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The Missing American Jury

An Introduction

Jorge has worked for a shipping company for thirty years, receiving great reviews throughout his tenure. He is sixty-years-old when the company terminates him, replacing him with Martin, a twenty-nine-year-old. A few months before Jorge was fired, his boss commented that the company needed an infusion of young blood. Believing that the company discriminated against him on the basis of his age, Jorge brings a lawsuit. In its defense, the company files for "summary judgment." It requests that the judge throw out Jorge's claim, asserting that it hired Martin to replace Jorge only to reduce labor costs, not because of Jorge's age. The judge dismisses the case, depriving Jorge of the chance to present his case to a jury.

Mary is accused of selling an ounce of crack cocaine. She wants a jury to hear her case. But her lawyer has advised her that if a jury convicts her, the statutory sentencing guidelines dictate a severe mandatory minimum sentence. Mary's sole chance of serving less time lies with the prosecutor. He can modify the charge to an offense that has a lower mandatory minimum, but will do so, only if Mary agrees to forgo a jury trial by taking a plea. Mary pleads guilty.

David is charged with insider trading after a grand jury indicts him. The judge gives the prosecutor and David, through his lawyer, the opportunity to select a fair jury, eliminating jurors who may be biased and excluding a certain number of jurors without giving any reasons. During the trial, the prosecutor presents evidence of insider trading, and David's lawyer sets forth proof that he did not commit the crime. The jury unanimously convicts David of insider trading, subjecting him to a prison sentence of ten years. Deciding there is insufficient evidence of insider trading, the judge acquits David, resulting in David going free.

The American jury captivates us. In high-profile cases, juries are portrayed as fundamental and pivotal to the government of the United States. They are not, however. Despite frequent highlights in media and

pop-cultural displays in movies and television, juries have come to play almost no role in the American legal system. The examples involving Jorge, Mary, and David paint a more accurate picture of the jury's role. The jury has essentially vanished.

Although statistics from America's founding are sparse, we know that juries decided the final fates of nearly every defendant accused of a crime at that time. In most cases, the government could not even prosecute a criminal defendant without a grand jury's stamp of approval. With rare exception, juries also determined civil cases in which people sought money for wrongs allegedly committed against them.

But by 1962 – when much of trial statistics becomes available – juries tried only 8.2% of criminal cases in federal court.[1] And by 2013, juries tried just 3.6% of these cases.[2] In 1976, in the courts of the most populous twenty-two states, juries decided only 3.4% of criminal cases. By 2002, juries decided even fewer cases, with jury verdicts in just 1.3% of criminal cases in these state courts.[3] While federal courts still employ grand juries for serious crimes, most state courts do not.[4]

The jury's role in civil cases has followed the same downward trend of the criminal jury. In 1962, civil juries decided just 5.5% of federal court cases,[5] further dwindling to 0.8% by 2013.[6] In 1976, in the courts of the most populous twenty-two states, juries decided only 1.8% of civil cases. And by 2002, juries tried just 0.6% of these cases.[7]

This decline of the American jury remains hidden to all but a few. Many of those who are aware of the jury's fate have failed to admonish

[1] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, J. Emp. Leg. Stud. 459, 554 tbl.A-17 (2004).

[2] Administrative Office of the United States Courts, Table D Cases – U.S. District Courts – Criminal Judicial Business (Sept. 30, 2013), www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/D00CSep13.pdf; Administrative Office of the United States Courts, Table T-1 – U.S. District Courts – Trials Judicial Business (Sept. 30, 2013), www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/T01Sep13.pdf.

[3] Galanter, *supra* note 1, at 510.

[4] Sara Sun Beale et al., Grand Jury Law and Practice 1–3 (2d ed. 2013); Suja A. Thomas, *Nonincorporation: The Bill of Rights After* McDonald v. Chicago, 88 Notre Dame L. Rev. 159, 201 (2012).

[5] Galanter, *supra* note 1, at 462 tbl.1.

