal cases until well into the nineteenth century,” the “truth is that, for the most part, we just don't know whether, when, or where colonial criminal juries had the authority to judge the law.”). In his contribution to this symposium, Professor William Nelson argues that new research reveals “the story of the [colonial] jury's power [to be] far more complex than [he] had thought before.” William E. Nelson, *The Lawfinding Power of Colonial American Juries*, 71 OHIO ST. L.J. (forthcoming 2010) (manuscript at 1) (on file with author) [hereinafter Nelson, *Lawfinding*]. He suggests, for example, that colonial juries in Pennsylvania lacked the power to decide the law. *Id.* at 11–21. Nonetheless, he concludes, by the time of the Revolution, “even Pennsylvania fell into line.” *Id.* at 25.

<sup>48</sup> NELSON, *AMERICANIZATION*, *supra* note 47, at 8 (Massachusetts juries lost their law-finding power by 1830); Howe, *supra* note 47, at 590–613 (tracing the history of the jury's law-finding power from colonial times through its demise in the early twentieth century); Kramer, *supra* note 47, at 382 (“The criminal jury retained its control over the law as well as the facts until at least the late nineteenth century.”); Nelson, *Province*, *supra* note 47, at 343 n.162 (the power to judge the law “persisted in criminal cases . . . well into the nineteenth century”); Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 451–52 (1996) (describing the decline of the jury's law-finding power over the course of the nineteenth and early twentieth centuries).

their ability to counterbalance and compete with legislative and judicial power. In this way, juries were conceived of not only as a cherished individual right, but as vital organs in the constitutional structure.<sup>49</sup> Juries were to serve the function of protecting individual liberty, to be sure; but, like other elements of the federal structure, it was expected that juries would protect individual rights, in part, by competing with the power of a distant central government.<sup>50</sup> As such, their presence was mandatory; jury justice could not be waived.<sup>51</sup>

The law-finding power of juries made them a formidable force. Juries did not just check courts and prosecutors by keeping them honest about the facts; they also checked courts (as the voice of the common law) and legislatures by ensuring that the substantive law comported with the local community's sense of justice.<sup>52</sup> The often-told story of the heroic grand and petit juries that refused to indict, and later refused to convict, John Peter Zenger for seditious libel loomed large in the minds of Revolutionary Americans.<sup>53</sup> "More than any formal law book," accounts of the Zenger trial "became the

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<sup>49</sup> See AMAR, *supra* note 47, at 104–05; see also STEVEN WILF, *LAW'S IMAGINED REPUBLIC* 34 (2010) ("Adams thought of the jury as analogous to the legislature. It restrained the bench just as Parliament was meant to balance the power of the Crown.").

<sup>50</sup> AMAR, *supra* note 47, at 88 ("Just as state legislators could in various ways protect their constituents against national oppression, grand and petit jurors could interpose themselves against central tyranny through the devices of presentments, nonindictments, and general verdicts.").

<sup>51</sup> The only way to cut the jury out of the criminal process was to plead guilty, in which case there was no trial at all. Thus, the community could not be cut out of the calculus. Courts spoke of juries as "jurisdictional"—a court sitting without a jury lacked power to enter judgment. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1196–99 (1991); Susan C. Towne, *The Historical Origins of Bench Trial for Serious Crime*, 26 *AM. J. LEGAL. HIST.* 123, 156–57 (1982).

<sup>52</sup> See William E. Nelson, *Summary Judgment and the Progressive Constitution*, 93 *IOWA L. REV.* 1653, 1660 (2008) [hereinafter, Nelson, *Summary Judgment*] (speaking specifically of the civil jury and claiming that "[b]y preserving powerful juries that determined both law and fact, the Seventh Amendment protected local communities from the metropole"); see also AMAR, *supra* note 47, at 98 (considering the "narrower question of whether a jury can refuse to follow a law if and only if it deems that law unconstitutional").

<sup>53</sup> See, e.g., *Jones v. United States*, 526 U.S. 227, 247 (1999) ("That this history had to be in the minds of the Framers is beyond cavil. According to one authority, the leading account of Zenger's trial was, with one possible exception, 'the most widely known source of libertarian thought in England and America during the eighteenth century.'") (quoting L. LEVY, *FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 133 (1963)); ABRAMSON, *supra* note 15, at 73 ("The 1735 trial of John Peter Zenger became the defining moment for the American jury in the colonies . . .").

American primer on the role and duties of jurors.”<sup>54</sup> Juries were to judge the rightness of the law, and to keep local communities safe from the perhaps corrupting, and certainly homogenizing, influence of the “metropole.”<sup>55</sup>

Although this paper focuses on criminal juries, civil juries had their place too. When merchant, patriot, and reputed smuggler John Hancock, was suspected by the Crown of evading British customs laws, the Crown was able to seize his ship and proceed against him in admiralty court—a court without a jury. The court ordered his ship condemned and its cargo turned over to authorities. But Hancock would have the last laugh—he sued the customs officers civilly for trespass on his ship. And in civil court, he was entitled to a jury. The jury was instructed that the decree of the admiralty court was good and must be respected by the jurors, but the jury ignored those instructions. They held the customs agents personally liable to Hancock for the value of his ship and cargo. Customs officials surely took the point: the Crown’s customs laws were unpopular, and local juries had the power to make officials pay for enforcing them.<sup>56</sup>

But juries could be a community check on the substance of the law only if trials were local events and juries were locally drawn.<sup>57</sup> If the Crown could try a case where it wished, then the government could shop for a favorable forum and a jury more disposed toward its laws. The Crown’s attempts to do just that were decried by the colonists in the Declaration of Independence, which accused King George of “depriving us, in many Cases, of the benefits of Trial by Jury” and “transporting us beyond Seas to be tried for pretended offences.”<sup>58</sup> Juries, for the founding generation, then, were more than checks on the prosecutor’s factual case—they operated in the fashion of modern “federalism” checks—checks by the local community on the power of a distant central government.<sup>59</sup>

The Framers of the original Constitution were sensitive to the jury’s role in the federal structure they were creating. Article III guarantees that “[t]he Trial of all Crimes . . . shall be by Jury; and such Trial shall be held *in the*

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<sup>54</sup> Alschuler & Deiss, *supra* note 13, at 874.

<sup>55</sup> Nelson, *Summary Judgment*, *supra* note 52, at 1660.

<sup>56</sup> ABRAMSON, *supra* note 15, at 24; JOHN PHILLIP REID, IN A DEFIANT STANCE: THE CONDITIONS OF LAW IN MASSACHUSETTS BAY, THE IRISH COMPARISON, AND THE COMING OF THE AMERICAN REVOLUTION 32 (1977). Professor William Nelson’s contribution to this symposium recounts a similar story. See Nelson, *Lawfinding*, *supra* note 47, at 9 (discussing the case of *Erving v. Cradock*).

<sup>57</sup> ABRAMSON, *supra* note 15, at 22–23.

<sup>58</sup> THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776).

<sup>59</sup> AMAR, *supra* note 47, at 88; Nelson, *Summary Judgment*, *supra* note 52, at 1660.

State where the said Crimes shall have been committed . . . .”<sup>60</sup> So federal prosecutors, and the Congress, would have to be sensitive to state needs or face a jury of state citizens with power to refuse to enforce federal law within their borders.

But to Anti-Federalists this was not enough local control.<sup>61</sup> States were large, transportation difficult, and communities varied, even within a single state. Anti-Federalists saw in Article III the threat that the national government would forum shop to thwart the competing power of the jury.<sup>62</sup> Anti-Federalists cried that the national government would be allowed to carry an accused “from one extremity of the state to another,”<sup>63</sup> and “hang any one they please, by having a jury to suit their purpose.”<sup>64</sup> Without more local control, Patrick Henry concluded, the right to a jury trial was “in reality sacrificed.”<sup>65</sup> Anti-Federalists, and ultimately the House of Representatives, therefore demanded constitutional protection for a more local jury “of the vicinage.”<sup>66</sup>

Federalists largely, though not universally, conceded the need for local jury power.<sup>67</sup> Their objection to the vicinage requirement was not, they claimed, mostly one of principle, but of practicality. By the time of the Constitutional Convention, the term “vicinage” did not denote a uniform geographic boundary. James Madison, in private correspondence, explained

<sup>60</sup> U.S. CONST. art. III, § 2 (emphasis added).

<sup>61</sup> ABRAMSON, *supra* note 15, at 22–23, 28–29.

<sup>62</sup> *Id.* at 22–23.

<sup>63</sup> 3 DEBATES IN SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447 (Jonathan Elliot ed., 1891) [hereinafter ELLIOT’S DEBATES] (statement of Patrick Henry).

<sup>64</sup> *Id.* at 569 (statement of William Grayson).

<sup>65</sup> *Id.* at 545.

<sup>66</sup> 1 ANNALS OF CONGRESS 435.

<sup>67</sup> To the extent that Federalists complained about local juries, they typically focused on the potential for prejudice or bias against an unpopular defendant. For example, a Federalist delegate to the Massachusetts ratifying convention attacked “[t]he idea that the jury coming from the neighborhood, and knowing the character and circumstances of the party in trial, is promotive of justice . . . .” ABRAMSON, *supra* note 15, at 26 (statement of Christopher Gore of Massachusetts) (quoting 2 ELLIOT’S DEBATES, *supra* note 63, at 112–13). To the contrary, “[t]he great object is to determine on the real merits of the cause, uninfluenced by any personal considerations; if, therefore, the jury could be perfectly ignorant of the person in trial, a just decision would be more probable.” *Id.* (quoting 2 ELLIOT’S DEBATES, *supra* note 63, at 112–13); *see also id.* (statement of Governor Johnston of North Carolina) (“We may expect less partiality when the trial is by strangers. . . I would rather be tried by disinterested men, who were not biased, than by men who were perhaps intimate friends of my opponent.” (quoting 4 ELLIOT’S DEBATES, *supra* note 63, at 150)).

that in some states, “juries, even in criminal cases, are taken from the State at large; in others, from districts of considerable extent; in very few from the County alone. Hence a dislike to the restraint with respect to *vicinage* . . . .”<sup>68</sup> To guarantee trial by “a jury of the vicinage,” was, therefore, to riddle the text with ambiguity; but to produce consensus on a more precise definition seemed an impossible task.<sup>69</sup> Still, whatever the precise geography, there seems to have been little objection, even among Federalists, to some form of local control. Even juries drawn from the state as a whole, as the Article III jury trial provision had suggested, would fill that role.<sup>70</sup>

And so we see the terms of the debate in the founding generation—there were those who valued a local check on distant government power, and those who favored an even more local check on that power. The law-finding power of juries was surely vital to that check.<sup>71</sup>

This allocation of power would, of course, eventually unravel. In the 1895 case of *Sparf v. United States*,<sup>72</sup> the Supreme Court would claim for the federal courts the exclusive power over questions of law. But *Sparf* was hardly the engine of this change. Instead, the idea that judges ought to control the domain of law, and juries only the domain of fact, developed gradually over the course of the nineteenth century.

