

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

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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.³ 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.⁴ They also learned about the importance of the jury from their experiences as colonists facing impediments created by Parliament and royal judges.⁵ 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.⁶

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.⁷ The First and Second Continental Congresses affirmed the importance of the jury trial with discussions of this right.⁸ 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.⁹ And before

3. See JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 1 (2006) (discussing the “history of trial by jury as established in England, transplanted to America, and preserved in the U.S. Constitution”); NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 39 (2007) (“The jury that the American colonists inherited was copied almost verbatim from the eighteenth-century English jury.”); RICHARD D. YOUNGER, THE PEOPLE’S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941, at 5 (1963); Stephan Landsman, *Appellate Courts and Civil Juries*, 70 U. CIN. L. REV. 873, 875-77 (2002). Some of the states had jury systems specifically modeled upon the English system. See THE FEDERALIST No. 83, at 410-11 (Alexander Hamilton) (Lawrence Goldman ed., 2008). In the mid-nineteenth century, the Supreme Court recognized the function that the jury played regarding a nation’s liberty when it declared, “England owes more of her freedom, her grandeur, and her prosperity to [trial by jury], than to all other causes put together.” *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 65 (1866).

4. See AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 109 (1998).

5. See *id.*

6. See AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 233, 237, 329 (2005).

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.¹⁰

The original Constitution, enacted in 1787, included the right to a jury trial for all crimes, except those of impeachment,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.¹² Ultimately the Constitution was enacted based on a promise of a Bill of Rights with additional jury protections.¹³ Indeed, the first Congress acted,¹⁴ and effective in 1791, the Constitution was amended to include criminal, civil, and grand jury protections.¹⁵

As for the particular jury rights, the Sixth Amendment contained further protections for the criminal jury trial, including a public and local trial.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.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.¹⁸

How were these jury provisions to be interpreted? This subject, including the propriety of the historical test, will be revisited in later chapters.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.²⁰ The colonists and Founders valued the English

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).

11. U.S. CONST. art. III, § 2, cl. 3.

12. See AMAR, *supra* note 6, at 233-35.

13. See *id.* at 234.

14. See *id.* at 235-36.

15. U.S. CONST. amends. V, VI, VII.

16. U.S. CONST. amend. VI.

17. U.S. CONST. amend. V.

18. U.S. CONST. amend. VII.

19. See *supra* note 3.

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.²¹ Daniel Boorstin has called Blackstone the blueprint for the nation,²² and Forrest McDonald has referred to his influence on the Constitution as "pervasive."²³

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.²⁴ At the same time, the Court has made comparisons to relevant practices in America at the time of the founding.²⁵

ed., 2011). Also, much of the history is inconsistent. *Id.* For example, the procedures were not set for the trial of Aaron Burr, and they were debated. *See id.* Similarly, there is little evidence of the civil jury right. *See* Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 291 (1966); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

21. M.H. HOEFLICH, LEGAL PUBLISHING IN ANTEBELLUM AMERICA 131-34 (2010); *cf.* Suja A. Thomas, *A Limitation on Congress: "In Suits at Common Law"*, 71 OHIO ST. L.J. 1071, 1084 n.79 (2010) (mentioning debate regarding the importance of Blackstone's influence).

22. *See* DANIEL J. BOORSTIN, *Preface* to THE MYSTERIOUS SCIENCE OF THE LAW (1941) (describing Blackstone's *Commentaries on the Laws of England* as the "bible of American legal institutions").

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.

24. *See, e.g.,* *Colgrove v. Battin*, 413 U.S. 149, 155-56 (1973) (using English common law to interpret the civil jury trial); *Costello v. United States*, 350 U.S. 359, 362 (1956) (using English common law to interpret the grand jury provision); *Smith v. Alabama*, 124 U.S. 465, 478 (1888) (stating that the Constitution should be interpreted using English common law).

25. *See, e.g., Costello*, 350 U.S. at 362; *Smith*, 124 U.S. at 478; JOHN H. LANGBEIN, RENEE LETTOW LERNER, & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 484 (2009).

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

26. U.S. CONST. art. III, § 2, cl. 3.

27. U.S. CONST. amend. VI.

28. See *supra* text accompanying notes 19-25.

29. See Thomas A. Green, *The English Criminal Trial Jury and the Law-Finding Traditions on the Eve of the French Revolution*, in *THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900*, at 66-67 (Antonio Padoa Schioppa ed., 1987).