[6] Administrative Office of the United States Courts, Table C – U.S. District Courts – Civil Judicial Business (Sept. 30, 2013), www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/C00Sep13.pdf; Administrative Office, tbl.T-1, supra note 2.

[7] Galanter, *supra* note 1, at 507 tbl.4; *see also* Carol J. DeFrances et al., Bureau of Justice Statistics Special Report, *Civil Justice Survey of State Courts, 1992: Civil Jury Cases and Verdicts in Large Counties*, www.bjs.gov/content/pub/pdf/cjcavilc.pdf.

this occurrence, instead, declaring juries at best obsolete and at worst dangerous, arguing that other methods to resolve cases, like plea bargaining, summary judgment, settlement, and arbitration, are more efficient, rational, and accurate.

This book sounds the overdue alarm, demonstrating the jury's plight while exploring the role that people through juries should play in government in relationship to other parts of the state. Exposing the silent diminution of the American jury from its constitutional role, it reveals that the executive, the legislature, the judiciary, and the states ("traditional constitutional actors") have caused the decline of the jury by usurping its authority. The traditional constitutional actors now decide matters that juries decided in the past. For example, the executive charges, convicts, and sentences, despite juries indicting, convicting, and sentencing in the past. The legislature can set damages, although only the jury historically had that power. The judiciary circumvents juries by dismissing cases via mechanisms such as the motion to dismiss, summary judgment, acquittal, and judgment as a matter of law, procedures nonexistent at our Constitution's founding. Many states have also appropriated jury authority, including by empowering prosecutors and judges to decide the propriety of criminal charges instead of grand juries. The American jury has been marginalized.

Juries do not try some cases because cases are settled or are decided in arbitration instead of court. Because this book concerns only procedures imposed by the government to which parties do not consent or procedures such as plea bargaining to which a party may unwillingly consent, it does not discuss settlement and arbitration.

The denigration of the jury by the government has taken place despite the jury's similarity to the traditional constitutional actors. With respect to the traditional actors, the Constitution gives significant authority to them, and the Supreme Court has recognized this authority. The Founders established divisions between the traditional actors to protect as well as limit their authority. For example, they provided that both houses of Congress must pass on legislation along with the President before a bill becomes law. The Supreme Court, through which we see the most transparent display of the authority of the traditional actors, has recognized that separation of powers between the executive, the legislature, and the judiciary, and federalism, the division of authority between the federal government and the states, co-actively empower and limit each of the traditional constitutional actors.

The Constitution similarly empowers and limits the jury in relationship to the traditional actors. For example, the prosecutor as an officer of the executive branch charges a defendant, and the jury decides whether the defendant is guilty. Likewise, the legislature makes laws and the jury decides facts and applies the facts to the law. The judiciary and the jury also share power. If a jury decides a case, the judiciary can alter that determination only in certain circumstances. Lastly, the states and the jury share power. States enact laws and juries apply those laws in particular cases.

Similar to the display in Supreme Court decisions of the rivalry between the traditional constitutional actors, the Court is the best place to view how the competing authority of the traditional constitutional actors and the jury has been handled. Different from its robust recognition of the authority of each of the traditional actors, the Court has reduced the jury's authority by failing to analyze the authority of the jury in terms like separation of powers and federalism.

While the Founders established the jury as a check on the executive, the legislature, the judiciary, and the states, the Supreme Court presently does not recognize this function. Often the Court has admitted a division of authority between the jury and the traditional constitutional actors, only later to disinherit the jury of its independence and power. For example, the Court initially permitted only a jury to try serious crimes but later changed its decision to allow judges to try such crimes. Similarly, at first, the Court prohibited a judge from second-guessing a civil jury's verdict but subsequently, judges were permitted to act in this manner. Many other similar shifts of authority away from the jury have occurred.

