The Historical and Constitutional Contexts of Jury Reform

Douglas G. Smith
THE HISTORICAL AND CONSTITUTIONAL CONTEXTS OF JURY REFORM

Douglas G. Smith*

CONTENTS

I. INTRODUCTION ........................................... 380

II. THE ENGLISH JURY SYSTEM ............................... 390
    A. Origins of the English Jury ....................... 391
    B. Internal Structure and Composition of the Jury .... 395
        1. Jury Size ....................................... 396
        2. Rule of Unanimity ............................... 397
        3. Method of Selecting Jurors .................... 397
            a. Experience and Qualifications
               of the Jury .................................. 398
            b. Voir Dire and Peremptory Challenges ....... 400
            c. Special Juries ............................... 402
            d. Trial de Medietate Linguae ............... 404
        4. Trial Length ..................................... 405
    C. Judicial Control of the Jury ......................... 406
        1. Judicial Coercion of Juries: Bushell's Case ........ 408

* Associate, Kirkland & Ellis, Chicago, IL. J.D., Northwestern University School of Law; B.S./B.A., State University of New York at Buffalo. I am grateful for comments on previous drafts of this Article from Steven Calabresi, Gary Lawson, and Daniel Polsby. This Article is based on a Senior Research Project conducted under the guidance of Professor Calabresi at Northwestern University School of Law. All mistakes are attributable to the Author.
2. Judicial Commentary on the Evidence .......... 408
3. Other Mechanisms of Judicial Control .......... 411
4. Minimal Rules of Evidence ................ 413
D. Role of the Jury ........................... 414
   1. The Authority of English Juries Concerning
      Issues of Fact and Issues of Law .......... 415
   2. The Role of the Jury in the Trial .......... 416
   3. Authority to Determine Sanction in Criminal
      Cases ................................ 419

III. THE AMERICAN JURY SYSTEM .................... 421
   A. Significance of the American Jury ............ 421
   B. Internal Structure and Composition of the Jury ..... 426
      1. Jury Size ................................ 426
      2. Rule of Unanimity ..................... 428
      3. Method of Selecting Jurors ............. 431
         a. Experience and Qualifications of the Jury ... 431
         b. Voir Dire and Peremptory Challenges .... 434
         c. Special Juries ....................... 437
         d. Trial de Medietate Linguae ............ 438
      4. Trial Length ........................... 439
   C. Judicial Control of the Jury .................. 439
      1. Judicial Coercion of Juries ............... 440
      2. Jury Instructions ...................... 441
      3. Judicial Commentary on the Evidence ...... 442
      4. Other Mechanisms of Judicial Control ...... 443
      5. Minimal Rules of Evidence ............... 444
      6. Erosion of the Jury’s Power ............... 444
   D. Role of the Jury ........................... 446
      1. The Authority of American Juries Concerning
         Issues of Fact and Issues of Law .......... 446
      2. The Role of the Jury in the Trial .......... 454
      3. Authority to Determine Sanction in Criminal
         Cases ................................ 455

IV. CONSTITUTIONAL CONSTRAINTS AND HISTORICAL
   ANALYSIS .................................... 455
   A. Internal Structure and Composition of the Jury ..... 458
      1. Experience and Qualifications of the Jury ...... 458
      2. Voir Dire and Peremptory Challenges ........... 470
      3. Jury Size ................................ 472
4. Requirement of Unanimity .......................... 474

B. Judicial Control of the Jury ............................ 474

1. Jury Instructions ........................................ 475
   a. Form of Instructions .............................. 476
   b. Furnishing Written Copies of the Instructions .... 476
   c. Preinstructing the Jury .......................... 477
   d. Interim Statements or Instructions .............. 479

2. Judicial Commentary on the Evidence .................. 479

3. Complex and Truth-Defeating Rules of Evidence ...... 483

4. Other Mechanisms of Judicial Control .................. 483
   a. Special Interrogatories .......................... 485
   b. Special Verdict .................................. 486
   c. Summary Judgment ............................... 488
   d. Directed Verdict ................................ 489
   e. Judgment Notwithstanding the Verdict ............ 490

C. Role of the Jury ........................................ 491

1. The Authority of American Juries Concerning Issues of Fact and Issues of Law .... 492

2. Juror Questioning of Witnesses ....................... 496

3. Juror Questioning of the Judge ....................... 498

4. Communication Among the Jurors ....................... 498

5. Juror Note-Taking .................................... 500

6. Authority to Determine Sanction in Criminal Cases .... 502

V. CONCLUSION ............................................. 504
I. INTRODUCTION

The role that the jury plays in the adjudicatory process has been given much scholarly attention in recent years. Not only has the role that the jury plays in adjudication come into question, but also the jury's ability to function effectively in that role. For example, the civil jury has been criticized for producing unwarranted delay and irrational outcomes in civil trials that are detrimental to society. The ability of civil juries

1. In general, this Article does not distinguish between the role of the jury in civil cases and the role of the jury in criminal cases. With respect to most of the issues that are addressed within the following Parts, the distinction does not appear to be essential. Some commentators have noted the similarity of the role of the jury in the civil and criminal contexts. See, e.g., Colleen P. Murphy, Integrating the Constitutional Authority of Civil and Criminal Juries, 61 GEO. WASH. L. REV. 723, 729 (1993) (stating that "the history, text, and structure of relevant constitutional provisions suggest that the authority of civil and criminal juries is more shared than divergent"). The Supreme Court, to a certain extent, has also noted the similarity. See Colgrove v. Battin, 413 U.S. 149, 157 (1973) (stating that "the purpose of the jury trial in criminal cases [is] to prevent government oppression and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues" (citations omitted)). However, particularly with respect to the constitutionality of the proposed reforms, the distinction might be important. Therefore, where appropriate, this Article discusses the relevance of the distinction to proposed reforms.

2. A number of commentators have been critical of the jury. See, e.g., JEROME FRANK, COURTS ON TRIAL (1973); LEON GREEN, JUDGE AND JURY (1930); THE JURY SYSTEM IN AMERICA (Rita James Simon ed., 1975); see also HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 4 (1966) (describing the jury as a "transient, ever-changing, ever-inexperienced group of amateurs"); Dale W. Broeder, The Functions of the Jury: Facts or Fictions?, 21 U. CHI. L. REV. 386, 424 (1954) (questioning the ability of the jury to fulfill its factfinding role); Alfred C. Coxe, The Trials of Jury Trials, 1 COLUM. L. REV. 286, 289 (1901) (referring to the jury system as "out of touch"); Stephan Landsman, The Civil Jury in America: Scenes from an Unappreciated History, 44 HASTINGS L.J. 579, 581 (1993) (stating that "in the early twentieth century the jury was subjected to some of the sharpest criticism in its long history"); cf. Hans Zeisel, The Debate over the Civil Jury in Historical Perspective, 1990 U. CHI. LEGAL F. 25, 31 (suggesting that we improve rather than criticize the jury system).

