Blackstone's Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States

Suja A. Thomas

SUJA A. THOMAS*

TABLE OF CONTENTS

INTRODUCTION ...................................... 1197
I. THE VIBRANT JURY OF THE LATE EIGHTEENTH CENTURY .. 1197
   A. The Criminal Jury ............................... 1201
   B. The Civil Jury .................................. 1207
   C. The Grand Jury ................................ 1211
II. THE FALL OF THE JURY ............................. 1214
   A. The Criminal Jury ............................... 1215
      1. Plea Bargaining .............................. 1215
      2. Trial by Judge ............................... 1216
      3. Military Tribunals ............................ 1217
         a. Military Service Members .................. 1218
         b. Noncitizens and Nonmilitary Citizens ...... 1219
      4. A Liability-Only Jury ......................... 1222
      5. Lessening the Role of the Jury and the Right of the Defendant ........................................ 1222
      B. The Civil Jury ............................... 1223
         1. Delegation of Damages to Other Tribunals .... 1224
         2. Procedures Before, During, and After Trial . 1225
            a. Judges as Fact-Finders ....................... 1225
            b. Courts as Determiners of Damages .......... 1228
            c. Congress as Determiner of Damages ........ 1229

* Professor of Law, University of Illinois College of Law. I am grateful for discussions with and/or comments from: Jack Chin, Margareth Etienne, Eric Johnson, Niki Kuckes, John Langbein, Andrew Leipold, James Oldham, Stephen Vladeck, and Lesley Wexler.
### C. The Grand Jury

1. More on Plea Bargaining .......................... 1230
2. The Power of the Grand Jury Not to Indict ........ 1231
3. Lessening the Power of the Grand Jury ......... 1232

### III. A Transfer of Authority

A. The Executive .................................. 1233
B. The Legislature ................................. 1235
C. The Judiciary .................................. 1237
D. The States ...................................... 1238

### Conclusion ..................................... 1239
INTRODUCTION

When we watch television and movies, criminal, civil, and grand juries are portrayed as performing significant roles in our government. It may come as a surprise to most Americans that despite the presence of the jury in three different amendments in the Constitution, juries play almost no role in government today. When America was founded, juries functioned differently—as an integral part of government in both England and the colonies. This Symposium Article, a chapter in my forthcoming book, tells a story about this change in the power of the jury.1 Between the founding in the late eighteenth century and today, power shifted from juries to other parts of government—to institutions that juries were to check. So as power in the criminal, civil, and grand juries has decreased over time, the powers of the executive, the legislature, the judiciary, and the states have increased. Similar stories have been told about shifts in power, for example, from the legislative branch to the judicial branch, but never has a story been told about an institution like the jury that has absolutely no power to protect and take back its own authority.2 Of course, the jury has arguably not fallen or has risen through other changes. This topic will be introduced later in this chapter and developed in a future chapter. As will be argued subsequently, however, the substance of the jury’s power under the Constitution has fallen.

I. THE VIBRANT JURY OF THE LATE EIGHTEENTH CENTURY

The jury has a long history in England. In America, the colonists and the Founders drew on this English tradition, in which the jury

1. Throughout this Article, I refer to the power of the jury. Arguably the jury does not have power. Instead, parties may exercise the right to a jury. This topic of right versus power will be explored in a future chapter. Because I ultimately conclude the jury has power, I use power in this chapter.

2. The ideas set forth in this Article will be developed more and explained in my book, THE OTHER BRANCH: RESTORING THE JURY’S ROLE IN THE AMERICAN CONSTITUTION, which Cambridge University Press will publish. In the book, I will argue that the jury is effectively a branch of government intended to act as much as a check on government as the other branches.
had served to check the government and in which it symbolized liberty. They had learned what could happen without juries from experiences in England, where judges bypassed juries and suppressed liberty, including in the Star Chamber in the seventeenth century. They also learned about the importance of the jury from their experiences as colonists facing impediments created by Parliament and royal judges. The English Parliament overruled their legislative acts, royal judges took customs cases away from colonial juries, and instead of being heard by colonial juries, some crimes committed by English officers in the colonies were shifted to English courts.

When the colonists and Founders established their own government, many wanted criminal, civil, and grand juries, all of which had a rich history in England. This importance is reflected in the frequent discussion of the right to a jury before the enactment of the Constitution. The First and Second Continental Congresses affirmed the importance of the jury trial with discussions of this right. In the Declaration of Independence, the colonists proclaimed that they sought independence in part because the king of Great Britain repeatedly had deprived them of trial by jury. And before

5. See id.
7. See id. at 329.
8. See id. at 329-30.
9. The Declaration of Independence para. 20 (U.S. 1776) (“For depriving us in many cases, of the benefits of Trial by Jury.”).
the constitutional convention, all of the states with written constitutions had some right to a jury trial.\textsuperscript{10}

The original Constitution, enacted in 1787, included the right to a jury trial for all crimes, except those of impeachment,\textsuperscript{11} but included no other jury rights. Many were concerned about this omission and the Supreme Court's retention of appellate jurisdiction over law and fact in Article III, so ratification was delayed.\textsuperscript{12} Ultimately the Constitution was enacted based on a promise of a Bill of Rights with additional jury protections.\textsuperscript{13} Indeed, the first Congress acted,\textsuperscript{14} and effective in 1791, the Constitution was amended to include criminal, civil, and grand jury protections.\textsuperscript{15}

As for the particular jury rights, the Sixth Amendment contained further protections for the criminal jury trial, including a public and local trial.\textsuperscript{16} The Fifth Amendment required a presentment or an indictment of a grand jury before a person could be formally accused of a capital or infamous crime.\textsuperscript{17} And the Seventh Amendment required the preservation of a jury trial in suits at common law where the value in controversy exceeded twenty dollars.\textsuperscript{18}

How were these jury provisions to be interpreted? This subject, including the propriety of the historical test, will be revisited in later chapters.\textsuperscript{19} Suffice it to say now that although jury rights were prevalent in states in existence at the time of the founding, and even in some circumstances greater than those in England, these jury rights varied.\textsuperscript{20} The colonists and Founders valued the English

\textsuperscript{10. See AMAR, supra note 6, at 330; Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. CHI. L. REV. 867, 870-71 (1994) (the desirability of safeguarding the jury may have been the most consistent point of agreement between the Federalists and Anti-Federalists).}
\textsuperscript{11. U.S. CONST. art. III, § 2, cl. 3.}
\textsuperscript{12. See AMAR, supra note 6, at 233-35.}
\textsuperscript{13. See id. at 234.}
\textsuperscript{14. See id. at 235-36.}
\textsuperscript{15. U.S. CONST. amends. V, VI, VII.}
\textsuperscript{16. U.S. CONST. amend. VI.}
\textsuperscript{17. U.S. CONST. amend. V.}
\textsuperscript{18. U.S. CONST. amend. VII.}
\textsuperscript{19. See supra note 3.}
\textsuperscript{20. The Federalist No. 83, supra note 3, at 411-12 (Alexander Hamilton). Little explanatory evidence of the meaning of jury rights exists from the founding. The grand jury right was adopted with little debate. See Niki Kuckes, Retelling Grand Jury History, in GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 135 (Roger Anthony Fairfax, Jr.}
jury tradition, and they drew on these experiences and knowledge, including English legal commentaries like Blackstone’s Commentaries on the Laws of England, which was a best seller in the colonies. Daniel Boorstin has called Blackstone the blueprint for the nation, and Forrest McDonald has referred to his influence on the Constitution as “pervasive.”

Recognizing the relevance of the English common law, including Blackstone, the U.S. Supreme Court has used it to interpret the jury provisions; it has cited the English common law in its jurisprudence on the Sixth Amendment criminal jury, stated that common law in the Seventh Amendment civil jury provision is the English common law, and stated that the American grand jury in the Fifth Amendment was to model the English grand jury. At the same time, the Court has made comparisons to relevant practices in America at the time of the founding.


23. FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 7 (1985). As an example, Hamilton cites Blackstone in his discussion of the importance of including the right to trial in a bill of rights. See THE FEDERALIST No. 84, at 419 (Alexander Hamilton) (Lawrence Goldman ed., 2008). McDonald remarked that he usually followed Blackstone in his book except in some circumstances in which modern scholars have shown Blackstone was wrong. See MCDONALD, supra, at xii.


A. The Criminal Jury

Article III, Section 2 of the Constitution establishes the criminal jury trial as follows:

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 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. 26

The Sixth Amendment further states:

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. 27

So, what is the meaning of these constitutional provisions? 28 As mentioned previously, the English common law and colonial practice were influential on the Founders and are thus discussed here and below. When the criminal jury provisions were adopted in the late eighteenth century, the English jury held significant power. Some viewed the criminal jury as an essential part of the English government, along with the Crown, Parliament, and the judiciary. 29 Most eighteenth-century commentators agreed that it was established as a necessary counter to governmental authority, including the executive, the legislature, and the judiciary. 30 Some believed that the jury was “an element in the constitution ... especially as a necessary surrogate for what [was] viewed as a corrupt and unrepresentative parliament.” 31 Others viewed the jury as a

27. U.S. Const. amend. VI.
28. See supra text accompanying notes 19-25.
protector against the executive and the judiciary.\textsuperscript{32} Some viewed the jury as important because the judiciary was dependent upon the executive for money and position.\textsuperscript{33} Calling the jury “the grand bulwark of [every Englishman’s] liberties,”\textsuperscript{34} Blackstone noted that the criminal jury itself was more essential than the civil jury because of the possible influence of the executive on judges.\textsuperscript{35} The criminal jury balanced and checked the king’s power to appoint a partial judge who could preside in a suit between the king and the subject.\textsuperscript{36}

In England, criminal juries tried serious crimes—felonies (crimes that were subject to the death penalty) including murder, rape, and property crimes of one shilling or more in value.\textsuperscript{37} Juries also heard misdemeanors, crimes not punishable by death, but judges tried summary offenses, crimes that generally did not involve imprisonment.\textsuperscript{38} An informal, lay set of people, including the victim, conducted a pretrial investigation of almost all crimes.\textsuperscript{39} A trial would occur for felonies and misdemeanors only if the grand jury approved the indictment drafted on the basis of the investigation.\textsuperscript{40} If the case was tried, the victim would generally act as the prosecutor\textsuperscript{41} before the jury, which was composed of property owners.\textsuperscript{42} John Langbein has described the jury members as typically “farmer, artisan and tradesman ... neither ‘aristocratic nor democratic.’”\textsuperscript{43} They were generally not people who had experience with those