In fracturing the jury from the greater structure of American government, the Court has disempowered the jury. The jury is often viewed as having a relationship with only the judiciary. Even this recognized relationship with the judiciary is looked upon as one by which only the judge oversees the jury, not one where the jury checks the judiciary. At the same time, the jury is also not thought of as having any sort of power-sharing relationship with the legislature, the executive, and the states. Compounding this problem, the jury has no ability to act against the traditional actors' power by, for example, constituting itself to hear a case after a court dismisses a case. For all of these reasons – related to the failure of the traditional actors to recognize an equal, fundamental place in the constitutional structure for the jury – the jury serves an inferior role in the American government, with the traditional actors essentially exercising one-way power against the jury.

Despite this enfeebled jury, removed from the greater constitutional structure, some might argue that the jury has as much or even more power than it should. For example, the jury hears some causes of action such as employment discrimination claims that did not exist in the past. Also, the jury may not actually possess any power. People instead may simply have the "right" to a jury trial. Arguably then people can freely forgo a jury, pleading guilty or choosing a judge to decide instead of a jury. These types of arguments will be explored. Briefly regarding the examples here, while the jury hears some new types of cases, those claims are within its constitutional authority. Moreover, many other pre-existing claims have been improperly removed from the jury's purview. Also, despite contentions to the contrary, there is significant evidence that the jury held affirmative power at the time of the founding and thus jury authority should not be limited to the exercise of a right to a jury. Additionally, people generally do not freely decide whether to have juries decide their cases. Judges may dismiss their cases or people may avoid a jury trial knowing that a case can be affected by the traditional actors using various modern procedures as a sword against them, including charge bargaining, summary judgment, and caps on damages.

This book investigates a new theory for the decline of the American jury. Disposing of the usual suspects of the inefficiency, cost, incompetence, and inaccuracy of the jury, it demonstrates that the traditional actors led by the Supreme Court have seized the domain of the jury. Depriving the jury of the same doctrines essential to the preservation of the authority of the traditional constitutional actors, the Court has pushed the jury to the periphery. Offering a novel argument about the role of juries in the very fabric of our political system, the book argues that the jury should be recognized as a co-equal of the traditional actors and specifically as a significant check to balance their powers – essentially as a "branch."

The book also hypothesizes about why the traditional actors currently do not treat the jury as an equal including recognizing its authority under the Constitution. At times, the traditional actors and particularly the Supreme Court have recognized that the jury holds significant authority under the Constitution. Since the 1930s, a recognizable shift has occurred, however, with the Court acting less favorably towards the jury. Although a difficult question to answer, the book begins to examine this issue of why this change against jury authority has occurred.

Taking the unique view of the jury as a branch, the book proposes that the traditional actors should exercise restraint when their power competes with the power of the jury. Because of the jury's unique inability to

protect its own authority and the ability and desire of the traditional actors to take the jury's power, restraint by the traditional actors is necessary. The book explores the extent of restraint that is appropriate, including the use of originalism, the original public meaning of the constitutional text. Concluding that originalism should be employed to interpret the criminal, civil, and grand jury provisions to limit the traditional actors' actions, the book argues that the jury of today should look more like the predecessor jury that existed in late eighteenth-century England at the time the jury provisions were adopted in America.

Restoring the jury's past role means preventing the executive, the legislature, the judiciary, and the states from usurping the jury's authority. For example, judges should not be able to dismiss criminal and civil cases by assessing the evidence and deciding juries could find only one way. Accordingly, factually intensive cases like employment discrimination cases should be left to juries to decide. Also, the legislature should not be able to shift cases that juries were to decide to judges. Moreover, if the government alleges individuals or companies violated the law, juries, not the government, should decide whether those sued by the government should pay monetary fines to the government. And grand juries should decide whether charges proceed against criminal defendants in state courts prior to any plea discussions by the government.

Whether the American jury can be restored depends on how we view the government that is set forth in the Constitution. If the jury is recognized as a constitutional actor that has competing relationships with the traditional actors, the jury can be legitimized as an essential, indispensible part of government in the same way that the executive, legislature, judiciary, and the states are already recognized.