The civil jury was the first to yield.<sup>73</sup> The criminal side was stickier. Justice Story’s 1835 opinion sitting as circuit justice in *United States v.*

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<sup>68</sup> Letter from James Madison to Edmund Pendleton, Sept. 14, 1789, in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 491 (1865); see also *Williams v. Florida*, 399 U.S. 78, 95–96 (1970) (discussing the controversy over vicinage); ABRAMSON, *supra* note 15, at 25.

<sup>69</sup> ABRAMSON, *supra* note 15, at 25.

<sup>70</sup> *Id.* at 34–35.

<sup>71</sup> This is not to say that the founding generation valued local juries solely for their law-finding function. Far from it. Many thought local juries to be superior factfinders because of their familiarity with local conditions, the parties, and witnesses. See, e.g., 2 ELLIOT’S DEBATES, *supra* note 63, at 110 (statement of Mr. Holmes of Massachusetts) (A jury of the vicinage “would, from their local situation, have an opportunity to form a judgment of the *character* of the person charged with the crime, and also to judge of the *credibility* of the witnesses.”); 3 *id.* at 547 (Statement of Mr. Pendleton of Virginia) ([J]urors “should have some personal knowledge of the fact, and acquaintance with the witnesses, who will come from the neighborhood.”). For a thorough discussion of the debate over vicinage, see Steven A. Engel, *The Public’s Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658 (2000).

<sup>72</sup> 156 U.S. 51, 102 (1895) (“[I]t is the duty of juries in criminal cases to take the law from the court and apply that law to the facts.”).

<sup>73</sup> ABRAMSON, *supra* note 15, at 75; Kramer, *supra*, note 47, at 381–82 (“[O]nly the power of the civil jury changed in this period. The criminal jury retained its control over the law as well as the facts until at least the late nineteenth century.”); Nelson, *Province*,

*Battiste*<sup>74</sup> is often cited as the vanguard of the movement to give judges exclusive control over questions of law in criminal cases.<sup>75</sup> There, Justice Story, the great nationalizer<sup>76</sup> and champion of “learned” over populist law,<sup>77</sup> famously rejected the notion that “in any case, civil or criminal, [jurors] have the moral right to decide the law according to their own notions, or pleasure.”<sup>78</sup> Constitutional security, in Story’s mind, arose not from the unchecked populism of Zenger’s jury, but from the stabilizing and equalizing force of knowable law, consistently applied.

The “truest shield against oppression and wrong,” Story wrote, lay in the right of every person to be “tried by the law, and according to the law . . . .”<sup>79</sup> This, for Story, meant judges’ law: Without the guiding hand of the judiciary, “the law itself would be most uncertain, from the different views, which different juries might take of it . . . .”<sup>80</sup> Thus, it was “the duty of the court to

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*supra* note 47, at 343 n.162 (arguing that juries had been “deprived of the power to find law in civil cases” by “the first decade of the nineteenth century” but noting that “[t]hat power persisted in criminal cases . . . well into the nineteenth century”). Just when the civil jury lost its power to find the law is the subject of dispute. *Compare* Nelson, *Province*, *supra* note 47, at 335 (arguing that “by 1804, at the latest, the civil jury had been tamed”), *with* Kramer, *supra* note 47, at 378 (“Certainly judges had obtained control of the law in civil cases in most states by the 1830s.”).

<sup>74</sup> 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545).

<sup>75</sup> *See, e.g.*, *United States v. Dougherty*, 473 F.2d 1113, 1133 (D.C. Cir. 1972) (“The tide was turned by *Battiste* . . . .”); ABRAMSON, *supra* note 15, at 79 (“Clearly, by 1835 Story was one federal judge ready to invert conventional wisdom about the criminal jury.”); Howe, *supra* note 47, at 590 (“[*Battiste*] seems more effectively than any other decision to have deflected the current of American judicial opinion away from the recognition of the jury’s right [to judge the law].”). Chief Justice Lemuel Shaw’s opinion in *Commonwealth v. Porter*, 51 Mass. (10 Met.) 263 (1846), often shares the stage. *See, e.g.*, Krauss, *supra* note 47, at 116.

<sup>76</sup> *See* Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Story’s Judicial Nationalism*, 1994 SUP. CT. REV. 247, 251 (“Story favored national power over any other value . . . .”).

<sup>77</sup> John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 566–67 (1993). Chancellor James “Kent and his contemporary and friend, Joseph Story, were the largest figures in th[e] triumph of the learned law”—the idea that “the intrinsic complexity of human affairs begets unavoidable complexity in legal rules and procedures” and requires legal professionalization—over “folk law”—the idea that “[o]rdinary people, applying common sense notions of right and wrong, could resolve the disputes of life in localized and informal ways.” *Id.*

<sup>78</sup> *Battiste*, 24 F. Cas. at 1043.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

instruct the jury as to the law; and . . . the duty of the jury to follow the law, as it [was] laid down by the court.”<sup>81</sup>

But Story would not immediately triumph. In most states, and in many federal courts, the criminal jury would not release its grip on questions of law until near the close of the century.<sup>82</sup> Slavery, and in particular, the jury’s role in opposing the Fugitive Slave Law, would fuel the continuing controversy,<sup>83</sup> as would the “considerably less grave issue of liquor.”<sup>84</sup> By the end of the century, however, the battle was mostly over. Learned law had won.

Several factors are typically thought to explain the rise of learned law and the decline of jury power. For one, “doing law” just became harder. In 1771, John Adams could write:

The general Rules of Law and common Regulations of Society . . . 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 say, they are drawn in and imbibed with the Nurses Milk and first Air.<sup>85</sup>

It was therefore “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.”<sup>86</sup> For a law that was perceived as “elementary and simple,”<sup>87</sup> the jury was a very fine judge. As Thomas

<sup>81</sup> *Id.*

<sup>82</sup> ABRAMSON, *supra* note 15, at 75; Howe, *supra* note 47, at 582; Kramer, *supra* note 47, at 382; Nelson, *Province, supra* note 47, at 343 n.162; Note, *supra* note 47, at 190. In some states, criminal juries retained law-finding power into the twentieth century. See Howe, *supra* note 47, at 614; Smith, *supra* note 48, at 453.

<sup>83</sup> ABRAMSON, *supra* note 15, at 80 (“With the passage of the Fugitive Slave Law of 1850, slavery emerged again as the single greatest issue driving the debate about whether criminal jurors should be able to decide questions of law and to nullify the law in the name of higher justice.”).

<sup>84</sup> *Id.* at 82; see also *United States v. Dougherty*, 473 F.2d 1113, 1130 (D.C. Cir. 1972) (referring to nullification in cases involving liquor laws).

<sup>85</sup> John Adams, *Adams’ Diary Notes on the Right of Juries*, in 1 LEGAL PAPERS OF JOHN ADAMS 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

<sup>86</sup> *Id.* In the same spirit, a justice of the New Hampshire Supreme Court instructed jurors to decide a case according to their common sense: “[a] clear head and an honest heart are [worth] more than all the law of the lawyers.” Alschuler & Deiss, *supra* note 13, at 906 (alteration in original) (quoting RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 115 (1971)).

<sup>87</sup> *United States v. Sparf*, 156 U.S. 51, 173 (1895) (Gray, J., dissenting) (“The rules and principles of the criminal law are, for the most part, elementary and simple, and easily understood by jurors taken from the body of the people.”).

Jefferson would put it: “The great principles of right and wrong are legible to every reader: to pursue them requires not the aid of many counsellors.”<sup>88</sup>

Law was not, then, as would later be thought, a science requiring professional training and practice to master. Law was instead “an eternal set of principles expressed in custom and derived from natural law.”<sup>89</sup> As such, it was something that could be known by laymen who had lived in, and therefore internalized, the rules of their communities. Judges, some legally trained, others not,<sup>90</sup> might instruct on this law<sup>91</sup> as they had learned it or as they found it in one of the few written sources available.<sup>92</sup> But juries could disregard these instructions if they did not resonate with their experiences. Law was what “[o]rdinary people, applying common sense notions of right and wrong,”<sup>93</sup> were willing through their verdicts to accept as their own.

To later thinkers, this arrangement looked chaotic. One mid-nineteenth century author jeered:

The justice of the case was held up as the law of the case; and the jury were to judge both of the law and the fact. Of course there could be no uniformity in the decisions. There were no fixed principles; but each case must have been decided according to the impulse of the jury, who could have no rule but their own fluctuating ideas of justice.<sup>94</sup>

And it may, indeed, have been chaotic, or even arbitrary. But it was not likely so conceived. A legal system that rests its faith on the untrained judgment of laypersons likely presupposes a certain “ethical unity” among them.<sup>95</sup> Jury judgments informed by this common, eternal, and internalized

<sup>88</sup> ABRAMSON, *supra* note 15, at 88 (quoting 1 THE PAPERS OF THOMAS JEFFERSON 134 (Julian Boyd ed., 1950) (internal quotation marks omitted)).

<sup>89</sup> HORWITZ, *supra* note 47, at 30.

<sup>90</sup> See Kramer, *supra* note 47, at 373; NELSON, AMERICANIZATION, *supra* note 47, at 33.

<sup>91</sup> Even the judges’ instructions—in some places issued seriatim by multi-member panels—were not always consistent. See NELSON, AMERICANIZATION, *supra* note 47, at 3, 26; Kramer, *supra* note 47, at 373.

<sup>92</sup> See Kramer, *supra* note 47, at 373–74.

<sup>93</sup> Langbein, *supra* note 77, at 566.

<sup>94</sup> Kramer, *supra* note 47, at 374 (quoting JOHN H. MORISON, LIFE OF THE HON. JEREMIAH SMITH, LL.D.: MEMBER OF CONGRESS DURING WASHINGTON’S ADMINISTRATION, JUDGE OF THE UNITED STATES CIRCUIT COURT, CHIEF JUSTICE OF NEW HAMPSHIRE, ETC. 174 (1845)) (internal quotation marks omitted).

<sup>95</sup> See NELSON, AMERICANIZATION, *supra* note 47, at 4, 117 (describing an “ethical unity” among the jury pool in colonial Massachusetts that broke down gradually “over a thirty-year period beginning in the 1780s”).

code could thus be *expected* to produce relatively stable and predictable judgments,<sup>96</sup> whether or not they actually succeeded.