\textsuperscript{32} See Green, supra note 30, at 290-91, 305, 334.
\textsuperscript{33} See id. at 334.
\textsuperscript{34} 4 William Blackstone, Commentaries on the Laws of England 342 (Univ. of Chi. Press 1979) (1769).
\textsuperscript{35} Id. at 343.
\textsuperscript{36} See id.
\textsuperscript{38} See id. at 17.
\textsuperscript{39} See id. at 19-21.
\textsuperscript{40} See id. at 22-23. Summary offenses, charged by information, did not require grand jury approval. Id. at 23.
\textsuperscript{41} See Green, supra note 30, at 270-71; Langbein, supra note 37, at 30.
\textsuperscript{42} 3 William Blackstone, Commentaries on the Laws of England 362 (Univ. of Chi. Press 1979) (1768); Oldham, supra note 3, at 130-32. Colonial juries also had property requirements, but for the most part they were not as high as in England. See Younger, supra note 3, at 5.
\textsuperscript{43} See Langbein, supra note 37, at 25.
whose lives they judged. Defendants had various rights, including challenging jurors for cause and without cause, and even a foreign defendant had rights, being entitled to a jury of half Englishmen and half foreigners. Rules of evidence were not fully developed in proceedings at this time.

In this atmosphere, lots of jury trials occurred, and they occurred quickly upon the unanimous agreement of the twelve jurors to the verdict. John Beattie stated that plea bargaining did not occur in these cases: “Virtually every prisoner charged with a felony insisted on taking his trial, with the obvious support and encouragement of the court.” Although in some colonies statutes provided that the defendant could waive the jury trial if the prosecution agreed, in England, conviction could occur in only two ways: confessing and pleading guilty or appearing before a jury.

The public nature of the criminal jury trial contributed to the role of the jury as a check on government. People could observe the government in action in court.

When cases were tried, the duty of the jury was somewhat complicated, particularly the law powers. Commentators debated the jury’s more general law-finding ability and the jury’s ability to mitigate sentencing by choosing the crimes that the defendant committed. Some proclaimed that the jury had the duty to find the law and fact. The seditious libel cases in particular are examples

45. See Blackstone, supra note 34, at 346; Langbein, supra note 37, at 28.
48. See Blackstone, supra note 34, at 343; Langbein, supra note 37, at 38.
50. Massachusetts Body of Liberties ¶ 29 (1641); cf. Amar, supra note 4, at 104-08 (describing the jury’s role in America); Amar, supra note 6, at 237 (same).
51. See Blackstone, supra note 34, at 355.
52. See Amar, supra note 4, at 112-13.
53. See Green, supra note 29, at 71.
54. See id. at 48-49; Mark DeWolfe Howe, Juries as Judges of Criminal Law, 52 HARV. L. REV. 582, 583 (1939); Langbein, supra note 37, at 34.
often used to demonstrate such power. The government sought to silence critics through enforcement of these laws. The debate centered on the struggle between whether judges or juries should determine the questions of criminal intent and seditiousness. The jury did not decide the legal question of whether the publication was libelous. However, through a general verdict, juries could go against the law on which the judge instructed them. Outside of this ability to find a general verdict, juries had no clear right to decide the law. And the Fox’s Libel Act of 1792, which gave the jury the power to decide the general verdict but did not give the jury explicit law-finding power, further defined the jury’s role.

The power of the American colonial jury to find law in the late eighteenth century has been significantly studied, and it is largely consistent with the power of the English jury at this time. Akhil Amar has stated that “it was widely believed in late-eighteenth-century America that the jury, when rendering a general verdict, could take upon itself the right to decide both law and fact.” He recognized that sedition may have been the significant influence to this view. The law-finding authority was actually greater in some parts of America than in England. Bill Nelson has carefully studied law-finding powers of colonies in the eighteenth century. He concluded that in some colonies juries had significant law-finding power and in others they did not. In New England, about

55. See Green, supra note 29, at 52-70.
56. See id. at 57.
57. See Green, supra note 30, at 319, 330; Green, supra note 29, at 61; cf. Green, supra note 30, at 323-25 (discussing the King’s Bench Chief Judge Mansfield’s refusal to instruct the jury on intent in a seditious libel case).
58. See Oldham, supra note 3, at 28.
59. See id. at 29; Howe, supra note 54, at 583.
60. See Oldham, supra note 3, at 29; Howe, supra note 54, at 583.
61. See Green, supra note 29, at 63-64.
62. AMAR, supra note 4, at 100-01. Moreover, the jury was otherwise valued because several people deliberating regarding the facts were “more reliable and less idiosyncratic fact finders than a single judge.” Id. at 113. Additionally, the jury’s presence prevented the bribery of judges. See id. at 114.
63. See id. at 101.
65. See id. at 1003.
66. See id. Nelson has revised his views since he first wrote on this topic. See id. (discussing William E. Nelson, The Eighteenth-Century Background of John Marshall’s
which he has conducted the most research, juries held this power in civil and criminal cases.\(^{67}\) Other published sources indicate that Virginia juries also held this power.\(^{68}\) However, in the other major colonies of New York, Pennsylvania, North Carolina, and South Carolina, they did not hold significant law-finding power.\(^{69}\)

Going back to the English jury, outside of political cases, they were engaged in law finding in one other significant context. Langbein has described jury discretion in sentencing.\(^{70}\) Offenses were associated with specific sanctions, particularly death.\(^{71}\) Engaging in what Blackstone called “pious perjury,”\(^{72}\) juries could essentially sentence by choosing the offense on which the defendant was convicted.\(^{73}\) Langbein stated that “[t]his mitigation practice was widespread and immensely important.... [T]he English criminal jury trial of the later eighteenth century ... was primarily a sentencing proceeding.”\(^{74}\) In one significant sample, a jury acquitted a third of the accused in property cases, and returned partial verdicts (on a lesser charge) in 10 percent of the cases.\(^{75}\) The partial verdicts took into account the seriousness of the offense, and the conduct and character of the accused.\(^{76}\) In another sample, a jury acquitted approximately a third of the defendants accused in capital cases and gave partial verdicts in another 30 percent.\(^{77}\)

\(\textit{Constitutional Jurisprudence,}\) 76 Mich. L. Rev. 893, 904-17 (1978)). John Adams also discussed the juror’s role to find law. “It is not only [the juror’s] right, but his duty, in that case, to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.” John Adams, Diary, in 2 The Works of John Adams 255 (1865) (Diary, Feb. 12, 1771).

\(^{67}\) See Nelson, supra note 64, at 1004-08.

\(^{68}\) See id. at 1008.

\(^{69}\) See id. at 1008-28.

\(^{70}\) See Langbein, supra note 37, at 36-37.

\(^{71}\) See id.

\(^{72}\) Blackstone, supra note 34, at 239.

\(^{73}\) See Akhil Reed Amar, America’s Unwritten Constitution: The Precedents and Principles We Live by 424 (2012); Langbein, supra note 37, at 36-37.

\(^{74}\) Langbein, supra note 37, at 37; see also Green, supra note 30, at 280-81; Green, supra note 29, at 48-49.

\(^{75}\) See Green, supra note 30, at 279; Hostettler, supra note 44, at 98.

\(^{76}\) See Hostettler, supra note 44, at 99.

\(^{77}\) See id. at 98. Thomas Green gives this summary of how juries influenced sentencing: “The general impression that the lay and professional writings of the eighteenth century convey is that juries were willing to punish but not often to condemn men and women who came from walks of life that were different, but not totally removed from their own.” See Green, supra note 30, at 288. Judges behaved similarly. See id.
During trials, English judges influenced the jury in different ways. They could state the issues and the supporting evidence. They could also direct the jury to find a verdict for the defendant if the judge concluded that there was insufficient evidence. However, this direction was not binding on the jury. A judge could also recommend a special verdict to the jury. With a special verdict, the judge could decide the case based on the facts adopted by the jury. Also, where there was no special verdict, if a jury found against the evidence and convicted, a judge could set aside the verdict and order a new trial.

However, juries retained independence. Juries could decide a case by a general verdict, finding a defendant guilty or not guilty, or by a special verdict, finding the facts and asking the judge to apply the law to the facts. A jury was not required to acquiesce to the special verdict when the judge recommended it, and these were not often employed. Further, no new trial would ever occur when the jury acquitted the defendant. Also because the jury gave no reason for its decision, there was little room for review, which resulted in limited appellate review of convictions and no appellate review of acquittals. With that said, for the most part, juries and judges worked in tandem. The recommendations of the judge carried

78. See BLACKSTONE, supra note 42, at 375; BLACKSTONE, supra note 34, at 350 (explaining that most evidence rules are the same for criminal and civil trials); GREEN, supra note 30, at 278-79.
80. See Thomas, supra note 79, at 728-30.
81. See Langbein, supra note 37, at 38.
82. See BLACKSTONE, supra note 34, at 354.
83. See id.; HENRY DAGGE, CONSIDERATIONS ON CRIMINAL LAW 135-36 (1774) (court can grant new trial after conviction when evidence is insufficient); see also JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 318-31 (2003) (discussing criminal jury procedure in the late eighteenth century); cf. MATTHEW HALE, 2 THE HISTORY OF THE PLEAS OF CROWN 309-10 (1778) (king can pardon); RICHARD PHILIPS, OF THE POWERS AND DUTIES OF JURIES, AND ON THE CRIMINAL LAWS OF ENGLAND 188-89 (1811) (judge can give opinion but jury decides), 190 (trial by jury useless if judge could overrule jury verdict (citing HALE, supra, at 258)); 179 (judge can only reprieve defendant and ask king to pardon him).
84. BLACKSTONE, supra note 42, at 354.
85. See BLACKSTONE, supra note 34, at 354; Langbein, supra note 37, at 38.
86. See BLACKSTONE, supra note 34, at 355.
87. See Langbein, supra note 37, at 37-38.
significant weight with jurors, and judges and juries generally agreed.88

