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Opening Remarks

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OPENING REMARKS*

DEAN DOUGLAS: Our next speaker is Akhil Amar, Sterling Professor of Law and Political Science at Yale University.

As it happens, Professor Amar was a Yale College classmate of Senator Whitehouse and then graduated a few years later from Yale Law School where he was my friendly classmate. After serving as a law clerk for Judge Stephen Breyer, Professor Amar returned to Yale to join the Law School faculty in 1985. Professor Amar is one of the most influential constitutional theorists in the United States. The Supreme Court has invoked his work in the course of its decision making on more than twenty instances. He is the author of several leading books on the American Constitution, including *The Bill of Rights: Creation and Reconstruction*, *America's Constitution: A Biography*, and most recently a book that I will recommend particularly for students in the room today, but for everyone: *America's Unwritten Constitution: The Precedents and Principles We Live By*.

Professor Amar.

(Applause)

PROFESSOR AMAR: It is a very great pleasure and honor to be here with you all back at William and Mary. It's a special treat to follow Senator Whitehouse—also a challenge, given his extraordinary performance. Dean Douglas, it's always great to see you again, and also a special thanks to Neal Devins for helping to make this possible. I guess I can't help saying one other thing. As I walked into this building, and I noticed the statue of George Wythe, teacher, known by, among other things, his extraordinary students: Thomas Jefferson, John Marshall, Henry Clay. Did I mention James

* This transcript has been lightly edited. The editors and staff of the *Law Review* express our sincere gratitude to Professor Akhil Amar for giving us the opportunity to publish his thought-provoking opening remarks.

Monroe? There are others. And as I look out in the audience and survey the schedule, I can't help notice that I, too, have been blessed over the years with extraordinary students, two of whom you will be hearing from over the course of this event. So I love the idea of a law school named for a teacher, celebrating a teacher, and a teacher in part known for his students. So thank you so much for inviting me back here.

At an event designed to encourage thought and discussion about the jury—the civil jury, as a political institution—I would like us to remember that the civil jury is a part of a larger jury family, a family of political institutions. So what I'm going to talk about today is what lessons we might learn if we think about the jury family.

Senator Whitehouse said blank jury, and he mentioned that some people put in runaway. Well, the idea of blank jury, we talk about civil jury, grand jury, criminal petit jury. There are a family of juries. Now, once you start to think about the family of jury trials, some of the history lesson that he has given to you is specific and unique to the civil jury. Some of those quotations from history revolve around juries more generally. So what might the civil jury have to learn from grand juries and criminal petit juries once we understand the jury family?

Here are a couple of thoughts. One, the grand jury is a sitting body. Here it's not as ad hoc as a civil jury, in which basically each one is summoned into existence for a specific case, and that's not true of a grand jury. A grand jury convenes and hears a variety of matters during the course of its tenure. And is it possible that the civil jury had been at a disadvantage to some extent because of its ad hoc quality? Earlier Senator Whitehouse and I were just briefly talking about the similarities and differences between the House and the Senate. And, of course, once one understands that juries are structured as a branch of the judiciary—that is, the lower house of a bicameral judiciary, judge and jury—the analogy of House and Senate becomes not an outlandish one. And the House is—has less continuity to it. Every two years one House dies. The Senate is a more continuing body, and in that continuity, I think, it has certain advantages over the House. And in the same way, is it possible that the civil jury over the course of history has lost out to some extent, vis-a-vis institutions that have more continuity and are less ad

hoc—institutions like the judiciary or the bar and other powerful interests.

Senator Whitehouse mentioned corporate interests that have more continuity. A corporation never dies. And when we think about the grand jury, we realize that this ad hoc nature of each jury on the civil side—summoned into existence just for the parties in designer fashion—is not an essential attribute of the jury as such, because there's another member of the jury family that doesn't have quite this ad hoc characteristic.

So, if we think about the jury family, is it possible to imagine jury reforms in which, for example, we have by law an officer, an ombudsperson—I won't say an ombudsman anymore as Professor Keswick was so scholarly, as Senator Whitehouse reminds us—an ombudsperson tasked with protection of the jury's interest as distinct from the judge's or the judicial system to try to soften to some extent the disadvantage of the ad hoc civil jury.

Is it possible to imagine a civil jury could actually be summoned into existence and hear a variety of cases over the course of a week or two weeks, rather than be picked by the parties for each case, subject, of course, to challenges for cause in any one of the cases that came before a civil jury that happened to be one in which one particular juror or another's participation was improper. So that's a thought about what the civil jury might have to learn from the grand jury.

What might it have to learn from the criminal petit jury? Maybe this: that there's a particular role for the civil jury in deciding a dispute between two private persons, between, as the phrase goes, unless you heard it quoted by Senator Whitehouse, between man and man. But when we recall the criminal jury, we see a particular and distinctive function of the jury in suits between government and man. And one particularly important role that the civil jury might need to play, even if it loses some of the power that it had across the board at Founding, I think we want to be especially careful about preserving the role of the civil jury in suits between government and man, or perhaps I should say man and government.