The book also addresses the question of the role the jury should play if the past does not govern the jury's place in the government. This potential role can be informed by the role of lay people in other countries. Despite a prevailing view that the jury is part of American exceptionalism, lay people actually participate in various forms in judicial systems of many other nations including through traditional juries and mixed panels of lay people and judges. The role of lay people in several other major countries shows significant value has been placed on the use of lay people in judicial decision-making. At the same time, many of these same nations have established controls on juries similar to the procedures in effect in the United States, seemingly showing a common distrust for lay judicial decision-making. Moreover, some countries have lesser controls on the jury than employed in the United States.

The presence of the jury in various forms throughout the world gives us the opportunity to examine the role that the jury should play in our government. Putting aside any requirements to adhere to the past, a fresh look at the appropriate role of the jury involves assessing its abilities and flaws, along with those of other governmental actors. The jury can perform important functions, including involving people in the operation of government on a more regular basis, thus engaging them in appreciating and policing the government. While, like any other governmental entity, juries do not perform every function well, the incentives of juries and competing decision-makers, including judges, differ in important ways. Most apparently, juries lack monetary and status incentives to decide in a certain manner. Examining these biases, as well as possible differences in judicial and jury decision-making, the book argues that juries, not judges or other traditional constitutional actors, should decide criminal and civil cases.

The book ends with additional thoughts about the importance of the jury and ways to improve it. It recognizes the essential role that juries can play to preserve civil liberties and civil rights. Also, brief recommendations regarding the current system are offered, including necessitating that prosecutors give juries the same options on which to convict as offered to the defendant in plea bargaining and requiring consensus for summary judgment on appeal.

Chapter 2 begins the discussion by describing the vibrant role of the criminal, civil, and grand juries in the late eighteenth century in England and in America. Next, several examples of how the traditional constitutional actors have taken the authority of juries are used to illustrate the fall of the jury. Finally, after the arguable rise of the jury is recognized, the overall decline of the jury is demonstrated through the virtual absence of the jury authority that existed in the past and the consequent inability of the jury to check any governmental actors.

Chapter 3 proceeds to explore why the jury has fallen. It first sets forth the traditional reasons offered for the declines of each of the criminal, civil, and grand juries. It then offers a new theory for the fall that acknowledges the common fate of the three juries. Despite their powerful presence in the constitutional text and their similarity to the traditional actors in separation of powers or federalism-type relationships with the traditional actors, the traditional actors have failed to recognize the jury's fundamental role as a co-equal in the government. To attempt to assess why the traditional actors, led by the Supreme Court, have changed their views on jury authority over time, this

chapter concludes with a review of news articles in the time period when much jury power shifted to the traditional actors.

Chapter 4 addresses the future interpretation of the jury provisions. It explores how they should be interpreted. Discussing the original public meaning of the Seventh Amendment, it concludes that originalism and specifically the late eighteenth-century English common law civil jury trial should govern the scope of the civil jury trial today. Further, describing a concept called relational originalism, the chapter argues that originalism is also the best methodology to protect the authority granted to the criminal and grand juries.

Chapter 5 then initiates a discussion on how the jury can be restored. It applies originalism to four commonly accepted present-day procedures and practices, concluding that they improperly take away jury authority.

Not all agree that history should govern some or all of the Constitution. Chapter 6 recognizes the arguments against using the past to govern the present. It explores the role the jury should have under an evolving Constitution. Examining the value that other nations grant lay people, this chapter shows the important role that lay people can play in government. This chapter proceeds to discuss who should decide criminal and civil cases. It assesses the incentives of lay people versus traditional constitutional actors and concludes that the jury is the most attractive decision-maker.

Chapter 7, the concluding chapter, first discusses how the jury can play a significant role to protect civil liberties and civil rights. It then briefly introduces five ideas to restore the jury in the event the jury-infringing modern procedures discussed in Chapter 5 continue to remain in place.

This book's examination of the fall of the jury gives us the opportunity to review what lay people have offered in the past and determine the place that they should hold in the future in the United States and in other nations.

PART I

The Jury Now