In limited circumstances in England—times of martial law—
juries did not hear certain criminal cases. Martial law could be
instituted only for “order and discipline in [the] army” during times
of war.89

B. The Civil Jury

The Seventh Amendment states:

In Suits at common law, where the value in controversy shall
exceed twenty dollars, the right of trial by jury shall be pre-
served, and no fact tried by a jury, shall be otherwise re-exam-
ined in any Court of the United States, than according to the
rules of the common law.90

So, again, what does this mean?91 Drawing on the English
common law, in many ways, the English civil jury was similar to the
English criminal jury in the late eighteenth century. Citing, among
other things, the treatment of juries by Blackstone, Langbein has
written that “[f]or many purposes until the nineteenth century the
criminal and civil jury were inseparable,”92 and the employment of
criminal and civil juries was viewed as equally significant.93 In his
chapter on the civil jury, Blackstone stated that it was “the glory of
the English law ... it [had] so great an advantage over others in
regulating civil property.”94 Blackstone described that the jury was
important to prevent partiality.95 He stated that although judges
have integrity, they are derived from a specific set of people and
“will have frequently an involuntary bias towards those of their own

88. See GREEN, supra note 30, at 285; Langbein, supra note 37, at 36.
89. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 400 (Univ. of Chi.
Press 1979) (1768); see MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 42
90. U.S. CONST. amend. VII.
91. See supra text accompanying notes 19-25.
92. See Langbein, supra note 37, at 15 (citing BLACKSTONE, supra note 42, at 379-81;
BLACKSTONE, supra note 34, at 343).
93. See id.
94. See BLACKSTONE, supra note 42, at 379.
95. See id.
rank and dignity.”96 He recognized that judges were necessary to present the law to the people who sat on juries,97 but he warned that judges should not decide facts:

[I]n settling and adjusting a question of fact, when intrusted [sic] to any single magistrate, partiality and injustice have an ample field to range in; either by boldly asserting that to be proved which is not so, or more artfully by suppressing some circumstances, stretching and warping others, and distinguishing away the remainder.98

Blackstone also cautioned against establishing tribunals of judges and other like persons to decide facts without juries.99 He named countries that had gradually not used the jury, where power shifted, and the countries became aristocracies.100

Oldham has written extensively about the special jury. In some cases, a special jury, composed of principal freeholders comprising members of a greater social status and wealth, was convened if an issue was too difficult for a common jury, or if the sheriff could be biased.101 Additionally, a party could ask for a special jury and could pay the extra expense for this jury if the court did not deem such a jury was required.102

Blackstone also described how a public jury trial, more than private examinations or interrogatories, promoted the truth to come out.103 He also discussed the importance of witnesses being cross-examined.104 Moreover, the written record was contrasted with the better method of live testimony; the “manner” of the evidence was as important as the “matter” of the evidence.105

96. Id.
97. See id. at 379-80.
98. Id. at 380.
99. See id.
100. See id. at 381.
101. See id. at 357-58; Oldham, supra note 3, at 145. Less frequently, special juries were convened in criminal cases. See id. at 154.
102. See Blackstone, supra note 42, at 358. Several definitions for special juries have emerged, including a jury of higher social class, a jury of experts, and a jury established through a procedure where the parties strike jurors. See Oldham, supra note 3, at 127-28.
103. Blackstone, supra note 42, at 373.
104. See id.
105. See id. at 373-74.
In short by this method of examination [the jury], and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge, in the absence of those who made them.\footnote{106}

Under this system, many jury trials occurred.\footnote{107} Juries heard cases where there were damages,\footnote{108} and judges in courts of equity decided issues such as specific performance and injunctions.\footnote{109} I previously have written that, consistent with these tenets, similar to criminal juries, civil juries decided cases without significant interference. For example, almost invariably, juries decided damages, and when they did not, the circumstances were controversial.\footnote{110} Additionally, there were few ways by which a court could dismiss a case before, during, or after a jury trial. At the beginning of a case, after the pleadings were completed, upon a procedure called the demurrer to the pleadings, a party could admit the facts stated by the other party and could argue that no cause of action or defense existed upon those facts.\footnote{111} When there was a demurrer by the defendant, if there was a cause of action, the plaintiff won because the defendant had admitted the facts.\footnote{112} If there was no cause of action, the defendant won.\footnote{113} During the trial a similar procedure existed. Here, upon a demurrer to the evidence, a party could admit the evidence of the other party and argue that the evidence did not constitute a claim or defense.\footnote{114}

\footnote{106. Id. at 373.}
\footnote{107. See James Oldham, Law-making at Nisi Prius in the Early 1800s, 25 J. LEG. HIST. 221, 226-29 (2006).}
\footnote{108. See Thomas, supra note 21, at 1083-1101; see also Oldham, supra note 3, at 49-56 (describing that when defendants defaulted, upon a writ of inquiry, a jury would decide the damages).}
\footnote{109. See Thomas, supra note 21, at 1084-85.}
\footnote{110. See id. at 1086-96 (describing Denton and cases that debated the power of the equity court in Denton to decide damages).}
\footnote{111. See, e.g., Blackstone, supra note 42, at 314-15. I have discussed the procedures at common law in detail. See Thomas, supra note 79, at 704-48.}
\footnote{112. See Thomas, supra note 79, at 704-48.}
\footnote{113. See id.}
\footnote{114. See Blackstone, supra note 42, at 373, 395; Thomas, supra note 79, at 704-48.}
demurrer by the defendant, if there was a cause of action, the plaintiff won; if there was no cause of action, the defendant won.\textsuperscript{115} In the late eighteenth-century case, \textit{Gibson v. Hunter}, the House of Lords proclaimed that even if it was unclear whether the facts were true, if the facts were to be “proved by presumptions and probabilities” the defendant must admit these facts to demur to the evidence.\textsuperscript{116} After the explanation that the defendant must admit “every fact, and every conclusion, which the evidence given for the Plaintiff conduced to prove,” the House of Lords stated a similar demurrer would not be presented ever again.\textsuperscript{117}

Another English procedure was the nonsuit. In circumstances in which the plaintiff thought he did not have sufficient evidence to win the case, the plaintiff could decide not to appear in court when the jury was called to render the verdict. In this situation, the court would nonsuit the plaintiff.\textsuperscript{118} This practice occurred frequently.\textsuperscript{119} The plaintiff would be required to pay the defendant’s costs, but the plaintiff could bring the same suit again.\textsuperscript{120}

Similar to the procedure for a criminal jury, if the case was tried, the jury in a civil case could render a general verdict or a special verdict.\textsuperscript{121} Again, a unanimous jury of twelve was required for the plaintiff to win.\textsuperscript{122}

At this time, the new trial was the only procedure by which a judge could decide that the evidence was insufficient to support a jury verdict. Blackstone stated that both the demurrer to the evidence and the bill of exceptions had fallen into disuse in favor of

\textsuperscript{115} See Thomas, \textit{supra} note 79, at 709-15.
\textsuperscript{117} See \textit{id.} at 712 (quoting \textit{Gibson}, 126 Eng. Rep. at 510).
\textsuperscript{118} See Thomas, \textit{supra} note 79, at 722-25.
\textsuperscript{119} See \textit{Oldham, supra} note 3, at 10; see, e.g., \textit{James Oldham, Case Notes of Sir Souluden Lawrence 1787-1800}, at 10 n.15, 56, 68 (2013).
\textsuperscript{120} See Thomas, \textit{supra} note 79, at 722. What has been referred to as “compulsory nonsuits” were rare. See James Oldham, \textit{The Seventh Amendment Right to Jury Trial: Late-Eighteenth-Century Practice Reconsidered}, in \textit{Human Rights and Legal History: Essays in Honour of Brian Simpson} 231 n.35 (2000); see \textit{also} Thomas, \textit{supra} note 79, at 723-25 (discussing compulsory nonsuits).
\textsuperscript{121} See \textit{Blackstone, supra} note 42, at 377-78; see \textit{also} Thomas, \textit{supra} note 79, at 732-33. For a discussion of another procedure, the special case, see \textit{Blackstone, supra} note 42, at 378.
\textsuperscript{122} See \textit{Blackstone, supra} note 42, at 365, 375, 379.
the new trial. If the case went to a second jury because of insufficient evidence, Blackstone emphasized that if a second jury agreed at least similarly, a third jury was rarely constituted. He stated that “for the law will not readily suppose, that the verdict of any one subsequent jury can countervail the oaths of two preceding ones.” A judge could also order a new trial if the judge believed that the damages were excessive. Again, a third trial would rarely be ordered if the second jury agreed. On appeal, the only method to attack the judgment was an error of law.

C. The Grand Jury

The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.

The meaning of this provision also can be informed by the English common law and colonial practice. As previously mentioned, the grand jury stood in the way of a defendant’s trial in late-eighteenth-century England. Blackstone discussed the grand jury as one of a “strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown.”

123. See id. at 373; see OLDHAM, supra note 3, at 32-35. If a party argued that the court made an error of law with respect to its directions to the jury or its decisions, the party could request a bill of exceptions, which was an appeal on the judgment. See BLACKSTONE, supra note 42, at 372.

124. See BLACKSTONE, supra note 42, at 372.

125. Id. at 387.

126. See Suja A. Thomas, Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment, 64 OHIO ST. L.J. 731, 775-84 (2003); cf. OLDHAM, supra note 3, at 64-78 (describing cases where courts examined damages).

127. See BLACKSTONE, supra note 42, at 387.

128. See id. at 405-06.

129. U.S. CONST. amend. V.

130. See supra text accompanying notes 19-25.

131. BLACKSTONE, supra note 34, at 343.
Shaftesbury for treason in the seventeenth century when the Crown sought to indict him for speaking out against the Crown.  