This system would not survive the nineteenth century. Society and its governing rules grew more complex, and the need for legal specialists was then more keenly felt.<sup>97</sup> At about the same time, there appeared on the scene an increasing supply of legally-trained professionals,<sup>98</sup> equipped with newly available law books<sup>99</sup> and reported cases.<sup>100</sup> Law came to be seen not just as “common sense and common justice” but as “a system of principles . . . [that] could be understood and taught using the same methods practiced in other sciences.”<sup>101</sup> And it came, too, to be seen as something that belonged properly only to those trained to handle it.<sup>102</sup> Whether by design<sup>103</sup> or

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<sup>96</sup> *Id.* at 165–66 (“In prerevolutionary Massachusetts juries had been able to arrive at verdicts in individual cases and to apply law consistently over a long series of cases largely because men selected to juries shared a common set of ethical values and assumptions that facilitated the attainment of unanimity and consistency in the application of the rules of common law.”).

<sup>97</sup> Alschuler & Deiss, *supra* note 13, at 917; Smith, *supra* note 48, at 445 (“[A]s legal principles (and society in general) grew increasingly complex, the role of the jury in adjudicating disputes decreased.”).

<sup>98</sup> On “the shift from the apprenticeship system to university legal education,” which included “an intervening phase[] of proprietary law schools,” see John L. Langbein, *Blackstone, Litchfield, and Yale: The Founding of the Yale Law School*, in *HISTORY OF THE YALE LAW SCHOOL: THE TERCENTENNIAL LECTURES* 23 (Anthony T. Kronman ed., 2004).

<sup>99</sup> See A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 669–74 (1981) (discussing the work of early nineteenth-century American treatise writers).

<sup>100</sup> See Langbein, *supra* note 77, at 571–84 (discussing the early nineteenth-century movement to produce, publish, and circulate written judicial opinions); see also Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291 (1985) (discussing the history of reporting United States Supreme Court cases).

<sup>101</sup> Kramer, *supra* note 47, at 375.

<sup>102</sup> *Id.* at 375–76.

<sup>103</sup> On the “design” side of the argument, Professor Langbein describes Chancellor James Kent’s and Joseph Story’s “campaign to make American law a ‘learned law’” through “three media—the published judicial opinion, juristic writing and legal education.” Langbein, *supra* note 77, at 571; see also HORWITZ, *supra* note 47, at 141 (characterizing the “subjugation” of the jury’s law-finding power as the product of an “alliance between bench and bar on the one hand,” who were interested in elevating the status of their profession “and commercial interests on the other” who sought to make the law more stable and business-friendly); Nelson, *Summary Judgment*, *supra* note 52, at 1658 (describing “a loosely knit group of Federalist judges . . . [who] initiated a plan to

happenstance,<sup>104</sup> the appearance of “real” law and real lawyers meant that lay jurors could step down.<sup>105</sup>

With “real” law came other values too. Book law is transparent and accessible. Its application can be checked across cases for consistency—a process that, in turn, promotes predictability. Its value to commercial interests and economic prosperity cannot be overstated. In the words of Professor William Nelson: “The entire world assumes that the rule of law—i.e., known, stable, and predictable legal doctrine that is neutrally and objectively applied—is a prerequisite to the commitment of the money and energy essential to economic activity.”<sup>106</sup> The civil jury, whose domain was private interests, was the first to lose its power over the law.<sup>107</sup>

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seize control of the law from juries and the lay public and place it in the hands of judges and legal professionals”).

<sup>104</sup> On the “happenstance” side, Professor Alschuler and Mr. Deiss argue that “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.” Alschuler & Deiss, *supra* note 13, at 917.

<sup>105</sup> *Id.*

<sup>106</sup> Nelson, *Summary Judgment*, *supra* note 52, at 1660; *see also* Kramer, *supra* note 47, at 386 (“[I]f any single factor predominated in bringing [about the demise of the law-finding jury] it seems to have been a growing appreciation of the need to have predictable rules in civil cases.”).

<sup>107</sup> Democracy is also said to have played a role in the demise of the jury’s law-finding function.

[I]n 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.

Alschuler & Deiss, *supra* note 13, at 917 (citing FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 41 (1985)); *see also* Nelson, *Province*, *supra* note 47, at 329, 351–55. But there is reason to question whether the rise of democracy can explain the jury’s decline. As Larry Kramer has pointed out, “only a very small portion of litigation involved statutes. The overwhelming majority of cases were still based on the common law. . . .” Kramer, *supra* note 47, at 381. Thus, diminishing the jury’s role empowered not legislatures, but judges, who could hardly claim to have “reflected the voice of a republican people better than a jury.” *Id.* Moreover, concerns that individual juries would thwart the will of the people “would presumably have been *more* compelling in the context of criminal cases given the special role of criminal law as an expression of community will.” *Id.* Yet, criminal juries retained their law-finding power for more than a century after the Revolution. *Id.* at 382.

Criminal juries, by contrast, would retain their law-finding power much longer.<sup>108</sup> We might attribute this to the multifaceted and sometimes conflicting aims of the criminal law, not all of which are served by the transparent, uniform, and predictable application of legal rules. Justice might be blind, but mercy, like vengeance, never can be.

Still, over time we might imagine the difficulty of sustaining a janus-faced system of judge-jury relations. Judges, accustomed to having the final say over the law in civil cases, may have come to see the law as their domain in all cases. And the virtues of transparency, predictability, and uniformity, which seemed so apparent to Justice Story in 1835, may also have come to dominate nineteenth-century thinking about the criminal law. And so at the close of the nineteenth century, even the criminal jury would lose its power over the law, marked most prominently by the Supreme Court's holding in *Sparf*.<sup>109</sup>

And yet even Justice Harlan's majority opinion in *Sparf* did not squarely deny that this was new.<sup>110</sup> At the time of the Founding—and through at least the first third of the nineteenth century—the practice in federal courts had been to instruct criminal juries that they were the judges of both the fact and the law.<sup>111</sup> In many states, and in some federal courts, the criminal jury reigned much longer. The jury's law-finding power cannot fairly be understood as tangential to the functioning of the criminal jury during this period—it was essential to it.

*Sparf*, therefore, rested its judgment not so much upon history, but upon the Court's interest in “the stability of public justice,”<sup>112</sup> and its embrace of

<sup>108</sup> See *supra* note 48 and accompanying text.

<sup>109</sup> Juries would shortly thereafter lose their guaranteed seat in the courtroom. Although jury participation was once mandatory absent guilty plea, most states in the latter part of the nineteenth century began to allow felony bench trials. Towne, *supra* note 51, at 123. The Supreme Court would not recognize this innovation until the middle third of the twentieth century, but it too, would ultimately yield. See *Patton v. United States*, 281 U.S. 276 (1930).

<sup>110</sup> Howe, *supra* note 47, at 589 (“Mr. Justice Harlan could not deny the fact that in the federal courts until 1835, lower court judges and Justices of the Supreme Court, sitting on circuit, had time and again specifically instructed juries that they were ‘the judges both of the law and the fact in a criminal case, and are not bound by the opinion of the court . . . .’” (quoting *United States v. Wilson*, F. Cas. No. 708,730 (C.C.E.D. Pa. 1830) (No. 16,730))).

<sup>111</sup> *Id.* at 589 n.22. Indeed, one commentator would claim “[t]here was only one judge in the United States who, between 1776 and 1800, was to deny the jury the right to decide law in criminal cases.” Smith, *supra* note 48, at 447 n.302 (alteration in original) (quoting LLOYD E. MOORE, *THE JURY TOOL OF KINGS, PALLADIUM OF LIBERTY* 107 (1973)).

<sup>112</sup> *Sparf v. United States*, 156 U.S. 51, 106 (1895).

the nineteenth-century vision of what counted as “law,” however sharply that contrasted with the vision of the founding generation.<sup>113</sup>

### III. THE COURT’S RETURN TO ORIGINALISM

Fast forward precisely one hundred years and the Court again found itself confronting the constitutional allocation of power between jury and judge. *United States v. Gaudin*<sup>114</sup> involved an odd corner of criminal jurisprudence in which the authority transfer from jury to judge, blessed in *Sparf*, had traveled one step further. *Sparf* held that juries were bound by judicial instructions on questions of law.<sup>115</sup> But *Sparf* had left firmly intact the jury’s right to render general verdicts and to draw ultimate conclusions about guilt or innocence.<sup>116</sup> Michael Gaudin’s case challenged even that notion.

The trial judge in *Gaudin* had instructed the jury that “materiality” was an element of the false statements offense with which Gaudin was

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<sup>113</sup> The Court rejected the eighteenth century view that giving the jury the power to judge the law would better secure, “the safety and liberty of the citizen,” *id.*, in terms that extolled the nineteenth century virtues of transparency, accountability, and uniformity:

“[A]s long as the judges of the United States are obliged to express their opinions publicly, to give their reasons for them when called upon in the usual mode, and to stand responsible for them, not only to public opinion, but to a court of impeachment, I can apprehend very little danger of the laws being wrested to purposes of injustice. But, on the other hand, I do consider that this power and corresponding duty of the court, authoritatively to declare the law, is one of the highest safeguards of the citizen. The sole end of courts of justice is to enforce the laws uniformly and impartially, without respect of persons or times or the opinions of men. To enforce popular laws is easy. But when an unpopular cause is a just cause, when a law, unpopular in some locality, is to be enforced, there then comes the strain upon the administration of justice, and few unprejudiced men would hesitate as to where that strain would be most firmly borne.”

*Id.* at 107 (quoting *United States v. Morris*, 26 F. Cas. 1336 (C.C.D. Mass 1851) (No. 15, 815)).

<sup>114</sup> 515 U.S. 506 (1995).

<sup>115</sup> *Sparf*, 156 U.S. at 106.

<sup>116</sup> *Id.* at 105 (“[I]t is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offence charged or of any criminal offence less than that charged.”); *id.* (“In a civil case the court may set aside the verdict . . . upon the ground that it is contrary to the law as given by the court; but in a criminal case, if the verdict is one of acquittal, the court has no power to set it aside.” (quoting *United States v. Taylor*, 11 F. 470, 474 (C.C.D. Kan. 1882) (internal quotation marks omitted))).

charged,<sup>117</sup> but that the question of materiality was not “submitted to [the jury] . . . for [its] decision but rather [was] a matter for the decision of the court.”<sup>118</sup> The court then instructed the jury that the statements Gaudin had made were material.<sup>119</sup> The jury was thereby disabled from considering this element of the crime.

Gaudin’s case was no quirk. With one exception, judicial reservation of the materiality element of false-statement offenses had been approved by every federal court of appeals to consider the issue.<sup>120</sup> And there were reasons for the rule. The “materiality” of a false statement, that is, its “natural tendency to influence, or [be] capable of influencing” a decision,<sup>121</sup> was thought to be akin to the “relevancy” of evidence to the proof of a cause;<sup>122</sup> and “relevancy” had always been considered a question for the court.<sup>123</sup> Indeed, Supreme Court case law had made such a judgment involving the strikingly similar element of “pertinancy” in criminal contempt prosecutions.<sup>124</sup> Thus, both precedent and the sense that judges were more accustomed to, and therefore more capable of, making determinations like “materiality” supported the then-prevailing rule.