30. See THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800*, at 332-34 (1985).

31. Green, *supra* note 29, at 61.

protector against the executive and the judiciary.³² Some viewed the jury as important because the judiciary was dependent upon the executive for money and position.³³ Calling the jury “the grand bulwark of [every Englishman’s] liberties,”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.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.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.³⁷ Juries also heard misdemeanors, crimes not punishable by death, but judges tried summary offenses, crimes that generally did not involve imprisonment.³⁸ An informal, lay set of people, including the victim, conducted a pretrial investigation of almost all crimes.³⁹ A trial would occur for felonies and misdemeanors only if the grand jury approved the indictment drafted on the basis of the investigation.⁴⁰ If the case was tried, the victim would generally act as the prosecutor⁴¹ before the jury, which was composed of property owners.⁴² John Langbein has described the jury members as typically “farmer, artisan and tradesman ... neither ‘aristocratic nor democratic.’”⁴³ They were generally not people who had experience with those

32. See GREEN, *supra* note 30, at 290-91, 305, 334.

33. See *id.* at 334.

34. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 342 (Univ. of Chi. Press 1979) (1769).

35. *Id.* at 343.

36. See *id.*

37. See John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY, 1700-1900, *supra* note 29, at 16.

38. See *id.* at 17.

39. See *id.* at 19-21.

40. See *id.* at 22-23. Summary offenses, charged by information, did not require grand jury approval. *Id.* at 23.

41. See GREEN, *supra* note 30, at 270-71; Langbein, *supra* note 37, at 30.

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.

43. See Langbein, *supra* note 37, at 25.

whose lives they judged.⁴⁴ 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.⁴⁵ Rules of evidence were not fully developed in proceedings at this time.⁴⁶

In this atmosphere, lots of jury trials occurred, and they occurred quickly⁴⁷ upon the unanimous agreement of the twelve jurors to the verdict.⁴⁸ 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."⁴⁹ Although in some colonies statutes provided that the defendant could waive the jury trial if the prosecution agreed,⁵⁰ in England, conviction could occur in only two ways: confessing and pleading guilty or appearing before a jury.⁵¹

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.⁵²

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.⁵³ Some proclaimed that the jury had the duty to find the law and fact.⁵⁴ The seditious libel cases in particular are examples

44. See JOHN HOSTETTLER, *THE CRIMINAL JURY OLD AND NEW: JURY POWER FROM EARLY TIMES TO THE PRESENT DAY* 99 (2004).

45. See BLACKSTONE, *supra* note 34, at 346; Langbein, *supra* note 37, at 28.

46. See GREEN, *supra* note 30, at 286; John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168 (1996).

47. See GREEN, *supra* note 30, at 271-72; John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119, 122-23 (1992).

48. See BLACKSTONE, *supra* note 34, at 343; Langbein, *supra* note 37, at 38.

49. JOHN M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND: 1660-1800*, at 336-37, 446-47 (1986).

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.⁵⁵ The government sought to silence critics through enforcement of these laws.⁵⁶ The debate centered on the struggle between whether judges or juries should determine the questions of criminal intent and seditiousness.⁵⁷ The jury did not decide the legal question of whether the publication was libelous.⁵⁸ However, through a general verdict, juries could go against the law on which the judge instructed them.⁵⁹ Outside of this ability to find a general verdict, juries had no clear right to decide the law.⁶⁰ 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.⁶¹

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."⁶² He recognized that sedition may have been the significant influence to this view.⁶³ The law-finding authority was actually greater in some parts of America than in England.⁶⁴ Bill Nelson has carefully studied law-finding powers of colonies in the eighteenth century.⁶⁵ He concluded that in some colonies juries had significant law-finding power and in others they did not.⁶⁶ 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.

64. See William E. Nelson, *The Lawfinding Power of Colonial American Juries*, 71 OHIO ST. L.J. 1004-05 (2010).

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

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.⁷⁸ They could also direct the jury to find a verdict for the defendant if the judge concluded that there was insufficient evidence.⁷⁹ However, this direction was not binding on the jury.⁸⁰ A judge could also recommend a special verdict to the jury.⁸¹ With a special verdict, the judge could decide the case based on the facts adopted by the jury.⁸² 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.⁸³

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.⁸⁴ A jury was not required to acquiesce to the special verdict when the judge recommended it, and these were not often employed.⁸⁵ Further, no new trial would ever occur when the jury acquitted the defendant.⁸⁶ 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.⁸⁷ 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.