In a criminal case, the government initiates a prosecution, and in one very important parody, now civil cases, an individual who had been intruded upon by government might sue a government official

who trespassed against him in an unreasonable way—committed an unreasonable search or seizure. The Fourth Amendment, you may recall, originally was about protecting innocent people from unjustified intrusion, and the civil jury played an important role, of course, in deciding whether the government intrusion was, in fact, reasonable—a mixed question of fact and law.

And even if the role of the civil jury is eroding in other ways, preserving its role in cases between man and government, the government has abused a man. The man goes to court either as plaintiff or defense. As I see my friend Ilya [Somin] here, it made me think about just compensation cases, you know, when the government is actually initiating a condemnation action against a property owner, or in a reverse condemnation proceeding, where the property owner says you've taken my property, and you haven't given me proper compensation.

Is there a role for a civil jury in deciding what compensation would truly be just? A set of—a jury composed of people who at one level are going to be the taxpayers whose tax money is going to be funneled through the government to pay for just compensation claims, ultimately, to pay for lawsuits brought against errant officials who search and seize unreasonably. So at one level, a civil jury can understand the legitimate needs of government, and on the other side, can see themselves as the intruded upon individual and can perhaps sympathize with that man or that person and be a very good and proper balancer or decision maker.

The Supreme Court of late has tended to think that questions of reasonableness in the Fourth Amendment are pure questions of law not fit for a jury determination, but for judicial determination, and I wonder about that. And the criminal jury is a reminder that juries do more actually than narrowly decide facts. They decide mixed questions of law and fact. On the criminal side, they decide questions of law of confrication, which is actually a fifth-century phrase.

We have a general verdict on the criminal side, specifically say not guilty. And in doing so, they have a certain policy function, a political function, alongside with their narrow fact-finding function. So does a grand jury for that matter. It can simply refuse to indict even if the facts permit an indictment. They can just say no, and so

can the criminal jury just say no, and that is that. Acquittal. No appeal. No retrial. No double jeopardy.

And there are at least questions about whether that more political and policy-soaked law and fact together role of the jury on the criminal side, even if inappropriate, across the entire range of civil litigation might be particularly appropriate in disputes between man and man and in suits between man and government.

The jury is designed in part to keep a professional government, official government in check. Okay. So much for what the civil jury might learn from other members of the jury family. What might it teach other members of the jury family, other political institutions that are also called juries that have the same last name but a different first name?

There is, I think, an interesting harmony between the idea of holding the scales evenly between man and man on the civil side and the idea of a mere preponderance of evidence being a relevant standard on the civil side, and the idea that in some civil suits, the juries may not be unanimous. Civil majorities may suffice to do civil justice.

Now, what might that tell us about the criminal side? Because here, actually, there's not a preponderance of the evidence standard. There's proof beyond a reasonable doubt. The scales are supposed to be designed to favor the individual, the man against the government, if there is genuine doubt about the man's guilt. Do the voting rules of the criminal jury sensibly reflect that idea? They require unanimity to convict. So, okay, but they also require unanimity to acquit. Does that make sense? Is it possible—and once you understand this, you see juries need not be unanimous. Civil juries aren't always—grand juries for that matter don't need to be unanimous. Lots of political institutions don't need to be unanimous. And as—okay, I'll say it—dysfunctional as the Senate at times can be (imagine how dysfunctional it would be with a rule of a hundred) really the high noon of consent, and sometimes they do act as if, you know, it's a rule of unanimity. But courts don't have to be unanimous, and the Senate doesn't always have to be unanimous, and the House doesn't always have to be unanimous, and yet grand juries and civil juries may not be.

So, on the criminal side, is it possible to imagine that we have asymmetry rules for criminal justice tracking the asymmetric rules of proof, something like nine: three sufficing to convict. Anything less than nine counting an as acquittal, double jeopardy attaches. That's how impeachment works. To go back to the Senate for just a second, senators act as judges and jurors deciding law and fact, and two-thirds is required to convict, and anything less counts as an acquittal asymmetrically. So once we start to see the jury as a member of a family of political institution, perhaps it has something to tell us about criminal jury reform.

Why would you ever want to move away from unanimity? It might be necessary as a practical matter to move away from unanimity as we let more people be jurors. Because we know it's no longer man and man, and white man and white man. And unanimity at the Founding on juries may have been accomplished by broad exclusions of folks who weren't even able to climb into the jury box. And if we open the jury box to more diverse citizenry, it may be unrealistic to imagine that the juries will always be able to achieve unanimity, just as it's not realistic to imagine that the Senate will always be able to achieve unanimity. So those are a couple of thoughts about what the civil jury might have to teach other institutions or that it might have to learn from other institutions.