The Supreme Court, however, was persuaded neither by precedent nor pragmatic appeals, and decided the case instead upon its understanding of the original balance of authority between jury and judge. “Juries at the time of the framing,” the Court found, “could not be forced to produce mere ‘factual findings,’ but were entitled to deliver a general verdict pronouncing the defendant’s guilt or innocence.”<sup>125</sup> And even *Sparf*’s recognition of judges’ power to issue binding instructions on the law had not “undermined the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes

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<sup>117</sup> Gaudin was charged with violating 18 U.S.C. § 1001 for making false statements on federal loan documents. *Gaudin*, 515 U.S. at 508.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 527 (Rehnquist, C.J., concurring) (citing *United States v. Gaudin*, 28 F.3d 943, 955 (9th Cir. 1994) (Kozinski, J., dissenting) (collecting cases)).

<sup>121</sup> *Id.* at 509 (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988) (internal quotation marks omitted)).

<sup>122</sup> *Id.* at 520–21.

<sup>123</sup> *Gaudin*, 515 U.S. at 519–21.

<sup>124</sup> *See id.* at 519 (discussing *Sinclair*); *Sinclair v. United States*, 279 U.S. 263, 298 (1929).

<sup>125</sup> *Gaudin*, 515 U.S. at 513 (citing Edmund M. Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 *YALE L.J.* 575, 591 (1922)); G. CLEMENTSON, *SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES* 49 (1905); Alschuler & Deiss, *supra* note 13, at 912–13).

application of the law to the facts.”<sup>126</sup> Finding “absolutely no historical support” for the proposition that juries at the Founding could be deprived of the power to pass upon every element of a criminal offense,<sup>127</sup> the Court declared unconstitutional the widespread modern practice of withholding the “materiality” element from the jury.<sup>128</sup>

*Gaudin*’s rule was clear enough—juries needed to determine every element of a crime—but it begged the question of just what constituted an “element.”<sup>129</sup> Chief Justice Rehnquist’s concurring opinion in *Gaudin* seized on this ambiguity and set the stage for battles to come. Writing for three members of the Court,<sup>130</sup> he expressed the view that original meanings did not govern this question.

Nothing in the Court’s decision stands as a barrier to legislatures that wish to define—or that have defined—the elements of their criminal laws in such a way as to remove issues such as materiality from the jury’s consideration. We have noted that ‘[t]he definition of the elements of a criminal offense is entrusted to the legislature . . . .’ Within broad constitutional bounds, legislatures have flexibility in defining the elements of a criminal offense. Federal and state legislatures may reallocate burdens of proof by labeling elements as affirmative defenses, or they may convert elements into ‘sentencing factor[s]’ for consideration by the sentencing court.<sup>131</sup>

The jury trial right, in Chief Justice Rehnquist’s view, was thus squarely within legislative control. It would attach when the legislature thought jury involvement was the better course—an opinion it could express by labeling a factual determination an “element”—but legislatures could oust the jury by the use of any other label.

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<sup>126</sup> *Gaudin*, 515 U.S. at 513.

<sup>127</sup> *Id.* at 512; *see also id.* at 516 (“[T]here was also no clear practice of having the judge determine the materiality question in this country at or near the time the Bill of Rights was adopted.”). The Court did suggest that “uniform postratification practice [could] shed light upon the meaning of an ambiguous constitutional provision . . . .” *Id.* at 519. In this case, however, the Court found that the original history left “the core meaning of the constitutional guarantee . . . unambiguous,” *id.*, and found the Government’s “latter part of the 19th century” evidence suggesting that “materiality” was an element for the judge to be, at best, divided. *Id.* at 517.

<sup>128</sup> *Id.* at 522–23.

<sup>129</sup> The government had conceded, in *Gaudin*, that materiality did constitute an element of the crime. *See id.* at 509; *id.* at 524–25 (Rehnquist, C.J., concurring).

<sup>130</sup> Chief Justice Rehnquist’s opinion was joined by Justices O’Connor and Justice Breyer.

<sup>131</sup> *Id.* at 525 (Rehnquist, C.J., concurring) (alteration in original) (citations omitted).

The Rehnquist view would not ultimately prevail. In a string of now-famous cases—referred to as the *Apprendi* line—a bare majority of the Court rejected the view that the Constitution left the jury trial right so vulnerable to legislative manipulation.<sup>132</sup> Once again, the Court's understanding of Founding Era practices would be its guide.<sup>133</sup>

The *Apprendi* cases examined the constitutionality of modern sentencing practices that permitted judges to sentence defendants to punishments greater than those authorized by the jury verdict based upon judicial findings of fact, often called “sentencing factors.” To the *Apprendi* majority, this practice looked like just another attempt to undercut the historic role of the jury—different in form, but not in substance, from that which it had invalidated in *Gaudin*. Reviewing the Founding Era's allocation of authority between judge and jury,<sup>134</sup> the Court concluded that “a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone” was such a “novelty” that it could not be constitutionally accepted.<sup>135</sup>

The *Apprendi* dissenters, for their part, disputed that historical practices spoke to the allocation of sentencing authority between judge and jury.<sup>136</sup> The historical record being in their view silent, they would have permitted the modern sentencing practices to continue. But notably, neither the

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<sup>132</sup> The *Apprendi* dissenters, for their part, thought the majority's rule just as easily evaded by the legislature. See *Apprendi v. New Jersey*, 530 U.S. 466, 540 (2000) (O'Connor, J., dissenting) (suggesting the possibility that a legislature could “achieve virtually the same results” as those forbidden by *Apprendi* by dramatically increasing the maximum penalty for a crime and allowing judicial factfinding to manipulate penalties within that broader range); *id.* at 539 (stating that the majority's rule “rests on a meaningless formalism”).

<sup>133</sup> Some scholars have criticized *Apprendi*'s reading of history and its application of originalist methodology. See, e.g., Bibas, *supra* note 3, at 196–99; Jonathan F. Mitchell, *Apprendi's Domain*, 2006 SUP. CT. REV. 297, 329–42 (2006). This paper does not engage that debate. For purposes of this discussion, it matters less whether the Court read the historical record correctly than that it chose to rest its judgment upon the historical record.

<sup>134</sup> *Apprendi*, 530 U.S. at 478–84.

<sup>135</sup> *Id.* at 482–83; see also *id.* at 499 (Scalia, J., concurring) (The jury trial right “has been assumed to guarantee throughout our history—the right to have a jury determine those facts that determine the maximum sentence the law allows.”).

<sup>136</sup> *Id.* at 525 (O'Connor, J., dissenting) (“None of the history contained in the Court's opinion requires the rule it ultimately adopts.”); *id.* at 527 (“The history on which the Court's opinion relies provides no support for its ‘increase in the maximum penalty’ rule.”); see also *id.* at 527–29 (disputing the reading of history and the methodology used by Justice Thomas's concurring opinion).

majority nor the principal dissent<sup>137</sup> suggested a second level of analysis. No one questioned whether, if the majority were right about the practice at the Founding, that practice would still have to obtain today. That is, *Apprendi* contains no discussion of whether *all* attributes of the original jury were constitutionalized and therefore, must endure.<sup>138</sup>

*Apprendi*, of course, may have been an unlikely vehicle for such a discussion. The scope of the jury's involvement in determining sentence eligibility may simply have seemed too central to the original understanding to have raised the question. But the point remains that, whatever the cause, the Court's modern engagements with originalism and the jury trial have presented the choices as binary: the jury was either frozen at the Founding, or it is largely malleable at the discretion of the legislature.<sup>139</sup> As far as the Court's originalist case law has presented the question, the jury is either everything it once was, or anything we could want it to be (including, perhaps, almost nothing).

The next section will ask whether the Court's brand of originalism has any as-yet unexplored tools that might help bridge the gulf between the original and the modern jury.<sup>140</sup>

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<sup>137</sup> Justice Breyer's separate dissent focused on pragmatic, rather than historic, concerns. *See id.* at 555 (Breyer, J., dissenting).

<sup>138</sup> The majority opinion in *Apprendi* did hint at the problem, but suggested no tools for its resolution. The Court was quick to distance itself from the "suggest[ion] that trial practices cannot change in the course of centuries and still remain true to the principles that emerged from the Framers' fears 'that the jury right could be lost not only by gross denial, but by erosion.'" *Id.* at 483 (quoting *Jones v. United States*, 526 U.S. 227, 248 (1999)). But the Court resolved that tension simply by asserting that jury practice "must at least adhere" to the rule the majority announced in *Apprendi. Id.*

<sup>139</sup> In Justice Scalia's view, the possibility of the infinitely malleable jury decided the case. *See id.* at 498–99 (Scalia, J., concurring) ("What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury *does* guarantee if, as they assert, it does not guarantee—what it has been assumed to guarantee throughout our history—the right to have a jury determine those facts that determine the maximum sentence the law allows.").

<sup>140</sup> Originalism has many adherents these days, and they do not always agree about what originalism entails. By one critic's count, "literally thousands of discrete theses can plausibly claim to be originalist." Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 16 (2009). This paper, focused as it is on the implications of the Supreme Court's return to originalism for the modern criminal jury, will focus on originalism as it has been practiced by the Court and articulated by the Court's most vocal originalist, Justice Scalia.

## IV. ORIGINALISM AND CHANGE

Originalism is often caricatured as being at war with change. Originalists are portrayed as pining for a return to a bygone era, which they seek to bring about through the ossification of constitutional rules. The mantle of change belongs, at least in the public imagination, to those who espouse some non-originalist philosophy.<sup>141</sup>

More sophisticated audiences, however, understand that originalism typically is quite comfortable with change; its only enemy is change imposed by judges. Originalism accommodates change primarily through two devices, which this paper explores below.

A. *Legislative Expansion*

When originalism confronts most constitutional rights, it can comfortably allow legislative expansions on their scope. Constitutional rights are frozen in the past in the sense that judges are charged with preventing an erosion of those rights as they were originally understood. But the judicial role ends there. Originalists do not believe judges to be licensed to expand those rights beyond the original understanding.<sup>142</sup> Nothing about an originalist approach to constitutional interpretation, however, prevents legislatures from being more protective.

To illustrate, consider the Eighth Amendment. Although its text forbidding “cruel and unusual punishments”<sup>143</sup> is capable of an interpretation that forbids capital punishment, most originalist interpretations of the amendment would not give it such an expansive construction. Rather, what the Eighth Amendment forbids, for an originalist like Justice Scalia, is what late eighteenth century Americans would have understood to be unusual and cruel. The clause is, in this sense, an impenetrable barrier, frozen solid in

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<sup>141</sup> See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 41 (1997).