However, the jury also has its defenders. For example, Professors Hans and Vidmar came to the following conclusion after their recent study of the jury:

Our final judgment on the jury system is a positive one. Despite some flaws, it serves the cause of justice very well. For over 700 years it has weathered criticism and attack, always to survive and to be cherished by the peoples who own it. Adaptability has been the key to its survival. It should remain open to experimentation and modification, but those who would wish to curtail its powers or abolish it should bear the burden of proof. Defenders of the jury clearly have the weight of the evidence on their side.


has been questioned primarily in the area of complex civil litigation, where the jury has been characterized as an inferior and inefficient decisionmaking institution.\(^4\) The incompetency of the civil jury has been


4. For example, in \textit{In re Japanese Electronic Products Antitrust Litigation,} 631 F.2d 1069 (3d Cir. 1980), the court held that the jury may not have been capable of understanding the extremely complex issues in the case. \textit{See id.} at 1089-90; \textit{see also} Leon Green, \textit{Jury Trial and Mr. Justice Black,} 65 YALE L.J. 482, 483 (1956) (noting that as civil cases have become more complex, conflicts have arisen in the jury system); Clyde Lowell Ball, Note, Constitutional Law—In re Japanese Electronic Products Antitrust Litigation—Denial of Jury Trial in Complex Litigation, 59 N.C. L. REV. 1263, 1266 (1981) (stating that "efforts have been made to eliminate jury trial in extraordinarily [sic] complex antitrust, securities, and patent cases"); Comment, \textit{The Right to a Jury Trial in Complex Civil Litigation,} 92 HARV. L. REV. 898, 906-07 (1979) (arguing that complex litigation detracts from the jury's ability to perform its core function). \textit{But see} Higginbotham, \textit{supra} note 3, at 53 ("Apart from the occasional situation in which a judge possesses unique training . . . the assumption that a jury collectively has less ability to comprehend complex material than does a single judge is an unjustified conclusion."). Several commentators have addressed the role of the jury in complex civil cases. \textit{See, e.g.,} Morris S. Arnold, \textit{A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation,} 128 U. PA. L. REV. 829, 848 (1980) (arguing against a complexity exception to the Seventh Amendment jury trial right); Maxwell M. Blecher & Candace E. Carlo, \textit{Toward More Effective Handling of Complex Antitrust Cases,} 1980 UTAH L. REV. 727, 752 (same); James S. Campbell & Nicholas Le Poidevin, \textit{Complex Cases and Jury Trials: A Reply to Professor Arnold,} 128 U. PA. L. REV. 965, 965 (1980) (arguing for a complexity exception to the Seventh Amendment right to jury trial); Patrick Devlin, \textit{Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment,} 80 COLUM. L. REV. 43, 106-07 (1980) (same); Joel B. Harris & Lenore Liberman, \textit{Can the Jury Survive the Complex Antitrust Case?,} 24 N.Y.L. SCH. L. REV. 611, 637 (1979) (suggesting that more research into jury behavior is needed before improvements to the system can be made); Richard O. Lempert, \textit{Civil Juries and Complex Cases: Let's Not Rush to Judgment,} 80 MICH. L. REV. 68, 130-32 (1981) (same); Jeffrey Oakes, \textit{The Right to Strike the Jury Trial Demand in Complex Litigation,} 34 U. MIAMI L. REV. 243, 300 (1980) (arguing that "[a] jury cannot properly perform its function . . . in complex litigation"); Kathy E. Davidson, Note, \textit{The Right to Trial by Jury in Complex Litigation,} 20 WM. & MARY L. REV. 329, 355 (1978) (emphasizing the importance of a party's capacity to decline trial by jury); Douglas W. Ell, Comment, \textit{The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment,} 10 CONN. L. REV. 775, 798 (1978) (suggesting that the Due Process Clause should be used as a standard for defining the right to a jury trial); Constance S. Huttner, Note, \textit{Unfit for Jury Determination: Complex Civil Litigation and the Seventh Amendment Right of Trial by Jury,} 20 B.C. L. REV. 511, 538 (1979) (arguing against a complexity exception); Montgomery Kersten, Note, \textit{Preserving the Right to Jury Trial in Complex Civil Cases,} 32 STAN. L. REV. 99, 120 (1979) (suggesting that the Seventh Amendment provides safeguards guaranteeing a constitutionally fair trial before a jury in complex cases); Note, \textit{The Case for Special Juries in Complex Civil Litigation,} 89 YALE L.J. 1155, 1157-60 (1980) (addressing the difficulties of trying complex cases in front of juries). \textit{See generally} William V. Luneburg & Mark A. Nordenberg, \textit{Specially Qualified Juries and
argued to be so great that it might conceivably raise due process concerns.\(^5\)

Similarly, the role of the jury in criminal cases has also been questioned.\(^6\) A jury of twelve peers of the vicinage is no longer unanimously viewed as a “bulwark of liberty”\(^7\) against which ordinary citizens might be protected from the unwarranted encroachments of the government or from which might be expected the “common sense” judgments embodying the practical wisdom of twelve ordinary members of the community. Thus, in recent years, dissatisfaction with the functioning of the jury in both civil and criminal trials has been of increasing public and scholarly concern.

In response to these perceived deficiencies in current jury procedures, a number of commentators have argued for reforms that would result in a more active jury.\(^8\) These commentators believe that allowing

---

**Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation**, 67 Va. L. Rev. 887 (1981) (analyzing alternatives to jury trials). As one commentator has noted, “[t]he reoccurrence of jury failure in complex and lengthy civil litigation cases and in other contexts, such as understanding jury instructions, has created doubts about the efficacy of the jury as a competent decisionmaking body.” Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 191 (1990).


6. See, e.g., *KALVEN & ZEISEL*, supra note 2, at 3-11 (discussing the debate over the jury); Craig M. Bradley, *Reforming the Criminal Trial*, 68 IND. L.J. 659, 659 (1993) (describing the modern criminal jury trial as “needlessly inefficient”); Friedland, supra note 4, at 190 (“Numerous examples support the contention that a jury selected at random sometimes serves as an incompetent decisionmaker.”); Carolyn M. Howell, Comment, United States v. DeLorean: *The Case of the Confused Jury*, 1 DET. C.L. REV. 97, 97 (1988) (describing how the jury evidently misconstrued the court’s instructions on hung juries in the *DeLorean* case, believing that it was required to acquit the defendant if the jury did not unanimously agree on the conviction). Much like the civil jury trial, the criminal jury trial has been criticized for its length and complexity. See Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 408 (1992) (“In the past few decades, criminal jury trials have become so lengthy and complex that we cannot, or will not, provide them to the vast majority of defendants.”).

7. See 4 *WILLIAM BLACKSTONE*, COMMENTARIES *342.

the jury a more active role in the adjudicatory process may help to improve jurors' ability to carry out their factfinding function. They also believe that trial procedures that are currently employed handicap the jury in its role as a finder of fact. Among the reforms advocated by such scholars are the following: (1) allowing the knowledge and experience of potential jurors to be a factor that works for instead of against their being placed on the jury; (2) eliminating or cutting back on peremptory challenges and extensive lawyer-conducted voir dire; (3) retaining the rule of unanimity and the twelve member jury; (4) drafting jury instructions in plain English and preinstructing the jury; (5) requiring the judge to comment on the evidence and the credibility of witnesses; (6) relaxing the rules of evidence to allow hearsay, character, and past conviction evidence to be heard by the jury; (7) giving jurors the right to communicate with each other, ask questions of witnesses as well as the judge, and take notes during trial; (8) allowing for greater jury participation in determination of sanction in criminal cases; and (9) requiring the jury to give reasons for its verdict in a written decision.9

Many of these reforms have been adopted or are currently recommended at the state level where the states seem to be fulfilling their role in our federal system as "experimental laboratories."10

The purpose of this Article is to examine the evolution of the institution of the jury from its origins in England through its transportation to American soil and to compare and contrast the various historical models of the jury with the modern American jury. Although much has been written concerning the historical development of the English jury, surprisingly little has been written about the historical development of the
American jury. In particular, consideration of historical practices in America may serve as a useful guide to future reform of the jury system. However, it may also serve as a guide in outlining the constitutional constraints that have been imposed on reform of jury procedures in the United States. The conclusion of this Article is that several modifications could be made in the structure and function of the American jury in both civil and criminal trials in order to enhance the jury's ability to discover the truth and deliver justice without running afoul of constitutional constraints that might be imposed on jury procedures. Such modifications of the role of the jury would not only produce greater justice, but would also be consistent with the traditional functions that juries have exercised at one time or another in the English and American legal systems.