Blackstone referred to presentments as the notice by a grand jury of a crime from their own information. A court official would frame an indictment thereafter. Outside of presentment, as discussed above, private people generally brought criminal accusations, so the grand jury largely served without a governmental prosecutor. In the grand jury proceeding, which was closed to the public, only the prosecutor, whether private or governmental, presented evidence. At least twelve of the jurors—freeholders, “usually gentlemen of the best figure in the county”—were to be “thoroughly persuaded of the truth of an indictment” and “not to rest satisfied merely with remote probabilities.” The grand jury may have been required to find more than probable cause to indict the defendant. If the grand jury did not indict, another grand jury could be convened on the same charges.  

Although the grand jury was intended to protect people who were falsely accused from the “stigma, risk, and expense of a criminal trial,” some commentators criticized the grand jury’s role, for example that the jury could be tampered with to prevent indictments.


133. See BLACKSTONE, supra note 34, at 298.

134. See id.


136. BLACKSTONE, supra note 34, at 299-301.

137. BLACKSTONE, supra note 34, at 299-301; see also LANGBEIN, supra note 135, at 42, 45.

138. See BARBARA J. SHAPIRO, “BEYOND REASONABLE DOUBT” AND “PROBABLE CAUSE” 81-83 (1991); Kuckes, supra note 20, at 142-47. Niki Kuckes also offers support for grand juries hearing cases under the same rules of evidence as criminal and civil juries. See id. at 136-39. Kuckes also found evidence that judges could review an indictment and decide whether there was sufficient admissible evidence for the grand jury to indict. See id. at 139-42. To support the principle, Kuckes provides an example of an indictment set aside by Justice Story in the early nineteenth century, which provides some indication of the previous late eighteenth-century English practice. There, the judge dismissed the indictment because a witness was not sworn; in effect, the grand jury improperly heard hearsay evidence. See id. at 140 (citing United States v. Coolidge, 25 F. Cas. 622, 623 (C.C.D. Mass. 1815)). Blackstone, who sets forth the different ways by which judges can interfere with criminal and civil jury verdicts, does not describe such ways for a judge to interfere with an indictment by a grand jury. See BLACKSTONE, supra note 34, at 298-303.

139. BLACKSTONE, supra note 34, at 301.

140. HOSTETTLER, supra note 44, at 115-17.
Consistent with this, there is some disagreement about the importance of the grand jury at the time in England.\footnote{141. See Langbein, supra note 37, at 22 (arguing that in eighteenth-century England, the grand jury was “more a ceremonial than an instrumental component of the criminal procedure”); cf. Langbein, supra note 83, at 45 (describing a more significant role for the grand jury).} It is argued that although the grand jury prevented poor cases from proceeding, (indictments did not occur in approximately 10-20 percent of the cases),\footnote{142. See Beattie, supra note 49, at 402 tbl.8.1 (1986); Green, supra note 30, at 274-75; Hostettler, supra note 44, at 97-98; Langbein, supra note 37, at 23.} even if the grand jury indicted, the criminal jury would not convict if the evidence was weak.\footnote{143. See Langbein, supra note 37, at 23-24.}

In America, the grand jury had similarities to its English counterpart but seemed to play a more significant role. Similar to its role in England, we see grand juries that refused to indict people who criticized the Crown. In the case of John Peter Zenger, two grand juries refused to indict the publisher for publishing an editorial critical of the Crown.\footnote{144. See Kevin K. Washburn, Restoring the Grand Jury, 76 Fordham L. Rev. 2333, 2343 (2008).} The grand jury also acted against the Crown by setting forth presentments and indictments including against British soldiers and by promoting boycotts.\footnote{145. See Marvin E. Frankel & Gary P. Naftalis, The Grand Jury: An Institution on Trial 10-12 (1977); Roger A. Fairfax, Jr., The Jurisdictional Heritage of the Grand Jury Clause, 91 Minn. L. Rev. 398, 409-10 (2006); Renee Lettow Lerner, Reviving Federal Grand Jury Presentments, 103 Yale L.J. 1333, 1337 (1994).} Characterized as “indispensable” in the colonies,\footnote{146. Younger, supra note 3, at 26. The information, on the other hand, was assailed “as an odious instrument of British tyranny.” Id. at 37.} grand juries also acted to denounce actions by Parliament and even called for support for the war after independence was declared.\footnote{147. See id; Leipold, supra note 132, at 283 & n.121 (describing different roles of the grand jury including proposing tax, inspecting prisons and roads, and assisting local government administration).} While they did this, they also protested local problems.\footnote{148. See id.} The grand jury was an agent of the community, not simply an agent of the defendant.\footnote{149. See Washburn, supra note 144, at 2364.} “[T]he grand jury’s role [was] to represent the local community and thus act more independently of all the instruments of central authority, including the state or national legislature.”\footnote{150. Id. at 2369; see also Amar, supra note 4, at 84-86.}
the legislature by its power not to follow the law and not to indict people under the law.\textsuperscript{151}

II. THE FALL OF THE JURY

Although the English jury is largely our historical model,\textsuperscript{152} England had a very different system of government that enshrined the jury. There was no written constitution, and jury power was simply historical, subject to change according to the will of Parliament.\textsuperscript{153} In the mid-nineteenth century, Parliament acted to change the jury’s authority by transferring power for some civil and criminal matters from juries to courts, and the jury began to fall.\textsuperscript{154} Contributing to the fall were the increase in caseload, the costs of jury trials, and the democratization of the jury.\textsuperscript{155} Although the jury in the United States had an auspicious beginning, with inclusion in the original Constitution and a central role in the Bill of Rights, the jury began to decline in the nineteenth century like its historical counterpart in England, despite its different constitutional presence.\textsuperscript{156} In other chapters, I will describe several ways in which the jury has arguably not fallen or has risen in power since the late eighteenth century, including, for example, through the inclusion of diverse sets of people on the jury,\textsuperscript{157} changes in the law of evidence,\textsuperscript{158} and the unavailability of special juries.\textsuperscript{159} Suffice it to say here that I argue later that any “gains” do not adequately account for the losses in the substance of the power. Also, in other chapters, I will describe the reasons offered for the fall of the jury, and I will propose why the jury has fallen.

\textsuperscript{151} See Washburn, supra note 144, at 2358-59.
\textsuperscript{152} See supra text accompanying notes 19-25.
\textsuperscript{153} See Thomas, supra note 21, at 1102-04.
\textsuperscript{154} See HOSTETTLER, supra note 44, at 109-22; Thomas, supra note 21, at 1098-1102.
\textsuperscript{155} See HOSTETTLER, supra note 44, at 131, 140.
\textsuperscript{158} See supra note 46.
\textsuperscript{159} See supra text accompanying notes 101-02.
A. The Criminal Jury

Blackstone warned of “secret machinations” that could undermine the jury, including the “introduction of new and arbitrary methods of trial, by justices of the peace.” He declared that although these may seem “convenient,” they were “opposite to the spirit of our constitution” and would lead to the jury no longer being used. For the most part, the jury has disappeared and has been displaced by modes similar to what Blackstone noted that we should fear. Moreover, when the jury actually hears a case, although some powers of the jury remain in those circumstances, many powers have been reduced.

1. Plea Bargaining

As described above, the criminal jury heard almost every serious criminal case in the late eighteenth century. Today though, in contrast to such frequent jury trials in the past, criminal juries rarely decide whether a defendant is guilty. In many cases in state court, often where no grand jury is required, and in some cases in federal court, prosecutors charge defendants by information or complaint without grand juries and obtain guilty pleas without a trial. Criminal defendants almost always plead to crimes because prosecutors set forth an offer of leniency that will not be available if the defendant goes to trial. The prosecutor can charge bargain, threatening to bring more or more serious charges; or it can sentence bargain, offering to recommend or stipulate to a sentence below the maximum, agreeing not to prove predicate offenses or not to charge the defendant as a recidivist, or agreeing that mitigating factors exist or aggravating factors do not.

160. BLACKSTONE, supra note 34, at 343-44.
161. Id. at 344.
162. See supra Part I.A.
163. See infra text accompanying notes 278-80.
164. See FED. R. CRIM. P. 7(b); Roger A. Fairfax, Jr., Remaking the Grand Jury, in GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 333-34 (2011).
166. See, e.g., John H. Langbein, Frontline: The Plea (PBS television broadcast Jan. 16,
Blackstone recognized that a defendant could plead guilty without a jury trial.\(^{167}\) However, he suggested that promises before conviction should not be made because these agreements could be used unfairly. For example, decision makers could use those situations for monetary gain.\(^{168}\) Although the court sometimes permitted the defendant, once convicted of a misdemeanor, to speak to the prosecutor and if the prosecutor agreed, the court could give a trivial punishment, Blackstone warned that this was “a dangerous practice” because monetary gain could be sought.\(^{169}\) The right to punish belonged not to an individual but to society or the government that represented society.\(^{170}\)

Amar, citing Albert Alschuler, has stated that guilty pleas had little effect on jury trials at the time of the founding; they were “highly atypical,” and plea bargaining was not viewed positively.\(^{171}\) Langbein has also recognized that pleas in the late eighteenth century did not occur in the manner in which they occur today with pressure from the prosecutor.\(^{172}\) Plea bargaining began to have significance in the 1800s—after the enactment of the Constitution and the Bill of Rights.\(^{173}\)

2. Trial by Judge

Outside of plea bargaining, trial by judge has contributed to the decline of the criminal jury trial. Article III, Section 2 provides that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”\(^{174}\) In other words, under the Constitution’s text, if a trial in a criminal case occurs, other than in an impeachment case, a jury

\(^{167}\) See Blackstone, supra note 34, at 355.

\(^{168}\) See id. at 372.

\(^{169}\) See id. at 356.

\(^{170}\) See id. at 357.

\(^{171}\) Amar, supra note 4, at 108 (citing Albert W. Alschuler, Plea Bargaining and Its History, 79 Colum. L. Rev. 1, 1-24 (1979)).

\(^{172}\) See Langbein, supra note 47, at 121-22.

\(^{173}\) See Beattie, supra note 49, at 337.