79. See BLACKSTONE, *supra* note 42, at 375; Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687, 728-30 (2004).

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 preserved, and no fact tried by a jury, shall be otherwise re-examined 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 (Charles Runnington ed., 6th ed. 1820).

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.¹⁰⁶

Under this system, many jury trials occurred.¹⁰⁷ Juries heard cases where there were damages,¹⁰⁸ and judges in courts of equity decided issues such as specific performance and injunctions.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.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.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.¹¹² If there was no cause of action, the defendant won.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.¹¹⁴ When there was a

106. *Id.* at 373.

107. See James Oldham, *Law-making at Nisi Prius in the Early 1800s*, 25 J. LEG. HIST. 221, 226-29 (2006).

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).

109. See Thomas, *supra* note 21, at 1084-85.

110. See *id.* at 1086-96 (describing *Denton* and cases that debated the power of the equity court in *Denton* to decide damages).

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.

112. See Thomas, *supra* note 79, at 704-48.

113. See *id.*

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.¹¹⁵ In the late eighteenth-century case, *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.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.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.¹¹⁸ This practice occurred frequently.¹¹⁹ The plaintiff would be required to pay the defendant’s costs, but the plaintiff could bring the same suit again.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.¹²¹ Again, a unanimous jury of twelve was required for the plaintiff to win.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

115. See Thomas, *supra* note 79, at 709-15.

116. See *id.* at 711 (quoting *Gibson v. Hunter*, (1793) 126 Eng. Rep. 499, 510).

117. See *id.* at 712 (quoting *Gibson*, 126 Eng. Rep. at 510).

118. See Thomas, *supra* note 79, at 722-25.

119. See OLDHAM, *supra* note 3, at 10; see, e.g., JAMES OLDHAM, CASE NOTES OF SIR SOULDEN LAWRENCE 1787-1800, at 10 n.15, 56, 68 (2013).

120. See Thomas, *supra* note 79, at 722. What has been referred to as “compulsory nonsuits” were rare. See James Oldham, *The Seventh Amendment Right to Jury Trial: Late-Eighteenth-Century Practice Reconsidered*, in HUMAN RIGHTS AND LEGAL HISTORY: ESSAYS IN HONOUR OF BRIAN SIMPSON 231 n.35 (2000); see also Thomas, *supra* note 79, at 723-25 (discussing compulsory nonsuits).

121. See BLACKSTONE, *supra* note 42, at 377-78; see also Thomas, *supra* note 79, at 732-33. For a discussion of another procedure, the special case, see BLACKSTONE, *supra* note 42, at 378.

122. See BLACKSTONE, *supra* note 42, at 365, 375, 379.

the new trial.¹²³ 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.¹²⁴ 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.”¹²⁵ A judge could also order a new trial if the judge believed that the damages were excessive.¹²⁶ Again, a third trial would rarely be ordered if the second jury agreed.¹²⁷ On appeal, the only method to attack the judgment was an error of law.¹²⁸

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.¹²⁹

The meaning of this provision also can be informed by the English common law and colonial practice.¹³⁰ 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.”¹³¹ Often cited is the grand jury's refusal to indict Lord

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.¹³²

Blackstone referred to presentments as the notice by a grand jury of a crime from their own information.¹³³ A court official would frame an indictment thereafter.¹³⁴ Outside of presentment, as discussed above, private people generally brought criminal accusations, so the grand jury largely served without a governmental prosecutor.¹³⁵ In the grand jury proceeding, which was closed to the public, only the prosecutor, whether private or governmental, presented evidence.¹³⁶ 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.”¹³⁷ The grand jury may have been required to find more than probable cause to indict the defendant.¹³⁸ If the grand jury did not indict, another grand jury could be convened on the same charges.¹³⁹

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.¹⁴⁰

132. See YOUNGER, *supra* note 3, at 2. *But see* Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 282-83 (1995) (discussing the subsequent pressure to indict in the case).

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

134. *See id.*

135. LANGBEIN, *supra* note 83, at 40-48.

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.¹⁴¹ 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),¹⁴² even if the grand jury indicted, the criminal jury would not convict if the evidence was weak.¹⁴³

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.¹⁴⁴ The grand jury also acted against the Crown by setting forth presentments and indictments including against British soldiers and by promoting boycotts.¹⁴⁵ Characterized as “indispensable” in the colonies,¹⁴⁶ grand juries also acted to denounce actions by Parliament and even called for support for the war after independence was declared.¹⁴⁷ While they did this, they also protested local problems.¹⁴⁸ The grand jury was an agent of the community, not simply an agent of the defendant.¹⁴⁹ “[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.”¹⁵⁰ The grand jury served to check

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).