Despite the fact that reform of jury procedures may result in beneficial improvements in jury performance, significant barriers to such reform remain. As this Article demonstrates, most of the procedural


12. As one early twentieth-century commentator noted, "[t]he question of the constitutionality of any particular modification of the law as to trial by jury resolves itself into a question of what requirements are fundamental and what are unessential, a question which is necessarily, in the last analysis, one of degree." Austin Wakeman Scott, Trial by Jury and the Reform of Civil Procedure, 31 Harv. L. Rev. 669, 671 (1918). Similarly, another commentator writing soon after the ratification of the Fourteenth Amendment stated that

"[t]he right [to trial by jury] may be regulated by the legislature in certain ways provided its fundamental requisites are not impaired or destroyed; that is, provided its number and unanimity, and we should say its impartiality, are not violated. These are necessary for its integrity; impliedly if not expressly fixed by the Constitution.

John Proffatt, A Treatise on Trial by Jury § 106, at 149 (Fred B. Rothman & Co. 1866) (1876).

13. Professor Van Kessel has identified the following barriers to reform in the area of criminal procedure:

(1) A legal system of fixed rules made impervious to significant modification by Supreme Court decisions constitutionalizing or otherwise federalizing the rules of criminal procedure, (2) professional inertia on the part of many lawyers and judges who believe their interests lie in maintaining the status quo, and (3) our "national character" which distrusts centralized authority in favor of the individual.

Van Kessel, supra note 6, at 487. In addition, other commentators have noted that there are a variety of special interests that have a vested interest in blocking reform of the judicial role in the trial process. See, e.g., John C. Reitz, Why We Probably Cannot Adopt the German Advantage in Civil
innovations suggested by commentators to remedy these problems are not constitutionally problematic and are already provided for within the current legal framework. Furthermore, many of the procedures enjoy a substantial historical pedigree, having been employed at one time or another in the United States. However, inertia on the part of judges and lawyers may account to a great extent for the failure of the legal system to experiment with, and ultimately adopt, these procedures. Many of these reforms may serve to diminish the power of lawyers and judges in the adjudicatory process. However, if such procedures are sanctioned by legislatures, and if lawyers and judges are given guidelines to administer these procedures, it is likely that their use will become more widespread.

Procedure, 75 IOWA L. REV. 987, 994 (1990) (concluding that “reformers who contemplate changing our system to look like the German system must consider the daunting list of special interests with a clear stake in the way the current American legal culture defines the ideal roles for judges and for attorneys”). Similarly, there are vested special interest groups that may oppose any change in the role of the jury in the trial procedures. Many of these special interest groups may be the same as those opposed to reform of the judge’s role in the trial process. See id. at 994-95.

14. Several commentators, however, have noted that there may be constitutional objections to reform of the jury system stemming from the Sixth and Fourteenth Amendments. See, e.g., Graham Hughes, Pleas Without Bargains, 33 RUTGERS L. REV. 753, 756 (1981); Van Kessel, supra note 6, at 459 (arguing that the Supreme Court is unlikely to approve a “Continental-style mixed court in which professional judges sit alongside lay jurors and participate with an equal vote in deliberations”). However, other commentators have noted that many of these objections should carry little weight:

In light of Duncan and other decisions “incorporating” provisions of the Bill of Rights within the fourteenth amendment’s due process clause, it commonly is assumed that a revision of American trial procedures to embody the dominant features of Continental justice would require “either constitutional amendment or radical reinterpretation of the Bill of Rights by the Supreme Court.” In fact, however, neither constitutional amendment nor a judicial reinterpretation of the federal Constitution would be necessary.

... It would be strange and unfortunate if the federal Constitution were read to preclude states from seeking workable alternatives to our existing regime of criminal justice—a regime so costly and so far beyond the states’ perceived capacities that the Supreme Court and other observers regard the avoidance of its procedures through plea bargaining as a necessity.

Albert W. Alschuler, Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System, 50 U. CH. L. REV. 931, 995, 996-97 (1983) (footnote omitted). In Duncan v. Louisiana, 391 U.S. 145 (1968), Justice Harlan, in his dissenting opinion, noted that “the Court has chosen to impose upon every State one means of trying criminal cases; it is a good means, but it is not the only fair means, and it is not demonstrably better than the alternatives States might devise.” Id. at 193. Justice White noted the following:

A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems. Yet no American State has undertaken to construct such a system.

Id. at 150 n.14.
Furthermore, if, as is the goal of this Article, it is demonstrated that these reforms would be consistent with historical jury practices in England and America, then it may be more likely that members of the legal profession would feel more comfortable and confident with the adoption of such procedures.

Although the right to a trial by jury in both civil and criminal cases has been deemed one of the most fundamental of rights, essential to civil liberty in the United States since the colonial era, the way in which this fundamental right has been implemented in practice has never been rigidly dictated. In particular, the federal system has allowed for a great deal of variation in jury procedures employed among the states. There has also been a temporal variation as societal perceptions of the purposes of adjudication have shifted. Therefore, incorporation of reforms that may lead to greater justice in both civil and criminal trials and which are also consistent with traditional jury practices in America, as well as in England, are not likely to violate the fundamental right to trial by jury or traditional notions of due process. The relevant time periods for determining the popular understandings of these concepts are, for the federal system, the Founding era, and for the states, the period surrounding the ratification of the Fourteenth Amendment, which the Supreme Court has construed as making applicable to the states due process guarantees and the Sixth Amendment guarantee of trial by jury. Consequently, this Article examines practices from colonial times through

15. See Edith Guild Henderson, The Background of the Seventh Amendment, 80 HARV. L. REV. 289, 289 (1966) (arguing that the Seventh Amendment did not codify "a rigid form of jury practice" in civil cases). “A study of the decided cases in the thirteen original states shows that . . . the power of the civil jury and the extent of judicial control over its verdicts varied enormously and unsystematically from state to state.” Id. at 299; see also Hyman & Tarrant, supra note 11, at 25 (noting that “[g]reat jury practice diversity grew not only between the colonies and between a colony and England, but also within a colony”); Lettow, supra note 3, at 505 (“Our jury system is not carved in stone: it has evolved considerably over the centuries, and will continue to develop.”). Even today, there is great variation in many of the procedures relating to the jury, due in large measure to the fact that the United States is a federal system. See Hyman & Tarrant, supra note 11, at 23 (noting that in 1961, “92 federal courts employed 92 differing methods for selecting jurors”).

16. The Supreme Court has acknowledged that due process is a flexible concept:

It is axiomatic that due process “is flexible and calls for such procedural protections as the particular situation demands.” The function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions. Because of the broad spectrum of concerns to which the term must apply, flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error.

Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 12-13 (1979) (citations omitted).
the end of the nineteenth century.