\(^{174}\) U.S. Const. art. III, § 2, cl. 3.
decides the case. 175 The Sixth Amendment later gave the defendant the right to a “speedy and public trial,” as well as an impartial local jury.176 In the late eighteenth century, judges did not try defendants apart from minor offenses tried by magistrates.177 Initially, in the late nineteenth century, the Supreme Court recognized that a defendant could not waive his criminal jury trial right.178 Some years later, in the twentieth century, the Court considered whether the criminal jury trial provisions established “a tribunal as a part of the frame of government, or only to guaranty [sic] to the accused the right to such a trial.”179 Citing Blackstone and Justice Story, who characterized the jury trial as a “privilege” to be used, the Court answered that the right was the defendant’s and the jury trial was not “part of the structure of government.”180 The Court ignored the role that the jury itself was to play in government through its decisions.181 With a judge as the decision maker in some modern cases,182 the jury has been taken out of its traditional role in these cases.

3. Military Tribunals

Despite limited use under the English common law,183 military tribunals have been used to try military service members, civilians who are citizens, and foreigners who are civilians and combatants. Although the merits and deficiencies of military tribunals can be debated,184 the question is whether the Constitution authorizes such

175. See id.
176. See U.S. CONST. amend. VI.
177. See supra Part I.A.
179. Patton v. United States, 281 U.S. 276, 293 (1930); AMAR, supra note 4, at 108.
181. See AMAR, supra note 6, at 236-37.
182. See Fred. R. Crim. P. 23(c); Andrew D. Leipold, Why are Federal Judges So Acquittal Prone?, 83 WASH. U. L.Q. 151, 159 (2005) (describing from 1983-2002, 77 percent of defendants who were tried were tried by juries).
184. Military tribunals may have benefits and may also have potential problems. See Laura K. Donohue, Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law, 59 STAN. L. REV. 1321, 1341-43 (2007).
trials without grand and criminal juries. Several constitutional provisions have been used to justify congressional or presidential authority to establish tribunals, including the jury provisions and Congress’s Article I, Section 8 powers. Primarily relevant are the Fifth Amendment, which states that a grand jury must be constituted “except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger” and Congress’s power “[t]o make Rules for the Government and Regulation of the land and naval Forces,” and “[t]o define and punish ... Offences against the Law of Nations.”

a. Military Service Members

The Supreme Court has decided that juries are not required for military service members in most circumstances. Overruling a prior case that interpreted the grand jury provision and found a jury right for cases unconnected to service, the Court interpreted Congress’s “make Rules for the Government and Regulation of the land and naval Forces” clause in Article I and found no jury right for such cases. Ignoring the jury provisions and discussing what it characterized as ambiguous history, the Court decided that military tribunals could properly try these cases.

186. U.S. Const. amend. V.
188. Id. art. I, § 8, cl. 10.
189. See O’Callahan v. Parker, 395 U.S. 258, 274 (1969) (holding that the alleged off-base sexual assault on a civilian could not be tried by court-martial; cases unconnected to service required grand juries and criminal juries).
190. Solorio v. United States, 483 U.S. 435, 450-51 (1987). The Court had already decided that criminal jury trials were required in the same circumstances that grand juries were required. See O’Callahan, 395 U.S. at 272-73; Ex parte Milligan, 71 U.S. (4 Wall.) 2, 123 (1866).
191. See Solorio, 483 U.S. at 450-51; see also id. at 456-62 (Marshall, J., dissenting); Stephen I. Vladeck, The Laws of Wars as a Constitutional Limit on Military Jurisdiction, 4 J. NAT’L SECURITY L. & POL’Y 295, 308-09 (2010). The Court may recognize one possible exception to warrant juries for trial of a capital offense that is not connected to service. See Vladeck, supra, at 311 n.95. An open question is whether civilian employees of the military
In addition to the “arising in” text in the Fifth Amendment, the “when in actual service in time of War or public danger” language has also been interpreted in a narrow manner. The text arguably provides for military tribunals only in times of war or public danger. The text is consistent with English commentary at the time of the adoption of the Bill of Rights; Blackstone argued against greater jurisdiction for the military courts and emphasized that they should be used only at times of war for order and discipline in the army. Consistent with this history, the Court decided that state militia is subject to military tribunals only in times of war or public danger. However, it also decided that the federal military is subject to such tribunals at all times.

b. Noncitizens and Nonmilitary Citizens

Although noncitizens and nonmilitary citizens receive jury trials when accused of most crimes, at times, they have been tried by military tribunals without juries. Assuming Congress can enact certain laws pursuant to the Offenses against the Law of Nations clause, the question is whether Congress has power to place these matters before military tribunals. Although a prior decision pro

---

192. U.S. CONST. amend. V.
194. See supra Part I.A.
195. See Johnson, 158 U.S. at 114.
196. See id.
198. Despite this assumption, according to the discussion around the adoption of the clause, unless all nations agreed to the prohibition of additional crimes, these crimes could not be proscribed as offenses against the law of nations. See Vladeck, supra note 191, at 329-31; see also BLACKSTONE, supra note 89, at 66-73 (discussing offenses against the law of nations); cf. Allison M. Danner, Defining Unlawful Enemy Combatants: A Centripetal Story, 43 TEX. INT’L L.J. 1 (2007) (describing the history of enemy combatants in the United States since 2001). The clause has been accepted as an evolving law of nations, which should be based on international law. See Vladeck, supra note 191, at 332-36.
199. See Thomas McDonald, Comment, A Few Good Angry Men: Application of the Jury
vided support for juries for noncitizens and nonmilitary citizens, the Court attempted to distinguish that case. Using the jury provisions and Congress’s authority to regulate Offenses against the Law of Nations as support, the Court subjected noncitizens and an apparent nonmilitary citizen to a military tribunal.

Despite the present state of the law, one could imagine that the Founders fresh off the revolution were concerned that the President or Congress could serve to persecute as the king and Parliament had, and thus they wanted military tribunals only in certain prescribed situations. In the past, the Court had warned that in times of unrest, liberty through the jury needed to be guarded:

This Nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution.... [T]he lessons of history informed [the Framers] that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong.

Other English and American authorities also support a broader reading of the Constitution to require juries for citizen and noncitizen, nonmilitary personnel. For example, as recognized above, under the English common law, noncitizens were indicted and received jury trials. Noncitizens even had the right to have noncitizens on their juries, except in cases of treason, as they were not good judges of whether the King’s allegiance had been violated.

---

201. See Quirin, 317 U.S. at 41 (1942).
203. See supra text accompanying note 45.
204. See supra text accompanying note 45.
In the past, the Court has mentioned that it would not make sense to provide more protections to noncitizens than to our own military members. Although there is historical support for treating opposing military members similarly, it does not seem possible that the Founders thought it would be constitutional to avoid a jury trial by simply for example changing the place the government chose to hold a noncitizen. Some support for jury trials is also found in the fact that state courts held military tribunals for citizens during the War of 1812 illegal.

205. See Quirin, 317 U.S. at 44.

206. Matthew Hale stated that military tribunals were for only the members of the military and the opposing military. See Hale, supra note 89, at 42. A different argument against the exception to juries encompassing foreign aggressors concerns war and public danger in the Amendment. The Constitution anticipates that there will be times when we are at war or in danger requiring the suspension of grand juries and criminal juries, and this language suggests that those times will be unusual. See U.S. Const. amend. V. There is an argument then that forces that regularly act against our interests in other countries are not at war with us, and individuals acting on their behalf very well were not intended to be tried by military tribunals. A similar argument could be made about the intention of public danger.

207. In a recent decision, apparently based on Congress's war powers and the inapplicability of the jury provisions, the Court of Appeals for the Armed Services decided that a noncitizen who was tried in a jurisdiction where the United States was not the sovereign had no jury rights. See United States v. Ali, 71 M.J. 256, 269-70 (C.A.A.F. 2012), reconsideration denied, 71 M.J. 389 (C.A.A.F. 2012), cert. denied, 133 S. Ct. 2338 (2013); Stephen I. Vladeck, The Civilization of Military Jurisdiction, in The Constitution and the Future of Criminal Justice in America 287, 292-95 (2013).

208. See Ex parte Milligan, 71 U.S. (4 Wall.) 2, 128-29 (1866) (citing Smith v. Shaw, 12 Johns. 237 (N.Y. Sup. Ct. 1815); M'Connell v. Hampton, 12 Johns. 234 (N.Y. Sup. Ct. 1815)); Ingrid Wuerth, The President's Power to Detain “Enemy Combatants”: Modern Lessons from Mr. Madison's Forgotten War, 98 Nw. U. L. Rev. 1567, 1580-83 (2004) (discussing Smith, 12 Johns. at 265 (refusing to permit citizens to be detained); In re Stacy, 10 Johns. 328 (N.Y. Sup. Ct. 1813); Case of Clark the Spy, in 1 The Military Monitor and American Register 121-22 (Feb. 1, 1813). In M'Connell v. Hampton and Smith v. Shaw, the Supreme Court of New York suggested, however, that a noncitizen accused of being a spy could be tried by a court-martial. M'Connell, 12 Johns. at 234-36; Smith, 12 Johns. at 257, 265. Finally, there is a practical argument. It does not make sense to have members of the military who have no particular expertise on these matters try noncitizens or citizens, although it does make eminent sense for members of the military to try crimes within the military. Cf. Milligan, 71 U.S. at 127 ("[A]s there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law."); Vladeck, supra note 207, at 299-300.
4. A Liability-Only Jury

When juries actually hear cases, important power has been taken from them, including law-finding powers such as the ability to decide on what crimes to convict the defendant based on the sentence. Unlike the eighteenth-century English jury, in most jurisdictions and circumstances, now the jury does not hear the sentence and cannot determine the sentence by choosing the crime on which to convict. What used to be a “sentencing proceeding” has been limited to a criminal liability determination only. In many situations, the most important decision will be the sentence, now an issue that for the most part the jury does not influence.

5. Lessening the Role of the Jury and the Right of the Defendant

Another law-finding power found in late eighteenth-century England has been taken from the criminal jury. Although the jury can find against the law when it acquits because the judge cannot alter an acquittal, the Supreme Court specifically has refused to recognize this power and will not permit a jury to be told that it serves as this check on government. In this situation when it is told that it must follow the instructions of the judge, the jury is less likely to find against the law. The failure to recognize the jury’s power has a bigger significance—not recognizing this power diminishes the importance of the jury to check both the executive, which has brought the charge, and the legislature, which has established the law.