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.

143. See Langbein, *supra* note 37, at 23-24.

144. See Kevin K. Washburn, *Restoring the Grand Jury*, 76 *FORDHAM L. REV.* 2333, 2343 (2008).

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).

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.

147. See *id.* at 36.

148. 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).

149. See Washburn, *supra* note 144, at 2364.

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.¹⁵¹

II. THE FALL OF THE JURY

Although the English jury is largely our historical model,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.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.¹⁵⁴ Contributing to the fall were the increase in caseload, the costs of jury trials, and the democratization of the jury.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.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,¹⁵⁷ changes in the law of evidence,¹⁵⁸ and the unavailability of special juries.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.

151. See Washburn, *supra* note 144, at 2358-59.

152. See *supra* text accompanying notes 19-25.

153. See Thomas, *supra* note 21, at 1102-04.

154. See HOSTETTLER, *supra* note 44, at 109-22; Thomas, *supra* note 21, at 1098-1102.

155. See HOSTETTLER, *supra* note 44, at 131, 140.

156. See Comment, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 170-71 (1964).

157. See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986).

158. See *supra* note 46.

159. See *supra* text accompanying notes 101-02.

A. The Criminal Jury

Blackstone warned of “secret machinations” that could undermine the jury, including the “introduc[tion of] new and arbitrary methods of trial, by justices of the peace.”¹⁶⁰ 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.¹⁶¹ 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.¹⁶² 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,¹⁶³ and in some cases in federal court, prosecutors charge defendants by information or complaint without grand juries and obtain guilty pleas without a trial.¹⁶⁴ 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.¹⁶⁵ 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.¹⁶⁶

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).

165. *See* Langbein, *supra* note 47, at 121; Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 91-100 (2005) (describing possible theories of plea bargaining).

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

2004) (transcript on file with the author), *transcript available at* <http://www.pbs.org/wgbh/pages/frontline/shows/plea/interviews/langbein.html>; *cf.* *Corbitt v. New Jersey*, 439 U.S. 212, 212-13, 215 (1978) (holding that there was no Sixth Amendment violation when New Jersey offered the defendant the possibility of less than life imprisonment for a plea of non vult or nolo contendere, but gave mandatory life imprisonment if defendant lost upon a jury trial).

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.

178. *See* Thompson v. Utah, 170 U.S. 343, 353-54 (1898); *Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874).

179. *Patton v. United States*, 281 U.S. 276, 293 (1930); AMAR, *supra* note 4, at 108.

180. *Patton*, 281 U.S. at 296.

181. *See* AMAR, *supra* note 6, at 236-37.

182. *See* FED. 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).

183. *See supra* Part I.A.; Benjamin V. Madison, III, *Trial by Jury or by Military Tribunal for Accused Terrorist Detainees Facing the Death Penalty? An Examination of Principles that Transcend the U.S. Constitution*, 17 U. FLA. L. REV. 347, 360 (2006).

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.¹⁸⁵ 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"¹⁸⁶ and Congress's power "[t]o make Rules for the Government and Regulation of the land and naval Forces,"¹⁸⁷ and "[t]o define and punish ... Offences against the Law of Nations."¹⁸⁸

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,¹⁸⁹ 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.¹⁹⁰ Ignoring the jury provisions and discussing what it characterized as ambiguous history, the Court decided that military tribunals could properly try these cases.¹⁹¹

185. See, e.g., *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1167-68 (U.S.C.M.C.R. 2011) (discussing several constitutional provisions). Ingrid Wuerth has undertaken an extensive study of the Captures Clause, which gives Congress the power to "make Rules concerning Captures on Land and Water." U.S. CONST. art. I, § 8, cl. 11. She concludes that this clause relates only to property, not to people. See Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683 (2009).

186. U.S. CONST. amend. V.

187. *Id.* art. I, § 8, cl. 14.