<sup>142</sup> This is not to say that originalists agree about how to discover or interpret that original understanding and how much freedom that interpretive choice gives judges. Compare, e.g., Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293–95 (2007) [hereinafter Balkin, *Abortion*] (rejecting the idea that original expected applications inform constitutional meaning and suggesting that interpreters retain a fair amount of discretion in construing the abstract provisions of the Constitution), with John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 371 (2007) (“[T]he Constitution’s original meaning is informed by, but not exhausted by, its original expected applications. In particular, the expected applications can be strong evidence of the original meaning.”).

<sup>143</sup> U.S. CONST. amend. VIII.

time in order to protect “against the moral perceptions of a future, more brutal, generation.”<sup>144</sup> Yet, viewed through this lens, the death penalty, having been in the late eighteenth century neither unusual nor considered cruel, is constitutionally permissible.<sup>145</sup> But no originalist would argue that the death penalty is compelled. Instead, “the state and federal governments may either apply capital punishment or abolish it . . . all as the changing times and the changing sentiments of society may demand.”<sup>146</sup> An originalist’s Constitution can thus easily keep up with the times.<sup>147</sup> Judges are just not licensed to be the engines of change.

This relationship between originalism and legislative or societal change rests on the particular direction that has marked the history of American conceptions of individual rights. Viewed through modern eyes, most eighteenth century conceptions of individual freedom appear minimal.<sup>148</sup> And the arc of history generally has been to expand upon, rather than to contract, these minimal baseline rules. Some states, for example, provide counsel to criminal defendants even when the Sixth Amendment does not require it. None of this troubles originalism.

It is harder for originalism to make space for such legislative freedom with respect to the jury trial right, however, because the trajectory of our history with respect to the jury trial has largely gone in reverse. Far from being a minimalist institution in need of legislative succor, the jury the Founders knew was already robust and powerful—and the arc of our relationship with the jury has been to curtail, not embellish, its role. Yet, the text, read on originalist terms, seems to endow criminal defendants with the right to demand just that robust procedure. Legislative improvement or alteration, if possible at all,<sup>149</sup> would seem possible only by offering elective

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<sup>144</sup> SCALIA, *supra* note 141, at 145.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 42. The same is true, Justice Scalia tells us, for physician-assisted suicide, women in combat, and same-sex public bathrooms: “Unisex toilets and women assault troops may be ideas whose time has come, and the people are certainly free to require them by legislation; but refusing to do so does not violate the Fourteenth Amendment, because that is not what ‘equal protection of the laws’ ever meant.” *Id.* at 149; *see also id.* at 42 (arguing that government is free to permit suicide, although the Constitution does not compel it to do so).

<sup>147</sup> *See* Scalia, *supra* note 29, at 862 (“[A] democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect ‘current values.’ Elections take care of that quite well.”).

<sup>148</sup> Rights of property and contract would be an exception. *See* SCALIA, *supra* note 141, at 43.

<sup>149</sup> *See* Amar, *supra* note 51, at 1196 (discussing the fact that, as an original matter, juries could not be waived, even with the consent of all parties).

alternatives to, not mandatory substitutes for, the constitutionally contemplated jury trial.

### B. *Modern Instantiations of Ancient Concepts—From Muskets to Machine Guns*

A second way in which originalism accommodates change is by making room for modern instantiations of original concepts. Thus, where the Constitution states a principle or a standard, the originalist can readily apply the principle in contexts the founding generation could not possibly have envisioned.

To return to the Eighth Amendment, Justice Scalia has explained his view that the cruel and unusual punishments clause represents an “abstract principle,” not a “concrete and dated rule.”<sup>150</sup> That principle, he posits, is to be tested against the “moral perceptions of the time” of its enactment and does not change.<sup>151</sup> But that unchanging principle can nonetheless be applied to forbid “all sorts of tortures quite unknown at the time the Eighth Amendment was adopted.”<sup>152</sup>

Similarly, the Supreme Court’s majority opinion in *District of Columbia v. Heller* could readily dismiss the argument “that only those arms in existence in the 18th century are protected by the Second Amendment;”<sup>153</sup> and conclude instead that “the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”<sup>154</sup> The Second Amendment’s non-interference principle thus operates on modern improvements on eighteenth-century weaponry in the same way that the Fourth Amendment’s principle forbidding “unreasonable searches” protects modern improvements on the log cabin. The Constitution is agnostic as to the form of housing, arms, or for that matter communications or surveillance technology.<sup>155</sup> Its commitment is instead to the original principle of (reasonable) governmental noninterference.

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<sup>150</sup> SCALIA, *supra* note 141, at 145 (internal quotation marks omitted).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> 128 S. Ct. 2783, 2791 (2008).

<sup>154</sup> *Id.* at 2791–92.

<sup>155</sup> See *id.* (“[T]he First Amendment protects modern forms of communications, e.g., *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849 (1997), and the Fourth Amendment applies to modern forms of search, e.g., *Kyllo v. United States*, 533 U.S. 27, 35–36 (2001)” (citations omitted)).

This could conceivably be true also of the Constitution's guarantee of trial by jury. The Court, even in its originalist opinions, has repeatedly reminded us of the principles protected by jury trial. Juries exist, for example, to protect the "fairness and reliability" of criminal trials,<sup>156</sup> "[t]o guard against a spirit of oppression and tyranny on the part of rulers"<sup>157</sup> and to "ensure [the people's] control in the judiciary."<sup>158</sup> Thus, we might reason, the Constitution protects the principle and is agnostic about the form of the jury and the trial that is its vehicle. That is a way of thinking about the jury trial right, and it is one that the Supreme Court has at times adopted,<sup>159</sup> but as this Section hopes to explain, it is not an originalist way.

### 1. *Originalism's Rules*

Originalists are not of a single mind on how to resolve constitutional questions, such as the nature of the jury. Yet there are significant areas of agreement among contemporary originalists, including those who currently sit on the Supreme Court. The first rule of originalism might be simply stated: Start with the text. If the text is clear, that is the end of the matter.<sup>160</sup> According to Justice Scalia, "[t]he theory of originalism treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated."<sup>161</sup> The constitutional text, in other words, should be interpreted in light of its "original public meaning."<sup>162</sup>

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<sup>156</sup> *United States v. Booker*, 543 U.S. 220, 244 (2005) (internal quotation marks and citations omitted).

<sup>157</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873)).

<sup>158</sup> *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

<sup>159</sup> See *infra* notes 189–209 and accompanying text (discussing *Williams v. Florida*, 399 U.S. 78 (1970)).

<sup>160</sup> See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 550 (1994) ("First and foremost, in interpreting text, commonsensically enough, one ought to begin with the text.").

<sup>161</sup> Justice Antonin Scalia, A Theory of Constitutional Interpretation, Remarks at Catholic University of America (Oct. 18, 1996), available at <http://web.archive.org/web/19980119172058/www.courtstv.com/library/rights/scalia.html>; see also Calabresi & Prakash, *supra* note 160, at 551–52 ("[T]he Constitution is thus like other legal writings, including statutes, contracts, wills, and judicial opinions. The meaning of all such legal writings depends on their texts, as they were objectively understood by the people who enacted or ratified them.").

<sup>162</sup> A majority of the Court has recently adopted this approach. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008) ("In interpreting [the] text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished

Nothing can trump text in interpreting the Constitution: not a principle, not an original intention.<sup>163</sup> A corollary to this rule might be phrased: read the text for what it is.<sup>164</sup> Treat rules as rules, standards as standards, principles as principles.<sup>165</sup> Thus, the text's precise rules, such as those regarding eligibility

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from technical meaning.' Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.'" (internal citations omitted)). This is also the dominant scholarly position. See Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999) ("[O]riginalism has itself changed—from original *intention* to original *meaning*. No longer do originalists claim to be seeking the subjective intentions of the framers. Now both Robert Bork and Antonin Scalia, no less than Ronald Dworkin and Bruce Ackerman, seek the original meaning of the text."); see also John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 761 (2009) ("Original public meaning is now the predominant originalist theory, with adherents including Randy Barnett, Gary Lawson, Michael Paulsen, and Larry Solum."); Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 609–10 (2004).

<sup>163</sup> It is useful to keep straight the distinction, helpfully made by Larry Solum, between "semantic theories of constitutional meaning" and "normative theories of constitutional practice." See Larry Solum, *Semantic Originalism* 30 (Illinois Public Law Research Paper No. 07-24, 2008), available at <http://papers.ssrn.com/abstract=1120244>. The former, simply put, involves figuring out what the Constitution means; the latter involves figuring out what to do with that meaning. *Id.* Originalists agree that nothing can trump text in divining the Constitution's meaning, although they might disagree that nothing can trump text, as originally understood, in putting the Constitution into practice. Some originalists, like Justice Scalia, believe that stare decisis can play a trumping role. See SCALIA, *supra* note 141, at 38–39. That, Justice Scalia says, is "not *part of* [his] originalist philosophy; it is a pragmatic *exception* to it." *Id.* at 140. This problem is unlikely to arise with a text that is indisputably clear even viewed through modern eyes; the Court has yet to read thirty to mean forty, for example. But it might arise with respect to texts that are clear when viewed through the lens of original meaning, but that have since been interpreted in a nonoriginal fashion. At least some aspects of the jury present such an example.

<sup>164</sup> See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 149 (1990); Jack N. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 432–33 (2008) [hereinafter Balkin, *Original*]; Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 671–75 (2009); Solum, *supra* note 163, at 124–25.

<sup>165</sup> The distinction between rules on the one hand and standards or principles on the other is relatively clear and well-accepted. "Rules are largely defined by the *ex ante* character of law," Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 961 (1995), and they apply in an all-or-nothing fashion. David Lyons, *Principles, Positivism and Legal Theory*, 87 YALE L.J. 415, 422 (1977). A standard, by contrast, "depend[s] on *ex post* assignments." Sunstein, *supra*, at 962. "A ban on 'excessive' speeds on the highway" states a standard; "a fifty-five miles per hour speed limit" states a rule. *Id.* at 964–65. The distinction between standards and principles is foggier, "in part because the

and selection for the office of the President, should be applied with precision.<sup>166</sup> An originalist would not deem a twenty-four-year-old eligible for service in the House of Representatives, even if a particularly mature twenty-four year old presented herself for the job; nor would an originalist read twenty-five to mean thirty-five on the theory that, in modern society, with longer life-expectancy and greater time spent pursuing education, the purposes of the rule are better served by a higher age limit. The first rule of originalism is to honor the text. If the text states a precise rule, the originalist will honor it because the text so commands.