Another manner by which the power of the sitting criminal jury has decreased is through the diminution of the jury to less than the

209. See supra text accompanying notes 70-77.
210. However, juries are involved in capital sentencing and in sub-capital sentencing in some states such as Texas. See Amanda Dowlen, An Analysis of Texas Capital Sentencing Procedure: Is Texas Denying Its Capital Defendants Due Process by Keeping Jurors Uninformed of Parole Eligibility?, 29 TEX. TECH. L. REV. 1111, 1116-17 (1978), Sam Kamin & Justin Marceau, Vicarious Aggravators, 65 FLA. L. REV. 769, 787 n.91 (2013).
211. See supra Part I.A; Langbein, supra note 37, at 37. Judges decided the sentences for misdemeanors. See, e.g., OLDHAM, supra note 119, at 54 n.44 (Munton), 138-39 n.1 (Kidd Wake), 158 n.34 (Crosley).
212. See supra text accompanying notes 53-69.
213. Sparf v. United States, 156 U.S. 51 (1895) (holding that there is no constitutional right for the jury to decide law).
twelve jurors who were required to convict under the English common law. 214 Initially this requirement was recognized. 215 But the Court changed its mind, and now six to twelve jurors sit. 216 Having fewer than twelve jurors lessens the role of the community in the decision-making process, decreases discussion among jurors, and diminishes the right of the defendant, who should be convicted by twelve, not less than twelve.

A related problem is unanimity. The Constitution has been interpreted not to require unanimity for criminal jury trials in state courts, although unanimity was a requirement under the English common law. 217 Again, initially, unanimity was recognized as a requirement under the United States Constitution. 218 However, later, the requirement was recognized only in federal trials. 219 Similar to the change to the twelve-person requirement, this change lessens both the role of the jury and the right of the defendant. The jury serves a lesser role in the community by not having to agree to the verdict, and the right of the defendant to have a jury convict him unanimously is eliminated by permitting less than a unanimous jury to convict. Only the states of Louisiana and Oregon do not require unanimity, however. 220

B. The Civil Jury

Similar to his discussion of the criminal jury trial, in his discussion of the civil jury trial, Blackstone condemned the replacement of the jury with other methods of trial: “[T]he introduction of new and arbitrary methods of trial ... under a variety of plausible pretences, may in time imperceptibly undermine this best preserva-

214. See supra text accompanying note 48.
215. See Thompson v. Utah, 170 U.S. 343, 349 (1898) (referring to a jury as “twelve persons, neither more nor less”).
216. See Williams v. Florida, 399 U.S. 78, 103 (1970); see also Ballew v. Georgia, 435 U.S. 223, 245 (1978) (finding that a five-member jury was unconstitutional).
217. See supra text accompanying note 48; Suja A. Thomas, Nonincorporation: The Bill of Rights After McDonald v. Chicago, 88 NOTRE DAME L. REV. 159, 171-72, 189-91, 203-04 (2012). In an odd decision, the Court decided that although the Fourteenth Amendment incorporated the criminal jury requirement against the states, unanimity was not required in the states. See id.
220. See id.
tive of English liberty.” 221 As he warned, such methods have displaced the modern civil jury in America. Where it has not disappeared, its power has been reduced even more than the criminal jury’s power. 222

1. Delegation of Damages to Other Tribunals

The jury’s jurisdiction to hear cases with damages, which was established in the late eighteenth century, 223 has been transferred to other tribunals in many circumstances. A court will not require a jury trial for newly created causes of action with damages unless a number of requirements are met, including, for example, the cause of action is analogous to one that existed at common law and the matter is compatible with a jury trial 224—requirements beyond the common law status quo that juries decided damages. Also now Congress can place certain damages decisions in non-Article III courts without juries, including in administrative agencies and bankruptcy courts, 225 again cases that would lie with juries under the common law.

The Supreme Court’s refusal to incorporate the civil jury trial amendment against the states has also contributed to the fall of the civil jury. Although almost all states require civil juries anyway, most states do not require juries for matters that involve smaller amounts, including amounts near $100,000. 226

221. BLACKSTONE, supra note 42, at 381.
223. See supra text accompanying note 110.
224. See Thomas, supra note 21, at 1078-82, 1083-1108.
225. See id.
226. See Thomas, supra note 217, at 172-75, 191-96, 198-203. Arbitrators hear a large portion of the cases that our courts heard in the past. Parties sign “contracts” to have disputes heard by arbitrators instead of juries. For the most part, the legality of the contracts is difficult to dispute with parties choosing, for example, to take a job or to have cable or phone service to which contracts of arbitration attach. Arbitration thus cannot be attributed to the
2. Procedures Before, During, and After Trial

The civil jury has also fallen through the use of procedures that did not exist under the English common law.

a. Judges as Fact-Finders

Using three procedures, which did not exist under the English common law, judges dismiss civil cases before, during, and after a jury trial. There are two primary ways to dismiss a case before trial. First, at the beginning of a case, a party can move to dismiss a claim, arguing that the alleged facts do not state a claim on which relief can be granted.227 Early on, in Conley v. Gibson, the Court decided a case should not be dismissed “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”228 For the most part, cases appear to have survived the pleading stage, and few defendants moved to dismiss under this standard.229 In 2007 and again in 2009, the Court changed its interpretation of the rules in a manner that took power away from the jury.230 After a plaintiff has filed a complaint with the court, a judge decides whether the claim is plausible.231 To decide this question, the judge takes into account not only the inferences that favor the plaintiff but also those that favor the defendant,232 and uses his “judicial experience and common
sense” to decide whether the claim is plausible. Although it is too early to tell how many and what types of cases will be dismissed at this stage, a case is now easier to dismiss than it was in the past.

In many ways the motion to dismiss mirrors summary judgment—a procedure to dismiss a claim that occurs after discovery is completed. Originally, the standard to dismiss a case upon summary judgment was more difficult to meet. In three cases during 1986, the Court made it easier for judges to dismiss cases on summary judgment, which included deciding that courts can consider inferences that favor the moving party in addition to inferences that favor the nonmoving party in its decision on whether a reasonable jury could find for the nonmoving party. Although a judge is not supposed to use his opinion of the evidence in the decision, he does so, and accordingly, the result is what the judge found, not what a reasonable jury could find. Although there is mixed evidence as to whether courts increased their grant of summary judgment after the trilogy, it is clear that courts have used summary judgment to dismiss many cases, including factually intensive cases, like employment discrimination cases.

233. Iqbal, 556 U.S. at 679.
235. The experiences under summary judgment make it more likely that the motion to dismiss will be increasingly used to dismiss cases. See Thomas, supra note 229, at 31-34.
239. Thomas, supra note 229, at 32-33.
A procedure similar to summary judgment that judges use to dismiss cases during and after trial is judgment as a matter of law.240 Under judgment as a matter of law, like summary judgment, the judge decides whether a reasonable jury could find for the nonmoving party.241 Similar to the motion to dismiss and summary judgment, judgment as a matter of law has been interpreted in a manner less generous to the jury over time. Early on, a new trial was required if the judge decided the evidence was insufficient after a jury found for the plaintiff.242 This interpretation was changed later, and a judge could dismiss the case entirely upon his decision that a reasonable jury could not find for the nonmoving party.243

Summary judgment, the motion to dismiss, and judgment as a matter of law contrast with the substance of the procedures under the common law generally and the specific procedures under the common law.244 Under summary judgment, the motion to dismiss and judgment as a matter of law, the court makes a determination respectively regarding the sufficiency of the evidence or facts.245 Courts did not make this decision under the common law.246 In order to move to dismiss a case, the defendant was required to accept the facts and conclusions pled by the plaintiff, and if there was a cause of action under such facts and conclusions, the plaintiff won.247 If there was not, the defendant won.248 The only manner similar to our modern procedure whereby a judge could examine the sufficiency of the evidence occurred after trial: a judge could order a new trial for insufficient evidence.249 Currently, a court can order a new trial, but this power is not used very often.250 Instead, using the new procedures that did not exist under the common law, judges dismiss

241. Id.
244. See Thomas, supra note 79; Thomas, Motion to Dismiss, supra note 230, at 1889-90; Thomas, Summary Judgment, supra note 230, at 180; see also Ellen E. Sward, The Decline of the Civil Jury 288-94 (2001).
245. See Thomas, Motion to Dismiss, supra note 230, at 1889-90; Thomas, supra note 79, at 750-51; Thomas, Summary Judgment, supra note 230, at 180.
246. See supra text accompanying notes 111-128.
247. See supra text accompanying notes 111-128.
248. See supra text accompanying notes 111-128.
249. See supra text accompanying notes 111-128.
250. Thomas, supra note 79, at 688 n.10.
cases without determinations by juries, or after jury verdicts, judges set aside the verdicts.  

b. Courts as Determiners of Damages

Another new procedure is the remittitur of damages by courts.252 A party can move for a new trial arguing that the damages awarded by the jury are excessive and, in the alternative, can move for a remittitur or reduction of the damages.253 If the court decides the damages awarded by the jury are excessive, the court can order a new trial and can determine the maximum amount that a reasonable jury could find.254 The plaintiff can accept this reduction of the jury verdict instead of a new trial.255 I found that no such procedure as modern remittitur existed under the common law,256 and consistent with this, in the past, the Court has called the constitutionality of remittitur “doubtful precedent.”257 I also found that a court’s remitting of damages effectively forces the plaintiff to take the remittitur instead of the new trial.258 The court has already stated the maximum amount that a reasonable jury could find.259 If the second jury found more than that amount, the second jury would be unreasonable per se, and that verdict would be found excessive.260 In other words, there is no reason for the plaintiff to take the new trial, and remittitur replaces the jury with the judge as the decider of the amount of damages.261

251. A final procedure under the common law was an arrest of judgment when there were problems with the record, for example, if the allegation was that a person was bankrupt, but the jury found specially that the person will be bankrupt. See BLACKSTONE, supra note 42, at 393.