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”¹⁹² language has also been interpreted in a narrow manner. The text arguably provides for military tribunals only in times of war or public danger.¹⁹³ 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.¹⁹⁴ Consistent with this history, the Court decided that state militia is subject to military tribunals only in times of war or public danger.¹⁹⁵ However, it also decided that the federal military is subject to such tribunals at all times.¹⁹⁶

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.¹⁹⁷ Assuming Congress can enact certain laws pursuant to the Offenses against the Law of Nations clause,¹⁹⁸ the question is whether Congress has power to place these matters before military tribunals.¹⁹⁹ Although a prior decision pro

can be subject to a military tribunal during a war. *See* Vladeck, *supra*, at 300-08.

192. U.S. CONST. amend. V.

193. *See* *Johnson v. Sayre*, 158 U.S. 109, 114 (1895).

194. *See supra* Part I.A.

195. *See Johnson*, 158 U.S. at 114.

196. *See id.*

197. 10 U.S.C. §§ 821, 948a-950w (2006); *Ex parte Quirin*, 317 U.S. 1, 20, 48 (1942); *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1155-57 (U.S.C.M.C.R. 2001); *cf.* Mark A. Godsey, *The New Frontier of Constitutional Confession Law—The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad*, 91 GEO. L.J. 851, 873-74 (2003) (“Provisions in the Bill of Rights that have been interpreted as ‘trial rights’ protect all defendants, regardless of alienage, during their trials in the United States.”).

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,²⁰⁰ 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.²⁰¹

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.²⁰²

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.²⁰³ 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.²⁰⁴

Trial Clause of the Sixth Amendment to Non-Citizens Detained at Guantanamo Bay, 62 AM. U. L. REV. 701 (2013); Vladeck, *supra* note 191, at 336-39. The Court has stated that "[t]he military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity." *Hamdan v. Rumsfeld*, 548 U.S. 557, 590 (2006). Vladeck argues that the interpretation of "make Rules for the Government and Regulation of the land and naval Forces" to apply only to Congress's court-martial regulation of service members makes the same clause inapplicable to other people, voiding any congressional authority to subject others to military tribunals absent another constitutional provision. *See* Vladeck, *supra* note 191, at 311-12. Of course, the Fifth and Sixth Amendments can provide independent constraints on this authority. *See id.*

200. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 122-23 (1866).

201. *See Quirin*, 317 U.S. at 41 (1942).

202. *Milligan*, 71 U.S. at 125-26.

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.²⁰⁵ Although there is historical support for treating opposing military members similarly,²⁰⁶ 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.²⁰⁷ 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.²⁰⁸

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. 257 (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.²⁰⁹ 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.²¹⁰ What used to be a “sentencing proceeding”²¹¹ 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.²¹² 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.²¹³ 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 (*Crossley*).

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.*

218. *See* *Am. Pub. Co. v. Fisher*, 166 U.S. 464, 468 (1897).

219. *See* *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972).

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 trial²²⁴—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.

222. See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 69 (2003). In *Parklane Hosiery Co. v. Shore*, Justice Rehnquist argued that “if the degree of invasion of the jury’s province is greater than allowed in 1791 ... [this would be] judicial repeal of the Seventh Amendment because nearly any change in the province of the jury, no matter how drastic the diminution of its functions, can always be denominated ‘procedural reform.’” 439 U.S. 322, 346 (1979) (Rehnquist, J., dissenting). Others have argued that the jury has properly disappeared. See, e.g., John H. Langbein, *The Disappearance of Civil Jury in the United States*, 122 YALE L.J. 522 (2012).

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

same sort of power shift that has been otherwise described here. See Suja A. Thomas, *Before and After the Summary Judgment Trilogy*, 43 LOY. U. CHI. L.J. 499, 508 (2012).

227. See FED. R. CIV. P. 12(b)(6).

228. 355 U.S. 41, 45-46 (1957).

229. See Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 24 (2010).

230. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Compare Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 150 n.39 (2007) [hereinafter Thomas, *Summary Judgment*] (arguing that the motion to dismiss under *Conley* is constitutional under the Seventh Amendment), with Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008) [hereinafter Thomas, *Motion to Dismiss*] (arguing that the motion to dismiss is unconstitutional under *Twombly*).

231. *Twombly*, 550 U.S. at 556.

232. See *id.* at 567-69 & n.13; *Iqbal*, 556 U.S. at 677-84 (majority opinion), 687-99 (Souter, J., dissenting).

sense” to decide whether the claim is plausible.²³³ 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.²³⁴

In many ways the motion to dismiss mirrors summary judgment—a procedure to dismiss a claim that occurs after discovery is completed.²³⁵ Originally, the standard to dismiss a case upon summary judgment was more difficult to meet.²³⁶ 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.²³⁷ 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.²³⁸ 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.²³⁹

233. *Iqbal*, 556 U.S. at 679.