Now, just a couple of thoughts about reaching beyond the jury family, narrowly understood, to rethink other political institutions that might learn from the model of the jury. Let's think about voting. You have a right to vote. Do you have a duty to vote? You have a right to serve on the jury, but also a duty, and we enforce that duty. I mean, it's a responsibility of citizenship along with a right, and if that's true of jury service, could we think of voting that way? There are other great democratic societies that have mandatory voting. One needn't vote for the Democrat or the Republican and is allowed to vote none of the above, but voting is a duty rather than a right.

In some ways, maybe it makes more sense to enforce the duty of voting now on the jury, because if you serve on the jury, you can make a difference. On a criminal jury today, actually, your vote will be decisive, given unanimity rules, and even in grand juries and

civil juries, it's a small enough group that one person's vote on that body might make a difference.

I'm going to say something here that may shock some of you, but some of you were taught by your third-grade teacher you should vote because your vote might make a difference. If your third-grade teacher told you that, either she was lying, or she never took a basic poli-sci class. Because here's the truth.

Your vote will never make a difference. If it's close, someone counting the votes will cheat. And if it's not close, it's not going to make a difference. That's not why you vote. You vote because you have a duty to vote, because you have a responsibility to vote. Do you refrain from committing murder because you might get caught? You refrain from committing murder because you know it's the right thing to do, and so is voting, and so is serving on the jury. But precisely because actually there are fewer intrinsic rewards of voting than in jury service, maybe we should supplement the intrinsic rewards of voting. Basically, just standing in a long line thus the intrinsic reward with a duty to vote, and this becomes less preposterous, less foreign-sounding, less Australian, if you will, once we see that the leaning is on the jury side, the entire jury family.

You have a duty to vote (inaudible). Juries vote. They deliberate. They talk to each other. They listen to each other. You have—as a voter, you have a duty not just to vote but to listen. Alongside the freedom of speech is there a duty to listen? And if so, how might that be enforced? So maybe before you vote, you actually have to hear the arguments on both sides. That's your duty as a citizen. Now, voting is no longer a ten-minute proposition. You know, warfare and fraud is a six-hour proposition. It's maybe a day-long proposition, more than a day-long proposition. And so here we come, for example, to a proposed reform. It's in the jury tradition that before you vote—this is building on Professors Ackerman and Fishman.

In some ways, I think it has some family resemblances to some of the work that Professor Reeves has done, again deliberative democracy in which actually people listen to each other, speak to each other, learn about the issues, and then they vote.

So you're summoned a week before the election just like jury duty, and you show up, and you listen to the arguments on both sides

made by the candidates on this amazing thing called television—on videos. You can actually hear the candidates for different offices making their pitches back and forth, and then you sit around a room with fellow Americans, and you actually talk about what you've just heard once a day. Because it's a day, you should be paid for your time just like you are in jury service. We make it a duty to do that. We actually listen to each other and talk to each other. And now—again, I'm coming here to a closing—that model, which is a jury model (oh, and maybe because people just tend to live alongside folks who are very like-minded, this is political science work about the big sort) maybe we actually hook up juries electronically through Skype and other things, juries from different districts.

Maybe we should actually talk to each other a little bit a week before the elections—ordinary people talking to other ordinary people about their common political life. See, because right now, when ordinary people talk to other ordinary people, the discourse is: Will you have fries with that, sir? That's what citizens (inaudible) is American. Will you have fries with that, sir?

It's not political, and that's not a self-governing society on the model of the jury as a political family. What I've just suggested, which is not really my idea—it's Reeves's and Bruce Ackerman's and Jim Fishman's—this is taking the idea of the jury family, and enlisting it in the name of (inaudible), one of the biggest challenges of our era, which is campaign finance reform and anticorruption.

See, because you can't bribe all the jurors [or] all these citizens. They are secret bound. You can give them money. They can still vote for whoever they want. But our elections right now are dominated by money because people are ignorant, because they are only getting their information in these thirty-second soundbites. And you have a thing like deliberation day on the model of the jury—it's a duty to show up, and we have to listen and speak and engage other folks. Now a thirty-second ad doesn't buy you as much because actually between that thirty-second ad and election day, we have juries across America thinking about their common political life. This is anticorruption. Remember what Hamilton said: The jury is an anticorruption device. So it might seem we've come a very long way from the idea of the civil jury to this democracy day, deliberation day together, I suggest to you that the idea of the jury, the civil jury

as a political institution, let's think about our other political institutions. If the idea of the jury is this fundamental[ly] democratic—it's about people power, more generally; and if the brief idea of a civil jury is known as, well, civil, can we think about other ways of making our politics more generally, well, civil?

Thank you very much.