252. See generally Thomas, supra note 126.

253. See id. at 736-39.

254. See id.


256. See Thomas, supra note 126, at 764-84.


258. Thomas, supra note 126, at 739-46.

259. See id. at 740.

260. See id. at 740-41.

261. See id. at 739-46. Appellate courts also should not be able to review the denial of a new trial motion. See Thomas, supra note 21, at 1078 & n.29. The Supreme Court has also decided that additur, a judge’s increase of a jury verdict, is unconstitutional, despite some evidence of the practice in certain cases. See OLDHAM, supra note 3, at 60-62; Thomas, supra
c. Congress as Determiner of Damages

Caps on damages have become commonplace, particularly in the setting of malpractice claims in the states,\(^{262}\) and they play a prominent role in some federal statutes, including employment discrimination cases under Title VII.\(^{263}\) Various reasons have been asserted in favor of the constitutionality of caps on damages:

Caps are constitutional because legislatures, not courts, are reviewing the facts found by a jury; caps are constitutional because the legislature can eliminate causes of action and thus also can limit damages; caps are simply the law that is being applied to a jury’s finding of the facts; caps are constitutional because there actually may not be a right to a jury trial in the remedy phase of a jury trial; ... [and] caps are simply a legislative remittitur, analogous to remittiturs [of damages] by courts.\(^{264}\)

Under the common law, however, only one way existed to check the damages rendered by a jury; a judge could decide that the damages were excessive and could order a new trial.\(^{265}\) Under the common law, the legislature did not have a role to check or curb damages. Ultimately, only a jury could decide damages subject to the new trial possibility.\(^{266}\)

---

note 126, at 750 n.91.

\(^{262}\) States that cap noneconomic damages include California, Colorado, Idaho, Indiana, Louisiana, Maryland, Michigan, Montana, Nebraska, North Dakota, Ohio, South Dakota, Utah, Virginia, West Virginia, and Wisconsin. States that have struck them down include Alabama, Georgia, Indiana, Louisiana, Missouri, Oregon, and Washington. Caitlin Haney, Trend Continues for Personal Injury Damage Caps, 38 A.B.A. Sec. Litig. 5, 4-5 (2013).


\(^{264}\) Suja A. Thomas, Federal Tort Reform and the Seventh Amendment, Address at the American Association of Law Schools Section on Civil Procedure Program: The Civil Jury in the Shadow of Tort Reform (Jan. 5, 2006).

\(^{265}\) See supra text accompanying note 126.

\(^{266}\) See Thomas, supra note 21; Thomas, supra note 126, at 775-82.
C. The Grand Jury

In many ways, the grand jury, as an institution, has faced even more opposition than the other juries. Recall the adage of the grand jury being willing to indict a ham sandwich and similarly being compared to an appendix. However, due to prosecutors offering plea bargains partly conditioned on the waiver of the right to indictment by grand jury, some states not requiring grand juries, and changes in procedure since the late eighteenth century, grand juries have not been given the opportunity to play the role that they occupied in late-eighteenth-century England.

1. More on Plea Bargaining

I have already discussed that when a grand jury is required, at times, prosecutors offer plea bargains before obtaining an indictment from a grand jury. Under the English common law, no case for a serious crime could proceed without a grand jury indictment. Moreover, during the first 150 years of our constitutional jurisprudence, a grand jury indictment or presentment was required in order for the federal courts to have jurisdiction over an infamous crime. The adoption of Rule 7 of the Federal Rules of Criminal Procedure in 1938, under which a criminal defendant could waive a grand jury indictment for noncapital cases, began to effect significant change in the indictment requirements. Thereafter, similar to many other swings of the Court against jury power, the Court decided that defects in an indictment do not deprive a court of jurisdiction, and to the extent the Court’s previous case law was inconsistent with this, it was overruled. So, in brief, the government can proceed with a plea without indictment of a grand jury

267. Washburn, supra note 144, at 2335-36, 2354.
268. See supra Part II.A.1.
269. See supra Part II.A.1.
270. See Ex parte Wilson, 114 U.S. 417, 426 (1885); see also Fairfax, supra note 145, at 408, 413.
272. See United States v. Cotton, 535 U.S. 625 (2002) (overruling Ex parte Bain, Jr., 121 U.S. 1 (1887) (holding that there was no jurisdiction over the defendant when the court attempted to amend the indictment to the extent it conflicted with Cotton)); Fairfax, supra note 145, at 405-06.
and in some circumstances with a trial even when the indictment is
defective despite history and prior precedent to the contrary.

2. The Power of the Grand Jury Not to Indict

Under the English common law, the grand jury had complete
discretion not to indict, and there are significant examples of the
exercise of this power in the English common law as well as in
colonial America.\textsuperscript{273} Although an indictment by a grand jury has
been characterized as simply a formality,\textsuperscript{274} the power of the grand
jury can come in the power not to indict.\textsuperscript{275} A grand jury might not
indict because of an unjust or unconstitutional law, an unwise law
or application of law, biased or unwise allocation of prosecutorial
resources, and improper motivation.\textsuperscript{276}

The historical role that the grand jury played, balancing power
between the colonists and England, has been compared with the
modern role that the grand jury could play to balance power
between the federal government and the states; individuals in
communities could participate and check federal power that is
exercised through federal laws.\textsuperscript{277}

Presently, in addition to grand juries not sitting on many cases in
the federal courts, the grand jury does not sit in many states,
because grand juries are not constitutionally required there.\textsuperscript{278}
Similar to nonincorporation in the context of the criminal jury
unanimity requirement and the civil jury amendment, the Supreme
Court has refused to incorporate the grand jury amendment against

\begin{itemize}
\item \textsuperscript{273} See supra Part I.C.
\item \textsuperscript{274} Josh Bowers makes the interesting point that prosecutors use grand juries to indict
the most serious crimes for which there will be the least disagreement, and thus it should not
be surprising that they indict. See Josh Bowers, The Normative Case for Normative Grand
\item \textsuperscript{275} See Roger A Fairfax, Jr., Grand Jury Discretion and Constitutional Design, 93
CORNELL L. REV. 703 (2008); see also Leipold, supra note 132, at 307-10; Ric Simmons, Re-
Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?, 82
B.U. L. Rev. 1, 15-16 (2002); Joe Palazzolo, Teen Jailed for Facebook Posting About School
\item \textsuperscript{276} Fairfax, supra note 275, at 711-16; see Palazzolo, supra note 275.
\item \textsuperscript{277} See Fairfax, supra note 275, at 729-31.
\item \textsuperscript{278} Thomas, supra note 217, at 181-82.
\end{itemize}
the states. As a result, very few states have grand juries, and grand juries do not have the opportunity not to indict.

3. Lessening the Power of the Grand Jury

Where grand juries sit, three changes may have hampered the grand jury. First, the grand jury today must find only probable cause to indict even though more may have been required under the common law. So, the ultimate task of the grand jury may have been made less important by giving the prosecutor a lighter burden to obtain an indictment than in the past. Second, although not permitted in the federal courts, most states permit judges to dismiss indictments upon finding that the evidence is insufficient despite no authority for dismissal under the common law. Finally, grand juries do not serve the independent investigative function through presentments that they have performed in the past.

III. A Transfer of Authority

The English viewed the jury as a protector against the judiciary, the executive, and the legislature. The American jury was established largely according to this model, including all of the English components of criminal, civil, and grand juries. Despite the intentions for the jury to protect against the formal government, in the years that followed this auspicious beginning, a transfer of authority developed, giving power to the very parts of government that the jury was intended to check.

279. See id.
280. See id. at 201.
281. See supra text accompanying note 138.
283. See, e.g., State v. Green, 810 P.2d 1023 (Alaska Ct. App. 1991) (upholding trial court’s dismissal of murder indictment); People v. Bello, 705 N.E.2d 1209, 1211 (N.Y. 1998) (the trial judge asks “whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes,” and whether “the Grand Jury could rationally have drawn the guilty inference”).
284. See supra Part I.C. England has acted similarly toward the grand jury as it has toward the criminal jury February 17, 2014 and civil juries. It abolished the right completely in 1933, Fairfax, supra note 145, at 428.
285. See supra Part I.
286. See supra Part I; see supra text accompanying notes 19-25.
A. The Executive

Today the jury is not viewed as a counterbalance to the executive, although, as discussed more above, the jury played this role in the past.\(^{287}\) For example, criminal and grand juries checked the executive from prosecuting people who spoke critically of the government.\(^ {288}\) And civil juries could award damages to people who were falsely arrested.\(^ {289}\)

Now, power has transferred from the jury to the executive in several ways. Most significantly, the executive can enforce any law that it wants to enforce with little or no jury involvement. Plea bargaining is the most prominent example of this shift in power from the jury to the executive, although it is often characterized as a shift in power from the judiciary to the executive.\(^ {290}\) With most cases being determined through plea bargaining, by leveraging punishment against the accused, the decision to prosecute a case becomes the decision to indict and the decision to convict, with the executive supplanting both the grand jury’s and the criminal jury's roles.\(^ {291}\) Langbein has remarked that “[p]lea bargaining transfers the power of condemnation to a low-visibility decisionmaker, the prosecutor.”\(^ {292}\) The development of the adversarial system, which

\(^{287}\) See supra Part I.
\(^{288}\) See supra text accompanying notes 55-60, 146.
\(^{289}\) See Landsman, supra note 3, at 908 n.176.
\(^{290}\) See Michelle Alexander, Go to Trial: Crash the Justice System, N.Y. TIMES, Mar. 11, 2012, at SR5. The executive could not proceed with its case unless a grand jury indicted. See Fairfax, supra note 275, at 728.
\(^{291}\) See supra Part II.A.1. Judge Gleeson wrote extensively about the practice of obtaining pleas in exchange for not offering prior felonies that will enhance punishments. See United States v. Kupa, 2013 WL 5550419 (E.D.N.Y. Oct. 9, 2013). He stated: “To coerce guilty pleas, and sometimes to coerce cooperation as well, prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that no one—not even the prosecutors themselves—thinks are appropriate. And to demonstrate to defendants generally that those threats are sincere, prosecutors insist on the imposition of the unjust punishments when the threatened defendants refuse to plead guilty.” See id. at *1.
\(^{292}\) Langbein, supra note 47, at 124. Professor Leipold has stated that simply the presence of a grand jury can check the prosecution because they know that they can bring only strong cases that will pass the review of the grand jury. See Leipold, supra note 132, at 275, 278.
lengthened trials and increased costs, is often credited for the rise of the role of prosecutors in convictions and plea bargaining.293