Part II discusses the origins and evolution of the English jury system. Several features of the early English jury differ significantly from the modern American jury. In general, jury selection was more random (except when special abilities or experience of jurors were considered) and less lawyer-dominated, jurors were more experienced, judges exercised greater control over the jury, and the role of the jury in the adjudicatory process was greater than that of the modern American jury. Early on, the judiciary exercised greater powers over the jury—both coercive and persuasive. However, over time, the judge's ability to coerce the jury to reach a decision in line with his own view of the case was diminished, while his ability to persuade the jury through commenting on the evidence and credibility of witnesses was retained. Similarly, the early jury played a more active role in the adjudicatory process by basing its decisions in part on personal knowledge of the issues to be tried and by questioning witnesses. In contrast, over time, the rules governing what evidence could be considered by the jury became more restrictive. The rules of evidence gradually developed to constitute a significant control on the functioning of the jury. Finally, although the jury did not always directly participate in sentencing in criminal cases, it indirectly possessed the power to determine sentences through its factfinding role. The facts found by the jury would determine the crime for which the accused was convicted, which in turn would determine the sentence served by the defendant.

Part III examines the structure and function of the jury in early America. Not surprisingly, there are several similarities between the early American jury and the early English jury. As in the early English jury system, early American jury selection was more random (except when experience or special abilities of jurors were considered in juror selection) and less lawyer-dominated, jurors were more experienced, the judge exercised greater persuasive control over the jury, and the role of the jury in the adjudicatory process was greater than that of the modern American jury. As in England, over time, the rules governing what evidence could be considered by the jury became more restrictive. A final similarity between early English and American juries is that both apparently possessed some measure of indirect power to determine the sentence in criminal cases through their factfinding role. However, the early American jury seemed to have exercised greater power than its English counterpart, resulting from its authority in many cases to judge issues of law as well as issues of fact.

Finally, Part IV considers the potential constitutional objections to
reforms of jury procedures currently under consideration by the states and the federal government. This Part contrasts the English jury system and the early American jury system with the modern American jury system. The first area that is discussed is the structure and composition of the jury. The modern jury is selected in such a way that results in a jury that is less experienced with trial procedures and less knowledgeable concerning the issues to be adjudicated than its counterpart in early English or American juries. Extensive voir dire and the use of peremptory challenges are practices in modern jury trials that are utilized in a strategic manner by lawyers and which lead to the placement of less qualified individuals on the jury. Furthermore, there is a trend toward allowing juries of less than twelve persons to sit at trial and abandoning the requirement of unanimity in verdict that were traditionally essential features of jury practice. These trends are disturbing in that they arguably weaken the jury in its ability to act as an accurate finder of fact.

The second area that is explored encompasses the mechanisms of judicial control over the jury utilized in modern trial practice. First, there is a desperate need for reform in the way in which the judge and the jury interact. Several commentators have noted that modern jury instructions have become so complex and written in such legalese that they are virtually incomprehensible to the average juror. Because of this trend toward more complex and obscurely-written jury instructions, the jury is unable to exercise its role in applying the law to the facts in the case, because it is unable to understand the legal principles that it is charged with applying. One valuable reform would be to allow the jury to be instructed not only at the end of the trial, but also at the beginning and perhaps at various times during the trial in order to keep before it the legal principles that it is expected to apply in rendering its verdict at the end of the trial. Such instructions can only help to facilitate the ability of the jury to fulfill its role in applying the law to the facts. Second, unlike the practice in early English and American trials, judges in modern American jury trials often do not comment on the evidence or the credibility of witnesses. This feature of modern jury practice has arguably deprived the jury of a valuable source of guidance. Third, the complex rules of evidence that originated in the nineteenth century and which serve to exclude from the jury's consideration much that is relevant to the issues to be adjudicated, have arguably deprived the jury of some of the power that it traditionally exercised. Judges are able to

17. See infra notes 416-19 and accompanying text.
keep from the jury evidence that might change the outcome of the adjudicatory process had it been considered. Finally, several other mechanisms of judicial control over the jury that are employed most often in the civil context, such as special verdicts and special interrogatories, summary judgment, the directed verdict, and the judgment notwithstanding the verdict, are considered in their relation to the proper scope of the judge's power to constrain the jury in its factfinding role.

The final area that is explored is the role of the jury in the adjudicative process. The role of the jury in the modern trial is generally that of a passive observer rather than an active inquirer. Arguably, this characteristic of the modern trial, which is due in large part to procedural rules that could easily be changed, has hampered the jury in its ability to act as an accurate finder of fact. The ability of the jury to fulfill its designated role could be improved if jurors were allowed to question witnesses, question the judge concerning uncertainties with respect to principles of law, communicate among themselves during the trial prior to deliberations, and take notes. Many of these procedural reforms have been advocated by other commentators as well as by lawyers and judges. However, by comparing early English and early American jury trials with the modern American jury trial, one notices that many of these "innovations" appear to have been employed traditionally. Finally, the jury should be involved to some extent in sentencing in the criminal context. Historically, the jury exercised such a function indirectly, if not directly, and artificially decoupling a determination of guilt from the determination of sanction impermissibly restricts the scope of the jury's power.

The modern American jury has strayed from its historical antecedents found in early English and American juries. The evolution of the modern American jury has had an adverse impact on its ability to discover the truth and arrive at just outcomes. By examining early English and American practices, this Article demonstrates that many of the reforms of jury procedure currently proposed are consistent with historical jury practices in both England and America, as well as any potential constitutional constraints placed on reform of the jury system. As a result, both courts and policymakers should feel more comfortable implementing such reforms when appropriate to improve the functioning

18. See infra notes 498-503 and accompanying text.
19. See infra notes 333-35 and accompanying text.
of the jury as an institution as well as to produce more just outcomes in adjudication.

II. THE ENGLISH JURY SYSTEM

Since the modern American jury finds its roots in the early English jury, it is useful to study this institution in order to determine how the jury has evolved in America and perhaps discover where this process of evolution has produced undesirable consequences. In undertaking this historical inquiry, one discovers that the original version of the English jury differed dramatically from the modern American jury in terms of the structure and composition of the jury, the nature of judicial control exercised over the jury, and the jury’s role in the adjudicatory process. Early English juries were characterized by the more active role they played in the adjudicatory process. Early English jurors possessed greater trial experience and specific knowledge of issues central to the case, which enabled them to undertake a more active role. As a result of their greater trial experience and familiarity with the issues to be tried, jurors were in a better position to ask questions and to participate more actively in the trial. Accompanying this more active role was a correspondingly greater degree of judicial control over the jury, which was increasingly less coercive with the passage of time. However, the English judge to this day retains a great deal of persuasive control over the jury, which he may exercise in order to provide the jurors with insight that they might not ordinarily possess, being primarily one-time participants in the adjudicatory process.

This Part is divided into four subparts. Subpart II.A discusses the origins of the early English jury. The origins of the jury as a decisionmaking body may be traced to the Norman inquisition. This is noteworthy since it may explain the many inquisitorial features of the early English jury. Subpart II.B examines the structure and composition of the early English jury. Juries were originally composed of individuals who were expected to possess knowledge relevant to the case to be tried, acting much as witnesses. Furthermore, voir dire and the use of peremptory challenges were greatly curtailed during the early history of the jury. Subpart II.C chronicles the evolution of mechanisms of judicial control over the English jury. The judge's power to coerce the jury declined over time, while his power to persuade the jury remained constant. Over the years, and particularly during the nineteenth century, rules of evidence became an additional mechanism through which the judge could exercise control over the jury’s decisionmaking power.
Finally, Subpart II.D discusses the generally active role of the early jury and the more informal nature of early jury trials.