## 2. *The Jury Trial Rule*

The Constitution twice guarantees the right to criminal trial by jury. Taking originalism's commitments seriously, those provisions seem most fairly read to state a rule, not a standard or a principle. Article III states first that:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have

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term 'principles' refers to several different phenomena." *Id.* at 966. Principles are sometimes said to "guide, but may not determine, legal decisions." Lyons, *supra*, at 422. "We might say that rules [or standards] are justified by principles . . . . The justification of the rule might be used to interpret its meaning; courts may resort to the principle in trying to understand the rule." Sunstein, *supra*, at 966. But sometimes a case "seems to turn on a 'principle,' as in the idea that speech may not be restricted unless there is a clear and present danger, or that discrimination on the basis of race is presumed invalid," *id.* at 967, or to bring it home to criminal procedure, that no person should be convicted without a fair trial. "In this usage, a principle is not distinguishable from a standard or a presumption . . . ." *Id.* For purposes of this paper, the precise boundary between a standard and a principle matters little; what is important is that neither standards nor principles have the quality of rules. See Balkin, *Original*, *supra* note 164, at 491 (treating standards and principles together as contrasted with rules); Sunstein, *supra*, at 967 (sometimes doing the same).

<sup>166</sup> See, e.g., Balkin, *Abortion*, *supra* note 142, at 305 ("When the text is relatively rule-like, concrete and specific, the underlying principles cannot override the textual command. For example, the underlying goal of promoting maturity in a President does not mean that we can dispense with the 35 year age requirement."); Randy Barnett, *Trumping Precedent with Original Meaning: Not as Radical as it Sounds*, 22 CONST. COMMENT. 257, 263 (2005) ("Sometimes the original meaning of a text is clear and rule-like—the age limits for presidents is the favorite example—and it directly dictates the outcome of a case or controversy."); Calabresi & Fine, *supra* note 164, at 677 ("The Framers' choice of electoral rules, not standards, allows for no judicial or other build-outs . . .").

been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.<sup>167</sup>

The Sixth Amendment in similar fashion commands: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .”<sup>168</sup>

These texts create a few clear and specific rules. The occasion for and location of jury trials are precisely defined. Jury trials shall take place “[i]n all criminal prosecutions,”<sup>169</sup> but not “in Cases of Impeachment,”<sup>170</sup> and shall be held “in the State where the said Crimes shall have been committed.”<sup>171</sup>

The text, at first glance, appears far less precise about constituting or defining the jury itself. Apart from the Sixth Amendment requirements that juries be “impartial,” and that their members be “of the State and district wherein the crime shall have been committed,”<sup>172</sup> the text does not on its face help us decide what a jury is, or what it means to be tried by one.

We might, therefore, assume that the Constitution is indifferent to the details. As long as defendants are convicted after a process that serves the purposes originally envisioned for the jury, the constitutional principle is satisfied. On this theory, “juries” no less than their Bill of Rights neighbors—“Arms,”<sup>173</sup> “papers,” and “houses,”<sup>174</sup>—can undergo radical change and still be true to the original Constitution. But an originalist would likely think this logic mistaken. Because, silence on the details notwithstanding, the Constitution seems most fairly read to state a rule, not a principle, when it demands “trial, by . . . jury.”

<sup>167</sup> U.S. CONST. art. III, § 2, cl. 3.

<sup>168</sup> U.S. CONST. amend. VI.

<sup>169</sup> *Id.*; see also U.S. CONST. art. III, § 2, cl. 3 (demanding juries for the “Trial[s] of all Crimes”).

<sup>170</sup> U.S. CONST. art. III, § 2, cl. 3.

<sup>171</sup> *Id.*

<sup>172</sup> U.S. CONST. amend. VI. The text goes on to assure that the “district” shall not be improvised on the spot, but “shall have been previously ascertained by law . . . .” *Id.* Note that the Article III jury trial provision did not specifically require that jurors be drawn from any particular locale; instead, Article III technically determines only venue. See U.S. CONST. art. III, § 2, cl. 3 (requiring trial “in the State where the said Crimes shall have been committed”).

<sup>173</sup> U.S. CONST. amend. II.

<sup>174</sup> U.S. CONST. amend. IV.

The argument that the Constitution's jury trial provisions state rules rather than standards or principles begins with the text—or rather, with an imagined text. Imagine setting out to write a text that stated a standard or a principle governing the form and method of criminal adjudication. One might command “trial by a fair system,” trial by a system that “prevent[s] oppression by the Government,”<sup>175</sup> or perhaps trial through a system that values “the community participation and shared responsibility that results from [lay] determination of guilt or innocence.”<sup>176</sup> But the Constitution's jury trial provisions are phrased nothing like that. The text does not prescribe an end, leaving discretion as to means. Instead, the text seems to dictate the means of criminal adjudication. Trial shall be “by jury.” Any imprecision here seems less to invite innovation than to assume that the words of the text are themselves sufficiently precise to convey a particular meaning.

That the Constitution states a rule, not a standard or principle, in its jury trial provisions also fits comfortably with the pattern created elsewhere in the Constitution. As Akhil Amar has ably demonstrated, the jury, to the founding generation at least, was not only a cherished individual right, but also a vital piece of the constitutional structure.<sup>177</sup> Usually when the Constitution creates a structure it uses a rule, and the rules are precise. So, for example, the text specifies that the “Congress of the United States . . . shall consist of a Senate and House of Representatives,”<sup>178</sup> whose members shall be chosen in a particular fashion from those who meet precisely defined eligibility requirements.<sup>179</sup> Similar precision defines or creates the presidency and the courts.<sup>180</sup>

But unlike the “Congress of the United States” or the “President of the United States,” which were offices and institutions unknown before their creation by the Constitution, and which, therefore required precise specification, the jury was an institution long pre-dating the Constitution,

<sup>175</sup> *Williams v. Florida*, 399 U.S. 78, 100 (1970).

<sup>176</sup> *Id.*

<sup>177</sup> AMAR, *supra* note 47, at 104–05; Amar, *supra* note 51, at 1183–85; *see also* Barkow, *supra* note 47, at 48–65; Bibas, *supra* note 3, at 187.

<sup>178</sup> U.S. CONST. art. I, § 1.

<sup>179</sup> U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 2, cl. 3.

<sup>180</sup> *See* U.S. CONST. art. II, § 1, cl. 1 (vesting power in a President of the United States); U.S. CONST. art. II, § 1, cls. 2–4 (establishing method of presidential selection); U.S. CONST. art. II, § 1, cl. 5 (determining eligibility for office); U.S. CONST. art. II, § 4 (specifying terms for removal from office); U.S. CONST. art. III, § 1 (vesting the judicial power in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish”; specifying tenure and salary protection); U.S. CONST. art. II, § 2, cl. 2 (specifying method of judicial appointment); U.S. CONST. art. III, § 1 (specifying that judges only “hold their Offices during good Behaviour”).

even on American soil. Every colony had employed trial by jury; and every state constitution since the Revolution had incorporated the jury into its proceedings. The Constitution thus could convey fairly precise meaning simply by using the words “trial by jury.” Little additional explanation was likely needed.

If the jury can be understood as part of the constitutional structure, albeit a structure comprising lay persons, not government officials, it makes sense that the jury trial provisions of the Constitution would follow the pattern of the other structural provisions, being governed by a rule, not a principle, and a fairly precise one at that.<sup>181</sup> And if the jury provisions state a rule, demanding trial *by* a particular entity called a *jury*, then the originalist’s task is to give effect to those terms as they were understood in 1791. Put differently, the question for an originalist is not whether some other entity might equally serve the purposes of the jury trial, but instead what attributes comprised the jury trial of 1791? Those are retained because the text so demands.

### 3. *Reading Rules as Rules; Reading Rules as Principles*—*Crawford v. Washington and Williams v. Florida*

We can see the difference between reading rules as rules and reading rules as principles displayed prominently in the Supreme Court’s own Sixth Amendment case law. Two cases—*Crawford v. Washington* and *Williams v. Florida*—illustrate the difference. *Crawford*, a case decided in 2004, displays the current Court’s method of originalism and its insistence on reading rules as rules. *Williams*, a case from 1970, shows a mode of decision making that reasons from the principles behind the Constitution’s rules but is willing to sacrifice the rules themselves.

#### a. *Crawford v. Washington*

We can see the current Court’s approach to originalism in one of its recent and important criminal procedure decisions—*Crawford v. Washington*.<sup>182</sup> *Crawford* involved not the jury but another Sixth

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<sup>181</sup> It does not take an originalist to come to this conclusion. Ronald Dworkin has made the point. Ronald Dworkin, *Comment, in A MATTER OF INTERPRETATION* 115, 121–22 (Amy Gutmann ed., 1997) (The Framers of the Constitution “knew how to be concrete when they intended to be: the various provisions for criminal and civil process in the Fourth, Fifth, Sixth, and Seventh Amendments do not speak of ‘fair’ or ‘due’ or ‘usual’ procedures but lay down very concrete provisions.”).

<sup>182</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

Amendment right—the defendant’s right “to be confronted with the witnesses against him . . . .”<sup>183</sup>

Twenty-five years before *Crawford*, the Supreme Court had held that the Confrontation Clause was not violated by the admission of an unavailable witness’s statement, as long as the statement bore “adequate ‘indicia of reliability’”—that is, if it fell under a “firmly rooted hearsay exception” or otherwise bore “particularized guarantees of trustworthiness.”<sup>184</sup> In *Crawford*, the Court abrogated that rule on the ground that it did not comport with the original understanding of the confrontation right: that “[t]estimonial statements of witnesses absent from trial [would be] admitted only where the declarant [was] unavailable, and only where the defendant . . . had a prior opportunity to cross-examine.”<sup>185</sup>

In so doing, the Court rejected the argument that the Confrontation Clause’s purpose—“to ensure reliability of [testimonial] evidence”—could be fulfilled in ways other than through cross-examination.<sup>186</sup> Confrontation, the Court held, was a “procedural rather than a substantive guarantee;” the text demanded “not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>187</sup> In other words, the Confrontation Clause stated a rule mandating cross-examination as the exclusive means through which to establish reliability, rather than a principle of admitting only reliable testimony that might be fulfilled through various means, including but not limited to cross-examination. As the Court would put it in a subsequent Confrontation Clause case decided on originalist terms:

[T]he guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider ‘fair.’ It is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then enforce its guarantees only to the extent they serve . . . those underlying values. The Sixth Amendment seeks fairness indeed but seeks it through very specific means (one of which is confrontation) that were the trial rights of Englishmen.<sup>188</sup>

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<sup>183</sup> U.S. CONST. amend. VI.

<sup>184</sup> *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

<sup>185</sup> *Crawford*, 541 U.S. at 59.

<sup>186</sup> *Id.* at 61.

<sup>187</sup> *Id.*

<sup>188</sup> *Giles v. California*, 128 S. Ct. 2678, 2692 (2008).