Despite the perceived need for a more efficient mode of procedure, Langbein discussed the strange result of modern plea bargaining: “Plea bargaining achieves just what the Framers expected the jury to prevent, the aggrandizement of state power.”294 Government prosecutors are able to convict defendants without any community involvement and without a public trial, preventing the public from viewing the evidence or participating in discussion about the laws and government.295

The executive also gains power because of its authority over the sentence through plea bargaining. Formerly the jury could decide the sentence through their knowledge of the sentences for the crimes that were charged.296 This jury decision has become the executive’s decision of what to offer the defendant for a plea bargain.297

When jury trials occur, changes in how juries are conducted have also shifted power to the executive. In state cases, the executive must convince six to twelve jurors, not necessarily twelve.298 Also, as discussed above, the executive must show probable cause for an indictment, even though the requirement may have been greater under the common law.299

293. See Langbein, supra note 135, at 44-45.
294. Langbein, supra note 47, at 124. In an interview with Frontline, Langbein described the type of threats available to a prosecutor: “multiplying the counts, threatening to recommend the most severe end of the sentence range, keeping you locked up in pretrial detention if you’re poor—most people who are in the criminal justice system are poor—prosecuting your wife as well as yourself, and things of this sort.” See Langbein, supra note 166.
295. See Langbein, supra note 166.
296. See supra text accompanying notes 70-77.
297. When criminal cases do not go to trial, in effect, the prosecutors are the decision makers. See Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 STAN. L. REV. 869, 871 (2009); William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 YALE L.J. 1, 45-46 (1997). George Fisher stated that the jury fell and “plea bargaining won in great part because it served the interests of the powerful.” GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 2 (2003). If a grand jury does not sit, the prosecutor effectively gains power with no requirement for an independent body to assess the evidence and the law. See Younger, supra note 3, at 3.
298. See supra text accompanying note 48.
Additionally, through the legislature, grand and criminal jury power over U.S. military members has shifted to military tribunals established and controlled by the executive in cases unconnected to service.\footnote{300. See supra Part II.A.3.a.} And in some circumstances, jury power over U.S. citizens and noncitizens has shifted to the executive through military tribunals.\footnote{301. See supra Part II.A.3.b.}

The executive has also taken power from the civil jury. As one example, the Supreme Court has decided that the National Labor Relations Board can decide questions of public significance and can decide backpay damages, questions that, arguably, juries should decide.\footnote{302. See Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 212, 218 n.4 (2002); Nat’l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Allan Dinkoff, Back Pay Is Not An Equitable Remedy, 7 Mealey’s Litigation Report: Employment Law #8 (Mar. 2011).} As another possible example, in order to bring an employment discrimination claim, the legislature has added an executive step to a judicial process.\footnote{303. See 42 U.S.C. § 2000e-4, 2000e-5(b) (2006).} It decided that an employment discrimination plaintiff must jump through the hurdles managed by the executive-created agency of the Equal Employment Opportunity Commission.\footnote{304. See id.} If the plaintiff does not meet the requirements, a jury will never hear the plaintiff’s case.

**B. The Legislature**

Similar to the executive, power has shifted from the jury to the legislature. The Founders could have given the legislature power reserved to the jury or given the legislature power over the jury, but the Founders decided otherwise. Alexander Hamilton wrote that “if nothing was said in the Constitution on the subject of juries, the legislature would be at liberty either to adopt that institution or let it alone.”\footnote{305. THE FEDERALIST No. 83, supra note 3, at 406 (Alexander Hamilton).} Writing before the Bill of Rights established grand and civil juries, he went on to state that the legislature did not have discretion with respect to the criminal jury because it was provided
Similarly, the legislature lacked power over the civil jury once the Seventh Amendment was enacted, which gave only juries and judges certain powers. And the legislature lost power over the grand jury when the Fifth Amendment was enacted, which gave the grand jury the power to indict or not to indict on laws that the legislature created.

Like with the executive, one of the most important shifts of power to the legislature from the jury has been in the context of plea bargaining. Langbein has argued that, in essence, the legislature and the prosecutor work hand in hand; the legislature sets forth extreme punishments for crimes, giving the prosecutor the ability to threaten the defendant with these punishments if they do not take a plea. Additionally, where the grand jury and the criminal jury formerly could respectively decide not to indict or convict, including by not following the law, perhaps because the law was unconstitutional, now, in many cases where plea bargaining occurs, the jury does not have the ability to decide not to follow the law and check the legislature.

The jury has also lost power to the legislature in the civil context. The jury decided damages under the common law, and the Seventh Amendment preserved this power. At the same time, no other provision in the Constitution gave the legislature the power to decide the damages in Article III cases. Now, Congress is, at minimum, a part of the damages determination when it chooses to enact caps on the damages that a jury can render. The caps or limitations that legislatures have placed on damages ultimately shift the power of the jury to decide damages to the legislature, especially when the damages awarded by the jury are above what the legislature has approved. Further, with such damages caps in place, many plaintiffs will not take a trial; they know the most that

---

306. See id.
307. U.S. CONST. amend. VII; see Landsman, supra note 3, at 876.
308. U.S. CONST. amend. V; see Fairfax, supra note 275, at 728-29.
309. See supra Part II.A.1
310. See supra Part II.B.1.
they can receive at trial and settlement negotiations will account for the caps. This takes the jury completely out of the damages determination.

C. The Judiciary

Significant power shifts have occurred from the jury to the judiciary as well. Although the Sixth Amendment gives juries the explicit power to decide criminal cases, courts have permitted defendants to waive their jury trial and choose a judge to decide the case.\(^{312}\) Moreover, in plea bargaining, if there has been a waiver of the grand jury indictment, the judge may be able to sentence without any jury involvement.\(^{313}\)

Power has also shifted from the civil jury to the judiciary because of the use of several modern procedures by judges. Upon a motion to dismiss, summary judgment, or judgment as a matter of law, a judge can decide that a claim is not plausible or that a reasonable jury could not find for the nonmoving party and dismiss the case without a jury or after a jury has heard it.\(^{314}\) Thus, a judge can decide what happens in a case—for example, whether the plaintiff employee wins or the defendant employer wins—taking a case away from a jury before, during, or after a jury trial based on what the judge thinks about the sufficiency of the evidence. Also, a judge takes away the power of a jury to decide damages by a decision to remit damages rendered by the jury, effectively making the jury’s verdict moot and the judge’s damages decision rule.\(^{315}\) The shift of power to judges is particularly troublesome in the context of the Seventh Amendment because the Amendment, and the history

\(^{312}\) See supra Part II.A.2.

\(^{313}\) See supra Part II.A.1. Even with a guilty plea, however, “[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty ... must be admitted by the defendant.” United States v. Booker, 543 U.S. 220 (2005).

\(^{314}\) See supra Part II.B.2.

\(^{315}\) See supra Part II.B.2.b. When the judiciary decides not to permit cases to go to the jury, the judiciary also exercises the power to decide not to publish the opinions, which, then, have no precedential effect. Cf. Michael A. Sall, Note, Classified Opinions: Habeas at Guantánamo and the Creation of Secret Law, 101 GEO. L.J. 1147, 1150-53 (2013) (describing the value of written judicial opinions).
underlying the Amendment, gives the judiciary only one specific way in which to check the power of the jury—through a new trial. 316

D. The States

The fall of the jury has also shifted power to the states. What I have referred to as “nonincorporation” has been the primary contributor to this redistribution of power. 317 Although the Supreme Court originally decided that the Fourteenth Amendment did not incorporate the Bill of Rights against the states, the Supreme Court has reversed course regarding all of them, most recently the Second Amendment right to bear arms, except several of the jury rights. 318 As described briefly above, the Court has never incorporated the Seventh Amendment, the Fifth Amendment grand jury, or the Sixth Amendment criminal jury unanimity requirement. 319 As a result of this nonincorporation, power has shifted to states.

The authority of states and localities has increased directly as a result of the decrease in power of the jury. Because the Fourteenth Amendment has not been interpreted to incorporate the grand jury, grand juries are not required in most states. 320 With the same incentive to plead as discussed in federal cases, a state or locality can put a person in prison on only its decision, bypassing a jury. 321 Likewise, because the unanimity requirement has not been incorporated against the states in criminal cases, in those few states that do not require unanimity, power shifts from juries to the states, as the states must not convince all jurors, as required under the common law. Moreover, in state court six to twelve jurors are required, resulting in the state at times having to convince less than the number of people required under the common law. States have also benefitted from the failure to incorporate the civil jury trial right. In a few states, there is no jury trial right at all, and where

316. See supra text accompanying note 249. Amar has stated that “Founding-era juries were far more active, and Founding-era judges far less so, than their modern counterparts.” See AMAR, supra note 6, at 474.

317. See generally Thomas, supra note 217.

318. See id.

319. See id.

320. See Thomas, supra note 217, at 201.

321. The State wins when the accused pleads. See FISHER, supra note 297, at 177.
there is a jury trial right, many states do not require a jury trial in cases involving small amounts.\textsuperscript{322}

\textbf{CONCLUSION}

As I have stated elsewhere, in other chapters I will discuss the propriety of the historical test and also describe ways in which the jury has arguably not fallen or has risen in power. I will argue, however, that even with these changes, the jury has fallen far from its late eighteenth-century origins. At the same time that the jury has fallen, power has transferred to other parts of the government including the executive, the legislature, the judiciary, and the states—the very bodies the jury was meant to check. My forthcoming book will discuss the concepts discussed here in more detail and propose why these phenomena have occurred.

\textsuperscript{322} Amar has written that the Court has not sufficiently described why it has failed to incorporate the Seventh and the Fifth Amendments. See AMAR, \textit{supra} note 6, at 389; AMAR, \textit{supra} note 73, at 473.