A. Origins of the English Jury

A number of scholars have addressed the history of the institution of the jury in England. Despite the great attention given to this subject, the origins of the jury have been much disputed. However, one point of agreement is that this venerable institution, guaranteed as a constitutional right under the Magna Charta, was well-established prior to 1215. The jury, as a factfinding body in England, has a long-established pedigree and played a significant role in early English trials—significant enough that it was worthy of constitutional protection. This original inquisitorial system evolved into a “bulwark of liberty” by the time of the reign of the Stuart Kings.

The jury’s historical antecedents may be traced to a variety of sources. It has been argued that the jury found its roots in ancient Greece and the laws of Solon, the system of Judices found in the twelve...
tables of Roman law imported during the Roman Conquest of England; the Anglo-Saxon practices under Alfred the Great (871-899), Aethelred I (865-871), Aethelred the Unready (978-1016), Edgar the Peaceful (959-975) and Edward the Confessor (1042-1066); and finally, to the Frankish inquisition brought from Normandy by William the Conqueror in 1066. However, the general consensus is that, although there existed important Anglo-Saxon precursors of the English jury prior to the Norman Conquest, the model of the English jury was founded upon the Norman inquisition.

The inquisition was originally a process used to obtain information concerning royal matters, usually involving the king's real property rights. Individuals who were knowledgeable concerning the disputed matter were gathered from the immediate area in order to convey what they knew to the agent of the king. Members of the jury testified concerning such matters as property arrangements, local customs, and taxable resources in their area. Thus, jurors originally functioned more as witnesses than as triers of fact. It was only later that witnesses were
called to testify before the jury.\textsuperscript{32} Thus, individuals were sought out to provide evidence in court. This practice is rooted in the historical context of jury trials.

32 AM. J. LEGAL HIST. 201, 201 (1988) ("Throughout at least the first five centuries of the regular use of the jury in England, jurors were drawn from the neighborhood in which an action arose, and were permitted and indeed expected to consider their personal knowledge of the facts in dispute in reaching a verdict."); John A. Phillips & Thomas C. Thompson, Jurors v. Judges in Later Stuart England: The Penn/Mead Trial and Bushell’s Case, 4 LAW & INEQ. J. 189, 220 n.167 (1986) (stating that juries evolved from “active knowers of local events to passive receivers of evidence made available to them only in court” (quoting John M. Murrin, Magistrates, Sinners, and a Precarious Liberty: Trial by Jury in Seventeenth-Century New England, in SAINTS AND REVOLUTIONARIES: ESSAYS ON EARLY AMERICAN HISTORY 152, 155 (David D. Hall et al. eds., 1984))).

The notion of jurors acting as witnesses may have given rise to the vicinage requirement imposed on trial by jury. Jurors from the area where the incidents occurred were likely to be more knowledgeable juror/witnesses. See Bushell’s Case, 124 Eng. Rep. 1006, 1012 (C.P. 1670) (stating that the jury “[b]eing return’d of the vicinage, whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue (and so they must) though no evidence were given on either side in Court”); 3 EDWARD COKE, FIRST INSTITUTE OF THE LAWS OF ENGLAND 368-69 (2d Am. ed. 1836) (“[E]very trial shall be out of that town, parish, or hamlet, or place known out of the town, &c., within the record, within which the matter of fact issuable is alleged, which is most certain and nearest thereunto, the inhabitants whereof may have the better . . . knowledge of the fact.”).

Professor Dawson has disputed this witness analogy on the grounds that the jury was required to enter a collective verdict instead of giving its views of the evidence. See DAWSON, supra note 26, at 123-25. Professor Landsman has attributed the decline of the juror as witness, in part, to the method of presentation of evidence:

Perhaps as important as the decline of the jury’s witnessing role was the rise of in-court testimony as the basis for decision. While it may be impossible to determine the precise moment that courtroom procedure shifted to testimonial presentations in open court, such presentations clearly came to dominate over the course of the fifteenth and sixteenth centuries.

Landsman, supra note 2, at 587.

32. See EDWARD COKE, THE THIRD AND FOURTH PARTS OF THE INSTITUTES OF THE LAWS OF ENGLAND pt. 3, at 163 (Garland Publishing, Inc. 1979) (1644) (explaining that early in the seventeenth century juries were commonly led by the testimony of witnesses examined in court); THAYER, supra note 20, at 137 (stating that “[t]he contrast between the functions of these two classes [jurors and witnesses] became always greater and more marked”; see also FORSYTH, supra note 20, at 128 (concluding that by the fourteenth century jurors and witnesses appeared as distinct groups in the trial process, but that witnesses and jurors may have come together in reaching a verdict).

Eventually, the expectation that jurors would rely on personal knowledge of the dispute to be tried was “gradually exploded.” Blackstone, writing in 1768, stated that “the practice . . . now universally obtains[] that if a juror knows any thing of the matter in issue, he may be sworn as a witness, and give his evidence publicly in court.” 3 BLACKSTONE, supra note 7, at *375. The rationale for the abandonment of reliance on personal knowledge was expressed by one commentator, writing in 1849, as follows:

Evidence, in order to be receivable, should come through proper instruments, and be in general original and proximate. With respect to the first of these; except in a few matters deemed too notorious to require proof, the judge and jury must not decide on their own personal knowledge, and should be, as it were, in a state of legal ignorance as to all things respecting the question in dispute before them, except such as are established by legal evidence, or legitimate inference from it. . . . It is obvious that if they were allowed
rather than rejected for jury duty if they possessed information that was relevant to the issues to be tried. Eventually, this prerogative of the king was extended to the general public under the reign of Henry II, resulting in its use in the resolution of private disputes.\(^{33}\) This procedure of dispute resolution was eventually available upon demand as a matter of right,\(^ {34}\) becoming widespread and popular for a variety of reasons.\(^ {35}\) The most commonly cited explanations for the popularity of the jury are: (1) the unpopularity of alternative modes of trial such as ordeal, battle, and wager of law;\(^ {36}\) (2) the action of Pope Innocent III in 1215, forbidding the clergy to perform religious ceremonies connected with the ordeal;\(^ {37}\) and (3) the provision in the Magna Charta abolishing large fees that previously had been exacted for granting the inquisition.\(^ {38}\) However, a final possible reason for the growth of this procedure is the
to decide on impressions, or information acquired elsewhere, not only would it be impossible for a superior tribunal, the parties, or the public, to know on what ground the decision proceeded, but it might be founded on common rumour or other forms of evidence, the very worst instead of the best.

W. M. Best, A Treatise on the Principles of Evidence and Practice as to Proofs in Courts of Common Law *94-95 (1849) (footnotes omitted).

33. See Plucknett, supra note 27, at 110-11 (noting that trial by jury eventually became the standard for all important civil litigation); 1 Pollock & Maitland, supra note 20, at 144, 149 (explaining that private disputes resolved in this manner often involved land).


35. See 1 Pollock & Maitland, supra note 20, at 151. Glanvill, an early treatise writer, summarized the reasons for the early popularity of the jury as follows:

The Grand Assize is a royal favor, granted to the people by the goodness of the king, with the advice of the nobles. It so well cares for the life and condition of men that every one may keep his rightful freehold and yet avoid the doubtful chance of the duel, and escape that last penalty, an unexpected and untimely death, or, at least, the shame of enduring infancy in uttering the hateful and shameful word ["Craven"] which comes from the mouth of the conquered party with so much disgrace, as the consequence of his defeat. This institution springs from the greatest equity. Justice, which, after delays many and long, is scarcely ever found in the duel, is more easily and quickly reached by this proceeding. The assize does not allow so many essoins as the duel; thus labor is saved and the expenses of the poor reduced. Moreover, by as much as the testimony of several credible witnesses outweighs in courts that of a single one, by so much is this process more equitable than the duel. For while the duel goes upon the testimony of one sworn person, this institution requires the oaths of at least twelve lawful men.