## b. *Williams v. Florida*

*Crawford's* originalist and rule-like reading of the Sixth Amendment's Confrontation Clause contrasts sharply with the purposive approach the Court, three decades prior, had taken to defining the contours of the Sixth Amendment's jury trial right. In *Williams v. Florida*, the Supreme Court confronted the question of whether one aspect of the original jury—its size—had been constitutionally fixed at the Founding.<sup>189</sup> The Court concluded that it had not, in terms that are hard to square with the modern Court's originalism.<sup>190</sup>

In 1968, Johnny Williams was convicted of robbery by a Florida jury comprising six persons.<sup>191</sup> That same year, the Supreme Court had held that the Sixth Amendment right to jury trial was binding on the states.<sup>192</sup> Mr. Williams claimed that the newly-incorporated federal jury trial right encompassed a right to be tried by a jury of twelve, in accordance with the long-standing common law and federal rule.<sup>193</sup> The Court rejected his claim. It did so by reading the jury trial rule as a principle.

By the Court's own admission, the size of the jury had been "generally fixed at 12" since "sometime in the 14th century."<sup>194</sup> "States that had adopted Constitutions by the time of the Philadelphia Convention in 1787" had "either explicitly provided that the jury would consist of 12," or "subsequently interpreted their jury trial provisions to include that requirement."<sup>195</sup> And the uniform practice of the federal courts had been to employ twelve-person juries.<sup>196</sup> Indeed, long before *Williams*, the Court had

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<sup>189</sup> *Williams v. Florida*, 399 U.S. 78, 87–90 (1970).

<sup>190</sup> Steven Calabresi, a prominent academic originalist, has criticized *Williams* in the press: "Once in a while the Supreme Court gets a case—or a line of cases—completely wrong. The question of whether criminal juries of fewer than 12 citizens are constitutional is such a blunder." Steven Calabresi & Michael Saks, *Justice Requires 12 Angry Men*, WALL ST. J., Jan. 6, 2009, at A13.

<sup>191</sup> *Williams*, 399 U.S. at 79–80.

<sup>192</sup> See *Duncan v. Louisiana*, 391 U.S. 145, 148–50 (1968).

<sup>193</sup> *Williams*, 399 U.S. at 79–80.

<sup>194</sup> *Id.* at 87–89.

<sup>195</sup> *Id.* at 98–99 n.45. The one instance the Court cites of a state court approving a jury of fewer than twelve dated from 1867, nearly a century after the adoption of the Bill of Rights. See *id.* (citing *State v. Starling*, 49 S.C.L. (15 Rich.) 120, 134 (S.C. Ct. App. 1867)).

<sup>196</sup> *Id.* at 90 (citing *Thompson v. Utah*, 170 U.S. 343, 349 (1898)). Justice Harlan's opinion, concurring in the judgment, described the "hitherto undeviating and unquestioned federal practice of 12-member juries." *Id.* at 117, 122 (Harlan, J., concurring in the judgment).

itself held that the Sixth Amendment demanded “a jury constituted, as it was at common law, of twelve persons, neither more nor less.”<sup>197</sup>

Nonetheless, the Court concluded in *Williams*, twelve persons were not “a necessary ingredient of ‘trial by jury’ . . . .”<sup>198</sup> Twelve, the Court found, was an arbitrary number, arrived at over centuries, for reasons either lost to history or veiled in the “mystical or superstitious” beliefs of a bygone era.<sup>199</sup> The Constitution’s text said nothing of twelve, and nothing the Court could discern in the historical record revealed an “explicit decision” on the part of the Framers to freeze the jury at precisely that number.<sup>200</sup> Therefore, the Court concluded, the form of a jury had no fixed content apart from its function. Instead, a jury could comprise any number, so long as that body served the purpose the Framers envisioned for the jury.<sup>201</sup>

The purpose of the jury, the Court explained, was to “safeguard [the defendant] against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”<sup>202</sup> Thus,

the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group’s determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury.<sup>203</sup>

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<sup>197</sup> *Thompson v. Utah*, 170 U.S. 343, 349 (1898); see also *Patton v. United States*, 281 U.S. 276, 288 (1930).

<sup>198</sup> *Williams*, 399 U.S. at 86.

<sup>199</sup> *Id.* at 88 (citing, for example, “Lord Coke’s explanation that the ‘*number of twelve* is much respected *in holy writ*, as 12 *apostles*, 12 *stones*, 12 *tribes*, etc.” (quoting 1 E. COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 155a (1st Amer. ed. 1812))); see also *id.* at 88–89 n.23 (“If the twelve apostles on their twelve thrones must try us in our eternal state, good reason hath the law to appoint the number twelve to try us in our temporal.” (internal quotation marks and citations omitted)).

<sup>200</sup> *Id.* at 99.

<sup>201</sup> *Id.* at 99–100 (“The relevant inquiry . . . must be the function that [jury size] performs and its relation to the purposes of the jury trial.”).

<sup>202</sup> *Williams*, 399 U.S. at 100 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (internal quotation marks omitted)). Numerous studies, both before and after *Williams*, have taken issue with the Court’s conclusion that six jurors perform as well as twelve.

<sup>203</sup> *Id.* The Court did provide a caveat. Although twelve was not essential, the Court thought “the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community.” *Id.*

Therefore, the Court held, “the 12-man requirement cannot be regarded as an indispensable component of the Sixth Amendment.”<sup>204</sup>

Originalists likely would charge the Court with having the interpretive question precisely backwards. Originalism requires honoring the text. For an originalist, that means reading rules as rules and giving those rules their original public meaning. On these terms, if, as of 1791, the right to a jury stated a rule that had everywhere and always<sup>205</sup> been understood to comprise twelve persons, then the Constitution requires twelve-person juries. Only the strongest evidence of some alternative meaning could dislodge that presumption.

An originalist would not be surprised, then, that the Court searched in vain through the drafting history of the jury trial provisions for any reference to the number twelve. If “jury” had always meant twelve, one would scarcely think to mention it. But an originalist would be surprised by the conclusion the Court drew from its fruitless labors. For an originalist, the text’s call for a jury would command its theretofore universally understood original meaning— a jury of twelve. *Williams* instead inferred from silence an intent to leave the shape of the jury up to legislative (or judicial) innovation.

The *Williams* majority relied heavily on the fact that, in the course of promulgating the Sixth Amendment, the Senate had deleted from Madison’s original draft language “that would have explicitly tied the ‘jury’ concept to the ‘accustomed requisites’ of the time.”<sup>206</sup> Implicitly acknowledging that a dozen jurors was just such a requisite, the Court concluded that the text’s failure specifically to call for the universal and customary features of the jury should be read to liberate legislatures (and courts) from such ancient shackles.<sup>207</sup> By failing to detail the form of the jury in the text, the Court concluded, the framers left it with no required form.

But most originalists would not accept that meaning. First, no ordinary reader of the Sixth Amendment would know about the secret drafting history

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<sup>204</sup> *Id.*

<sup>205</sup> Always, save for some period predating 1400 A.D. *See id.* at 89 n.23.

<sup>206</sup> *Id.* at 96–97. Madison’s draft of what would become the Sixth Amendment specified that criminal trials “shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites . . . .” ANNALS OF CONGRESS, *supra* note 66, at 435. The House deleted the “freeholder” requirement before the amendment was presented to the Senate. *See* 1 S. JOURNAL, 1st Cong. 77 (1789) (suggesting that the House omitted the “freeholder” from the Amendment’s text). Impartiality, of course, survives in the current text. As for the others, all the controversy surrounded the “vicinage” requirement. The absence of such a requirement had been a major source of Anti-Federalist dissatisfaction with the original Constitution. *See supra* notes 61–71 and accompanying text.

<sup>207</sup> *Williams*, 399 U.S. at 96–97.

that led the Senate mysteriously to delete Madison's reference to the jury's "accustomed requisites."<sup>208</sup> But even that history is open to the possibility that "the 'accustomed requisites' were thought to be already included in the concept of a jury" and the language therefore deleted as surplusage.<sup>209</sup> More fundamentally, however, it is hard to accept *Williams's* reading and at the same time presume that the jury trial provisions of the Constitution are meant to state rules constraining government choices about the conduct of criminal trials. For one cannot know a jury *except* by its "accustomed requisites." "Accustomed requisites" are all that distinguish a jury from other entities. Or as Justice Harlan's concurring opinion in *Williams* phrased it, "[t]he right to a trial by jury . . . has no enduring meaning apart from [its] historical form."<sup>210</sup> With *Williams* as a guide, jury unanimity easily met the same fate.<sup>211</sup>

#### V. CONCLUDING THOUGHTS—RESTORING THE ORIGINAL JURY?

We have seen thus far that originalism posits that text governs and that text is to be interpreted according to its original public meaning. The text seems best read to state a rule with respect to jury trials, which should, accordingly, be interpreted according to the meaning "known to ordinary citizens in the founding generation."<sup>212</sup> Legislative or judicial tinkering with this original conception is not permissible, at least not tinkering that diminishes the form or function of the Founding Era right. But the course of our history with respect to the jury has been to do precisely that. The jury of today is a pale "shadow of its former self;"<sup>213</sup> and originalism's ordinary methods of accommodating constitutional change seem unable to validate many aspects of the modern jury.

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<sup>208</sup> A thorough and thoughtful discussion of the proper use of the Constitution's secret drafting history appears in Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003). Although Kesavan and Paulsen challenge the "conventional wisdom" by being generally supportive of consulting such history as a second-best source of the Constitution's original public meaning, even they urge "extra caution" in inferring the meaning of enacted phrases from rejected language. *Id.* at 1118, 1212.

<sup>209</sup> *Williams*, 399 U.S. at 97. The Court in *Williams* acknowledged this possibility but thought "that explanation is no more plausible than the contrary one . . ." *Id.*

<sup>210</sup> *Id.* at 125 (Harlan, J., concurring).

<sup>211</sup> See *Apodaca v. Oregon*, 406 U.S. 404, 410 (1972) (following *Williams's* methodology in plurality opinion).

<sup>212</sup> *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008).

<sup>213</sup> Amar, *supra* note 51, at 1190 ("[T]he present day jury is only a shadow of its former self.").

We are left to ask just what was the original jury? What would a reasonable, late eighteenth-century American have understood a jury to be? There is much room for continued research and debate on this question.<sup>214</sup> Yet the historical record regarding at least three attributes of the Founding Era jury seems clear: petit juries in the late eighteenth century comprised twelve lay persons, who reached their verdict unanimously, and passed upon both the fact and the law. Whether Americans will ever again see this jury enshrined in the constitutional structure is considerably less clear, notwithstanding the Court's renewed attention to originalism.