234. See JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL COMMITTEE ON CIVIL RULES (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/\\$file/motioniqbal2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/$file/motioniqbal2.pdf); Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2315-24 (2012); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553 (2010); Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1 (2011); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 331-47 (2013); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011); Joseph Seiner, *The Trouble with Twombly: A Proposed Pleading Standard in Employment Discrimination Cases*, 2009 ILL. L. REV. 1011, 1025-36.

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.

236. See, e.g., Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1904-07 (1998).

237. See FED. R. CIV. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); see also *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); Wald, *supra* note 236, at 1913-14, 1926.

238. Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759 (2009).

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

240. See FED. R. CIV. P. 50.

241. *Id.*

242. See *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364 (1913).

243. See *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935).

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.²⁵¹

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.*

255. *See id.* A court cannot order a remittitur without giving the plaintiff the option of a new trial. *See* Hetzel v. Prince William Cnty., 523 U.S. 208, 211 (1998).

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

257. *Dimick v. Schiedt*, 293 U.S. 474, 485-88 (1935).

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).

263. 42 U.S.C. § 2000e (2006).

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.²⁶⁷ 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.²⁶⁸ Under the English common law, no case for a serious crime could proceed without a grand jury indictment.²⁶⁹ 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.²⁷⁰ 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.²⁷¹ 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.²⁷² 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.

271. *See* FED. R. CRIM. P. 7; *Fairfax, supra* note 145, at 423-25.

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.²⁷³ Although an indictment by a grand jury has been characterized as simply a formality,²⁷⁴ the power of the grand jury can come in the power not to indict.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.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.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.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

273. See *supra* Part I.C.

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 Juries*, 47 WAKE FOREST L. REV. 319, 328 (2012).

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 Shooting*, WALL ST. J., July 5, 2013, at A3.

276. Fairfax, *supra* note 275, at 711-16; see Palazzolo, *supra* note 275.

277. See Fairfax, *supra* note 275, at 729-31.

278. Thomas, *supra* note 217, at 181-82.

the states.²⁷⁹ As a result, very few states have grand juries, and grand juries do not have the opportunity not to indict.²⁸⁰

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.²⁸¹ 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,²⁸² most states permit judges to dismiss indictments upon finding that the evidence is insufficient despite no authority for dismissal under the common law.²⁸³ Finally, grand juries do not serve the independent investigative function through presentments that they have performed in the past.²⁸⁴

III. A TRANSFER OF AUTHORITY

The English viewed the jury as a protector against the judiciary, the executive, and the legislature.²⁸⁵ The American jury was established largely according to this model, including all of the English components of criminal, civil, and grand juries.²⁸⁶ 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.

282. *See Costello v. United States*, 350 U.S. 359 (1956).

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 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.

299. See *supra* note 281 and accompanying text; Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 11-24 (2004) (contrasting

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.³⁰⁰ And in some circumstances, jury power over U.S. citizens and noncitizens has shifted to the executive through military tribunals.³⁰¹

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.³⁰² As another possible example, in order to bring an employment discrimination claim, the legislature has added an executive step to a judicial process.³⁰³ It decided that an employment discrimination plaintiff must jump through the hurdles managed by the executive-created agency of the Equal Employment Opportunity Commission.³⁰⁴ 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.”³⁰⁵ 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

“rhetoric” of grand jury independence with the reality of the grand jury procedure).

300. *See supra* Part II.A.3.a.

301. *See supra* Part II.A.3.b.

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).

303. *See* 42 U.S.C. § 2000e-4, 2000e-5(b) (2006).

304. *See id.*

305. THE FEDERALIST No. 83, *supra* note 3, at 406 (Alexander Hamilton).

for in the Constitution.³⁰⁶ Similarly, the legislature lacked power over the civil jury once the Seventh Amendment was enacted, which gave only juries and judges certain powers.³⁰⁷ 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.³⁰⁸

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.³⁰⁹ 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.³¹⁰ At the same time, no other provision in the Constitution gave the legislature the power to decide the damages in Article III cases.³¹¹ 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.

311. *See* Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 TEX. L. REV. 345, 354 (1995).

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.³²²

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.

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, *supra* note 6, at 389; AMAR, *supra* note 73, at 473.