Thayer, supra note 20, at 42 n.1 (translating Glanvill).

36. See 2 Blackstone, supra note 7, at *331-49; 2 Pollock & Maitland, supra note 20, at 618; James B. Thayer, The Older Modes of Trial, 5 Harv. L. Rev. 45, 45 (1891) (discussing judicial duel or battle).

37. See Heller, supra note 27, at 5 (stating that "[t]he elimination of the religious sanction attached to ordeals deprived that method of proof of the divine aspects with which it had been associated, and practically abolished it as a trial procedure").

38. See Thayer, supra note 34, at 264.
economic benefits it offered to the Crown. The members of the jury were not paid by the Crown, thus providing a mechanism of dispute resolution that was relatively costless (at least to the government). Thus, the jury system was originally seen as a more efficient mechanism of dispute resolution than the alternatives that were available at the time of its early development. It was seen as reducing both the delay and expense in terms of life and labor necessary under alternative methods of dispute resolution. Furthermore, it was described as being more "equitable." Evidently, this was a reference to the element of arbitrariness that existed in the alternatives to the jury available during this early period. For example, a decision by twelve ordinary members of the community was likely to be less arbitrary than the outcome of a duel.

B. Internal Structure and Composition of the Jury

Early English jury trials were less adversarial than modern American jury trials. For example, the peripheral function of lawyers and the active role played by the accused in early English criminal trials are evidence of this less adversarial character. A number of commentators, most significantly Professors Langbein and Landsman, have pointed out that early English trials were less lawyer-dominated and less adversarial than their modern counterparts, and have argued that the excessive delay and undesirable strategic behavior on the part of lawyers is a direct result of the more adversarial character of modern trials.

Furthermore, most aspects of jury practice were not rigidly established in England prior to the foundation of the American colonies. Even though the jury trial as an institution had received constitutional protection under the Magna Charta, there were significant changes in jury

39. See Dawson, supra note 26, at 121.
40. See Langbein, supra note 20, at 315. Professor Langbein noted the following: In the Old Bailey, as on the Continent today, lawyers for the prosecution and defense were peripheral forensic figures, if present at all. To the extent that evidence was not adduced spontaneously in the altercation of accusor and accused, it was the trial judge who examined the witnesses and the accused, and it was he who, like the modern Continental presiding judge, dominated the proceedings.
41. Id. Langbein noted of the proceedings in the Old Bailey that "the accused took the active role in his own defense, speaking directly and continuously to the court as he does today in the European systems. The privilege against self-incrimination was not yet working to silence the accused and distance him from the conduct of his own defense." Id.
42. See id. (discussing the character of early English criminal trials in the Old Bailey).
43. See Landsman, supra note 20, at 498-520.
trial procedures over time. However, despite this flexibility, a few particular and important aspects of jury practice seem to have been firmly rooted in tradition. Among these aspects of the jury that remained constant over time were: (1) a jury composed of twelve members of the community; (2) a requirement of unanimity in the verdict; (3) fairly random selection of jurors based only on their knowledge concerning the issues to be tried; (4) a concomitant reduction in the use of peremptory challenges and extensive voir dire; (5) selection of jurors who possessed greater trial experience where appropriate; and (6) relatively short trials. Many of these aspects of trial procedures were arguably viewed as being essential or inherent in trial by jury, particularly the requirements that the verdict be unanimous and that the jury be composed of twelve jurors.

1. Jury Size

Juries were traditionally composed of twelve members. Although the number of jurors varied within the Frankish Empire, particularly among the Frankish Normans, the number in England appears to have been fixed at twelve since the reign of Henry II (1154-1189). Although parties might agree to impanel a jury of less than twelve, it seems that the practice of seating no less than twelve jurors was available as of right to the parties and therefore inherent in the notion of trial by jury. Requiring the jury to be composed of twelve jurors served as a bright, if not arbitrary, line that would prevent reduction of the size of the jury. As noted above, one of the advantages that led to the popularity of the jury in its early years was the reduction in arbitrariness occasioned by requiring decisionmaking to be made by a body composed of several members of the community. Maintaining the size of the jury at twelve members contributed to a reduction in arbitrariness.

44. See infra notes 45-93 and accompanying text.
45. See Arnold, supra note 26, at 7; see also Scott, supra note 12, at 672 (noting that although originally the Magna Charta did not mention the number of members of the jury, "by the middle of the fourteenth century the requirement of twelve had probably become definitely fixed"). But see Stephens, supra note 27, at 157 (stating that "[a]lthough twelve was the most usual number of the jurors of assise for some years, it was not the unvarying one. When the institution was in its infancy, the number appears to have fluctuated according to convenience or local custom.").
46. There are a number of reported cases wherein the parties agreed to fewer than twelve jurors. See Thayer, supra note 20, at 88-90.
47. See discussion supra Part II.A.
2. Rule of Unanimity

A second practice that seems to have been established as being inherent in the meaning of "trial by jury" was the requirement of unanimity of the jury verdict.\textsuperscript{48} Although a unanimous verdict was not always required, in 1367, during the rule of Edward III (1327-1377), such a rule was established and, absent consent of the parties, became the norm during the reign of Edward IV (1461-1483).\textsuperscript{49} This practice may have contributed to the demise of the juror as witness, since jurors would be required to enter a collective verdict rather than merely register their individual views concerning the evidence presented at trial.\textsuperscript{50} Furthermore, it undoubtedly served to increase the "black box" nature of jury decisionmaking, since the only output of the jury's deliberations would be a single collective decision.\textsuperscript{51} The process by which the individual members of the jury produced the verdict remained hidden from public view. Finally, the rule of unanimity arguably affected the dynamics through which the jury reached its decision. Requiring unanimity in the jury verdict made it more difficult to reach decisions, and increased the voice of minority members of the community.

3. Method of Selecting Jurors

A third interesting feature of English jury practice that remained fairly constant in the early years of the jury's existence was the method employed in selecting jurors. Besides being selected for knowledge concerning the issues involved in the case, jurors were also selected for their dedication to the Crown and "reputed honesty."\textsuperscript{52} Selection of jurors was relatively random in the sense that peremptory challenges were exercised less frequently by lawyers to select individual jurors they thought might be predisposed to find in their favor, and consequently,
voir dire was much less extensive.\(^5\)

However, selection of jurors was not always particularly random in a different sense. Jurors were originally selected for their specific knowledge concerning the issues to be tried. Furthermore, special juries were often impaneled to hear cases where the expertise of the jurors might better enable them to perform their function as finders of fact. Therefore, in cases where the principle of random selection of jurors was skirted, it was in order to better fulfill certain needs in achieving a just outcome in adjudication.\(^4\)

a. Experience and Qualifications of the Jury

An important characteristic of early English juries was the relatively significant trial experience often possessed by the members of the jury. Professor Langbein has analyzed the proceedings of criminal trials in the Old Bailey from the mid-1670s to the mid-1730s in an illuminating article.\(^5\) Langbein concluded that early English jurors were often more experienced than their modern counterparts for two reasons: (1) they often had had previous jury experience and (2) juries were impaneled to hear multiple cases.\(^6\) Thus, early English jurors were probably more familiar with trial procedures than their modern American counterparts. This greater trial experience facilitated a more active role for the jury in the trial process since members of the jury who were familiar with trial procedures may have felt more comfortable in the trial setting.