A few points, however, seem reasonably certain. First, although *stare decisis* would likely figure prominently in any opinion the Court would choose to write explaining a decision not to restore some aspects of the original jury,<sup>215</sup> respect for precedent alone cannot tell the whole story. Precedent, after all, has bowed to original meaning in this area before.<sup>216</sup>

Second, unanimity and twelve-person juries seem much more likely to be restored than the law-finding power of juries. This is not because the reliance interests traditionally countenanced by *stare decisis* doctrine weigh more heavily in the latter than the former cases.<sup>217</sup> Indeed, on one view of things,

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<sup>214</sup> See, e.g., William W. Van Alstyne, Symposium, *Foreword: The Constitution in Exile: Is it Time to Bring it in from the Cold?*, 51 DUKE L.J. 1, 16–23 (2001) (arguing that the criminal defendant's right to peremptory challenges was well-established at the Founding and was encompassed within the constitutional jury trial right); G. Ben Cohen & Robert J. Smith, *The Death of Death Qualification*, 59 CASE W. RES. L. REV. 87, 88–89 (2008) (arguing that the modern practice of “death qualifying” jurors is inconsistent with an original understanding of the constitutional jury trial right); Schmeller, *supra* note 14, at 20 (“It is difficult to estimate with much certainty how often jurors were starved, but if the volume of criticism is any indication, the practice had become *more* common by the late eighteenth century.”).

<sup>215</sup> Agenda control, of course, means that the Court need never address these or any other characteristics of the original jury. Criminal defendants will predictably continue to challenge the existing jury's departure from various aspects of the original jury. But as long as a clear precedent governs the question, the Supreme Court could evade the original jury forever. Lower courts, bound by Supreme Court precedent, even when it “appears to rest on reasons rejected in some other line of decisions,” *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (internal quotation marks omitted), will continue to deny the defendants' claims, and the Supreme Court can continue to deny their petitions for certiorari.

<sup>216</sup> See, e.g., *Ring v. Arizona*, 536 U.S. 584, 589 (2002) (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)); *United States v. Gaudin*, 515 U.S. 506, 520 (1995) (repudiating *Sinclair v. United States*, 279 U.S. 263 (1929)); see also *Crawford v. Washington*, 541 U.S. 36, 67 (2004) (abrogating *Ohio v. Roberts*, 448 U.S. 56 (1980)).

<sup>217</sup> See, e.g., *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (describing traditional reliance interests and noting that “[s]tare decisis has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in

we might think the opposite to be true. If we frame the problem as one of restoring discrete aspects of original jury practice, then we might say that restoring the law-finding power of the jury going forward would require little more than a change in the standard jury instructions. That would surely up the price of trial, and thus have an effect on plea bargaining, but that is to be expected of any amplification of the jury's role. The courts would likely handle backward-looking concerns as they have thus far handled the *Apprendi* line, declaring the decisions non-retroactive on collateral attack.<sup>218</sup> Reinstating the unanimity requirement or the twelve-person jury, by contrast, would surely impose substantial going-forward costs and cause administrative disruption in the few<sup>219</sup> criminal justice systems where less defendant-friendly rules operate.

But the on-the-ground disruption that would accompany either of these isolated changes would likely be no greater than that caused by the Court's other originalist criminal procedure cases. *Apprendi* and its progeny—*Blakely*, *Booker*, *Ring*, and the like—radically altered the relationships among juries, judges, legislatures, and sentencing commissions in every federal courthouse and in those of nearly half the states.<sup>220</sup> As Rachel Barkow has explained, these decisions “prompted multiple states to amend their sentencing guidelines,”<sup>221</sup> called others into question,<sup>222</sup> and “altered

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reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response”); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases such as the present one involving procedural and evidentiary rules.” (internal citations omitted)).

<sup>218</sup> The Supreme Court has held that *Ring v. Arizona* does not apply retroactively on collateral attack. See *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). Every circuit to consider the question has likewise held that *Booker* does not apply retroactively. See *Never Misses a Shot v. United States*, 413 F.3d 781, 783–84 (8th Cir. 2005) (collecting cases). Although no circuit court had held that *Blakely* applied retroactively, the Supreme Court granted certiorari to consider the question of *Blakely*'s retroactivity; it did not decide the question, however, because the district court had lacked jurisdiction over the petitioner's claim. See *Burton v. Stewart*, 549 U.S. 147, 149 (2007).

<sup>219</sup> See *infra* note 229.

<sup>220</sup> See Jon Wool & Don Stemen, *Aggravated Sentencing: Blakely v. Washington—Practical Implications for State Sentencing Systems*, VERA INST. OF JUST., STATE SENT'G AND CORR.: POL'Y AND PRAC. REV., Aug. 2004, at 1–2, available at <http://www.vera.org/download?file=369/PPR82004.pdf> (counting at least twenty-one states whose sentencing schemes were called into question by the *Blakely* decision).

<sup>221</sup> Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043, 1060 (2006).

<sup>222</sup> *Id.*

the plans of other states to adopt sentencing guidelines.”<sup>223</sup> In the federal system, these cases “transform[ed] the most stringent guidelines in the country into an advisory system subject to judicial review, leaving a host of questions in [their] wake.”<sup>224</sup> *Blakely* alone “has been likened to a legal earthquake, a forty-car pileup, a bombshell, and a bull in a china shop[,] . . . and some have opined that its full force will be greater than any past ruling in the field.”<sup>225</sup> In short, originalism has triumphed over traditional reliance-type concerns before.<sup>226</sup>

Instead, unanimity and twelve-person juries seem more likely to be restored than the law-finding power of juries for other reasons, related to traditional reliance, but not quite captured by the legal doctrine. Those reasons have to do with changed legal and cultural ideas about criminal justice and the very nature of law. We might call them, as Richard Primus has, “[c]onstitutional expectations”—“intuitions about how the system is supposed to work[,] . . . aris[ing] from a combination of experience, socialization, and principle.”<sup>227</sup>

Although the Supreme Court has blessed both six-person juries and non-unanimous decision rules,<sup>228</sup> measured on a national scale, neither decision has had great impact. The vast majority of states still choose twelve-person, unanimous juries to convict in serious criminal cases.<sup>229</sup> Juries, in the

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* (quoting Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1086 (2005) (internal quotation marks omitted)).

<sup>226</sup> It should be noted that neither *Apprendi*, *Blakely*, nor *Booker* explicitly overruled any prior decisions; thus, a discussion of stare decisis is not technically apt. Yet it is certainly the case that a set of legal expectations, occasioned by prior decisions and statements of the Court, had led states and the federal government to believe that their sentencing schemes were constitutionally permissible. See, e.g., *United States v. Gaudin*, 515 U.S. 506, 525 (1995) (Rehnquist, C.J., concurring) (“Within broad constitutional bounds, legislatures have flexibility in defining the elements of a criminal offense. Federal and state legislatures may reallocate burdens of proof by labeling elements as affirmative defenses, or they may convert elements into ‘sentencing factor[s]’ for consideration by the sentencing court.” (citing *Patterson v. New York*, 432 U.S. 197, 210 (1977)); *McMillan v. Pennsylvania*, 477 U.S. 79, 85–86 (1986) (alteration in original)).

<sup>227</sup> Richard Primus, *Constitutional Expectations*, 109 MICH. L. REV. 91, 93 (2010).

<sup>228</sup> It should be noted that these two jury attributes cannot be combined. That is, the Court has held that a six-person jury must be unanimous. See *Burch v. Louisiana*, 441 U.S. 130, 134 (1979).

<sup>229</sup> 6 LAFAYE, et al., CRIMINAL PROCEDURE § 22.1(d), at 19 (3d ed. 2007) (“Most jurisdictions continue to use juries of 12 in criminal cases notwithstanding the Court’s green light to states that would prefer to shrink jury size. Only six states authorize juries

American imagination, broadly defined, are still twelve and decide unanimously. Dollars and cents calculations or more traditional reliance interests in those states that have gone a different way may still persuade the Court that its cases should stand, but nothing outside of formal doctrine—no constitutional expectation—stands as an obstacle to their demise.

The law-finding power of juries is different and presents a particularly tough question for originalism. A decision to grant law-finding power to a lay jury reflects a particular understanding of what should count as law and what it means to live in a society governed by it. Jury justice, as originally practiced, was wrapped up in a legal system in which law was natural and intuitive. Contextualized case-by-case judgments produced no precedent, and jurors as law-givers (or law-validators) rotated through their temporary posts to return to the community whose values produced the law. Jury justice was localist, populist, and, at least to our modern reckoning, irregular. The late eighteenth century institution of the local jury meant that national law could apply differently—or not at all—in different parts of the country. Many in the founding generation understood this to be a virtue.<sup>230</sup>

Modern eyes might have a hard time seeing as “law” what the founding generation understood to be essential to it. Modern conceptions of law, and the rule of law, tend to favor ideas like predictability, uniformity, transparency, and equality, none of which is likely to result from jury justice.<sup>231</sup> These modern rule of law values and understandings of the criminal jury’s relationship to them did not spring up overnight; they were instead bred, spread, and cultivated over the course of the last two centuries, and no Supreme Court decision is likely instantly to uproot them.

It could be that the modern public could not tolerate a wholesale shift back to the localist conception of justice that dominated the late eighteenth century. And courts—even courts disposed to be bound by the original understanding of the Constitution—may need to make room for these contemporary public understandings.

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of less than 12 in felony cases; the use of smaller juries is more common in misdemeanor trials.”); *id.* § 22.1(e), at 22 (“[V]ery few states have authorized non-unanimous verdicts in felony cases. In the federal courts, the parties in a criminal case may not stipulate to a non-unanimous verdict.”).

<sup>230</sup> See *supra* text accompanying notes 47–71, 84–95.

<sup>231</sup> Cf. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1334 (2008) (arguing that jury nullification and executive clemency are currently disfavored because “the rise of the administrative state has made unchecked discretion an anomaly in the law, and a phenomenon to be viewed with suspicion”).

This is not to say that the original jury will never be restored. It could be that social movements,<sup>232</sup> or even the Court itself, through the nods it is making in the direction of the original understanding, will convince the public of forgotten virtues of jury justice, like contextualism, fine-grainedness, and perhaps even mercy. We may see the original jury yet, but if that is to occur, its restoration, like its decline, will require a broader shift in the way Americans think about juries, justice, and law.

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<sup>232</sup> The Fully Informed Jury Association (FIJA), for example, is an organization whose “mission is to educate Americans regarding their full powers as jurors, including their ability to rely on personal conscience, to judge the merit of the law and its application, and to nullify bad law, when necessary for justice, by finding for the defendant.” *Fully Informed Jury Association*, AMERICAN JURY INSTITUTE, <http://fija.org/about/fijas-purpose/> (last visited Oct. 27, 2010); see Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 434–35 (1998) (discussing the rise of FIJA and also noting a “renaissance of academic support for jury nullification”).