Furthermore, the relatively great experience of early English jurors also contributed to the speed of early English jury trials, since there was less of a concern with keeping information from an inexperienced jury through complex rules of evidence. Jurors were likely to be more sophisticated concerning the types of evidence offered at trial and the weight that such evidence should be accorded. By obviating the need for constant objections by lawyers concerning evidentiary points, much time was saved during trial and, for all intents and purposes, the goal of

\(^{53}\) See id. at 15-16.
\(^{54}\) See id. at 16-19.
\(^{55}\) See Langbein, supra note 20, at 263.
\(^{56}\) See id. at 276 ("Not only did a single Old Bailey jury commonly try dozens of cases at a single sessions, but most of the dozen jurors who sat at any one session were veterans of other sessions."); see also Roger D. Groot, The Jury in Private Criminal Prosecutions Before 1215, 27 AM. J. LEGAL Hist. 113, 129 (1983) (stating that the "hundred jurors almost certainly served repetitively, and so were accustomed to adjudicating guilt or innocence"); John H. Langbein, Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources, 50 U. Chi. L. REV. 1, 118 (1983) (discussing a scenario involving repetitive use of the same jury).
accurate factfinding by the jury was furthered.

Not only might jurors be selected for previous trial experience, but they might also be expected to possess specific knowledge concerning the dispute in the case. In this respect, the earliest jurors were more like witnesses than modern jurors. Originally, this aspect of jury selection was manifested in the requirement that jurors be selected from the vicinity where the dispute arose. 57 In fact, it was evidently a practice at one time to have mixed juries composed of jurors and witnesses. For example, Chief Justice Thorpe stated in a case in 1349:

"[W]itnesses . . . should say nothing but what they know as certain, i.e., what they see and hear. If a witness is returned on the jury, he shall be ousted. A challenge good as against a juryman is not good against a witness. If the witnesses and the jury cannot agree upon one verdict, that of the jury shall be taken, and the defeated party may have the attaint against the jury . . . ." 58

This practice apparently ended by the mid-1500s. 59 Thus, the general principle of random selection of jurors was skirted where resolution of the particular case called for familiarity with specific facts.

Finally, there is some evidence that the general intelligence of potential jurors was also considered when impaneling a jury. 60 Even if such a concern for intelligence or potential for understanding the issues to be tried was not explicitly recognized under the law, property qualifications for jurors may have implicitly served to ensure that the better-educated members of society served on juries. 61 Property qualifi-

57. See James C. Oldham, The Origins of the Special Jury, 50 U. CHI. L. REV. 137, 164 (1983) (explaining that jurors were presumed to have knowledge of the facts in the case to be tried because they were selected from the area where the dispute occurred). These requirements were laid out in early statutes that required jurors who were "next Neighbours," Articuli super Cartas (Articles upon the Charters), 28 Edw. I, ch. 9 (1300), or had "best Knowledge of the Truth, and be nearest." Statute of 42 Edw. III, ch. 11 (1368) (Eng.).

58. THAYER, supra note 20, at 100-01; see also PROFFATT, supra note 12, § 32, at 47-49 (discussing attaint).

59. See THAYER, supra note 20, at 102.

60. See Oldham, supra note 57, at 140-41 ("Several identifiable themes recur in the statutes and rules of court establishing qualifications for jurors. First, the statutes and rules sought to ensure that persons of understanding and intelligence served on juries, even though the level of concern varied according to the nature and importance of the litigation.").

61. See 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW *502-03 (London 1816); 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 234, at 155-57 (Garland Publishing, Inc. 1979) (1628); 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 415 (New York, Arno Press 1972) (1724); Oldham, supra note 57, at 144-45 (observing that "[t]hrough the reign of Elizabeth, Parliament sought to ensure that jurors were drawn from the vicinity of the trial and that jurors were men of property"). "If statutory property
cations in England served to disqualify three-quarters of the adult male population from jury service. Thus, such qualifications significantly impacted who was allowed to serve on juries. The purported rationale for property qualifications may have been to avoid corruption through bribery of members of the jury. However, a salutary side effect of this practice may have been the increased ability of the jury to understand both the issues argued at trial and their role in the adjudicatory process. The impaneling of members of higher classes is an indication that jurors on average were among the better-educated members of society.

b. Voir Dire and Peremptory Challenges

In general, selection of jurors was fairly random in early English jury trials. One salient feature of the early process of jury selection was the absence of attorney-conducted voir dire of prospective jurors, and the fact that peremptory challenges were rarely utilized. Furthermore,
peremptories were never allowed in civil cases. Therefore, lawyers were unable to utilize peremptory challenges to select jurors they thought might be predisposed to decide the case in their favor. Blackstone gave two justifications for the existence of the little-used peremptory challenge:

[I]n criminal cases, or at least in capital ones, there is, *in favorem vitae*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a *peremptory* challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons. 1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

Thus, the peremptory challenge was openly acknowledged to be a mechanism whereby the accused could exercise his prejudice and strike jurors he did not like or avoid the problem of juror resentment following a failed challenge for cause. Furthermore, peremptory challenges were allowed only in the most serious cases—criminal (and perhaps only capital) cases. Thus, their availability was not as widespread as it is in modern American trials.

Modern English jury selection is similarly, if not more, random in this respect. Unlike American law, English law does not permit litigants

---

40 (1928) (footnotes omitted).

67. The peremptory challenge “has an ancient lineage in felony prosecutions from the time of the settled common law, but has never been allowed by either force of practice or statute, in English civil procedure.” Moore, supra note 66, at 445 (footnote omitted).

68. 4 BLACKSTONE, supra note 7, at *346-47.

69. Furthermore, examination of potential jurors through voir dire could only be made pursuant to a previous challenge of the juror. Otherwise, no questioning of the potential jurors was allowed. See William H. Levit et al., *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916, 922 (1971); Moore, supra note 66, at 443.
to question prospective jurors.\textsuperscript{70} Furthermore, in 1988, England abolished peremptory challenges altogether.\textsuperscript{71} Therefore, both historically and in modern practice, the peremptory challenge and extensive voir dire have been limited as tools by which lawyers might attempt to affect the composition of the jury in such a way that it is more favorable to their side.

c. Special Juries

Despite the fact that jury selection was relatively random, the principle of random selection of jurors was abandoned to a certain extent in early English cases in order to select jurors that might better fulfill their roles as factfinders. "Special" juries of more experienced or better-qualified individuals were often impaneled to try a variety of cases.\textsuperscript{72} This practice was evidently well-ingrained in early English jury practices.\textsuperscript{73} One commentator has concluded that the phrase "special
JURY REFORM

jury" applies to three different types of jury practices: (1) impaneling a jury composed of members of a higher class; 74 (2) a special procedure allowing parties to strike names from an unusually large panel of prospective jurors; 75 and (3) impaneling a jury of experts. 76 Special juries were impaneled in many different kinds of cases where special knowledge or expertise of the jurors might facilitate the ability of jurors to act as finders of fact. For example, special juries composed of landowners were convened to hear more complex cases involving property. 77 Similarly, merchants might be pressed into service to try an issue between merchants involving merchants’ affairs. 78 The fact that the jury was composed of merchants meant not only that the jurors had experience with the issues to be tried, but also may have ensured that the jurors were of a higher quality. 79 The historical evidence therefore indicates

74. See Oldham, supra note 57, at 139.
75. A commonly-cited passage from Blackstone’s Commentaries describes both the special jury composed of more experienced jurors as well as the special “struck jury” procedure:

Special juries were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders; or where the sheriff was suspected of partiality, though not upon such apparent cause, as to warrant an exception to him. He is in such cases, upon motion in court and a rule granted thereupon, to attend the prothonotary or other proper officer with his freeholder’s book; and the officer is to take indifferently forty eight of the principal freeholders in the presence of the attorneys on both sides; who are each of them to strike off twelve, and the remaining twenty four are returned upon the panel.

3 BLACKSTONE, supra note 7, at *357-58; see also Oldham, supra note 57, at 190 (stating that “[b]y 1700 the struck jury procedure had become a much more regular feature of court practice,” and noting that the first statutory reference to the special jury occurred in 1696 (citing An Act for the Ease of Jurors and Better Regulating of Juries, 7 & 8 Will. 3, ch. 32, § 8 (1695-96) (Eng.))).

76. See Oldham, supra note 57, at 139 (citing as examples grand juries and petit juries in cases involving issues such as high treason and seditious libel, which were often composed of members of higher classes, juries composed of cooks or fishmongers, and all-female juries impaneled to determine whether a female defendant in a criminal case was pregnant). Other modern commentators have also discussed the special jury. See, e.g., Richard C. Baker, In Defense of the "Blue Ribbon" Jury, 35 IOWA L. REV. 409 (1950); Devlin, supra note 4, at 80-83; Jeannette E. Thatcher, Why Not Use the Special Jury?, 31 MINN. L. REV. 232 (1947).

77. See Thayer, supra note 34, at 300-02.

78. 2 POLLOCK & MAITLAND, supra note 20, at 623-24 n.3 (noting that the Carta Mercatoria of Edward I (1303) provided that foreign merchants were entitled to have six foreign merchants on their juries); see also WILLIAM MITCHELL, AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT 73 (1904); I SELECT CASES CONCERNING THE LAW MERCHANT: A.D. 1270-1638, at 17 (Charles Gross ed., 1908) (noting that findings were made by a “jury of merchants”); Oldham, supra note 57, at 164 (“During the late eighteenth century . . . special juries of merchants well-versed in mercantile customs helped Lord Mansfield articulate and order principles of commercial law.”).

79. See Oldham, supra note 57, at 173 (stating that “merchant status” may have “ensured quality rather than expertise” in some cases).
that in many cases, jurors who were selected had special knowledge that was useful in resolving factual disputes that might arise during the trial.80

d. Trial de Medietate Linguae

Another way in which the principle of random selection of jurors was often abandoned was the trial de medietate linguae.81 Under this procedure, foreigners or aliens were given the option to have a jury partially composed of members from their native country.82 The rationale for this procedure appears to have been to ensure the fairness of the trial.83 Thus, not only was increased juror proficiency viewed as a sufficient reason to deviate from the general rule of random selection of jurors, but it also appears that fairness concerns could serve as a sufficient reason for such deviation in limited contexts.

80. Another area in which individuals were selected for their particular expertise involved criminal trials where the defendant was a woman who claimed that she was pregnant in order to delay her trial. In such cases, special juries composed of married or widowed women who experienced childbirth were impaneled to determine whether or not the defendant was indeed pregnant. See id. at 171.

81. See ALICE BEARDWOOD, ALIEN MERCHANTS IN ENGLAND 1350-1377: THEIR LEGAL AND ECONOMIC POSITION 3 (1931) (noting that alien merchants were entitled to a trial by a jury composed half of jurors from their own country); CONSTABLE, supra note 20, at 112-27; Lewis H. LaRue, A Jury of One's Peers, 33 WASH. & LEE L. REV. 841, 848-50 (1976).

82. See Oldham, supra note 57, at 167 (discussing trials of aliens and clerks); Deborah A. Ramirez, A Brief Historical Overview of the Use of the Mixed Jury, 31 AM. CRIM. L. REV. 1213, 1221-22 (1994) [hereinafter Ramirez, An Overview of the Mixed Jury] (discussing the disappearance of the jury de medietate linguae in American law after 1936); Deborah A. Ramirez, The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and a Proposal for Change, 74 B.U. L. REV. 777, 781 (1994) [hereinafter Ramirez, The Mixed Jury] (“From 1190 until 1870, English law provided a ... mixed jury, or a jury de medietate linguae.”). The common law right to a trial de medietate linguae for alien merchants was codified in the Statute of the Staples, 1353, 27 Edw. 3, ch. 8 (Eng.), and was expanded to cover all aliens in a subsequent statute. See Statute of 1354, 28 Edw. 3, ch. 13 (Eng.). This right was not abolished until 1870. See The Naturalization Act of 1870, 33 Vict., ch. 14, § 5 (Eng.).

83. See THAYER, supra note 20, at 94 n.4 (stating that “the jury of the ‘halftongue,’ de medietate linguae, was founded on considerations of policy and fair dealing, rather than a wish to provide a well-informed jury.”). In particular, there was a concern that jurors should speak the same language as the party who was an alien. 2 SELECT CASES CONCERNING THE LAW MERCHANT: A.D. 1239-1633, at xx (Hubert Hall ed., 1930) (“It was clearly essential (if justice was not to become a farce) that not only half the jurors, but also some at least of the auditors ... and of the arbitrators ... should speak the language that was before them in a written form.”).
4. Trial Length

A fourth and final defining characteristic of early English jury trials is the extreme rapidity with which cases were decided. J. S. Cockburn, for example, characterized criminal trials in Tudor and Stuart England as being "nasty, brutish, and essentially short" with as many as twenty-five cases heard by a single judge and jury within a twelve-hour period. Similarly, Professor Langbein notes that in the Old Bailey, criminal cases moved with "extraordinary rapidity." This was in part a result of the effective lack of voir dire and the fact that the prosecution and defense in criminal trials often took the jury as it was. As noted above, although jurors could be challenged, the challenge was rarely employed in ordinary jury practice. Therefore, unlike modern American trials, jury selection did not consume a significant portion of trial time. Other factors that contributed to the speed of these trials were that (1) witnesses' recollections were fresh; (2) pretrial procedure contributed to efficient courtroom prosecution by generating a significant amount of pretrial confessions and bringing the best witnesses into court and weeding out the rest; (3) no lawyers appeared for the prosecution or defense; (4) the accused party spoke in his own defense; (5) judges were...
more active in examining witnesses and defendants;\textsuperscript{80} and (6) judicial instruction was perfunctory due to the trial experience possessed by jurors.\textsuperscript{91} Thus, early English trials seem to have borne little resemblance to lengthy modern American trials.

Several benefits were realized from the relatively short length of early English trials. The most obvious benefits were reductions in court congestion and the resources necessary to try cases. However, the relatively short length of trials also made it feasible to impanel jurors for multiple trials, enabling them to gain experience in trial procedures and thus arguably increase their competence and ability to participate more actively in the trial. Finally, because of the rapid nature of the trial, courts refrained from inducing waiver of the jury and actually encouraged criminal defendants to accept jury trial.\textsuperscript{92} Criminal defendants were not induced to enter guilty pleas to reduced charges, but rather were encouraged to plead not guilty and stand trial.\textsuperscript{93} Therefore, the reduced length of early English jury trials in many ways resulted in reduced stress placed on a system that was essential in maintaining the peace within society through formally resolving disputes either between private individuals or between the individual and the state.

\section{C. Judicial Control of the Jury}

Judicial control over the early English jury was originally very great. As one commentator has described it: "[T]he judge was the primary enquirer. He did most of the questioning, felt free to discuss the

\textsuperscript{80} See COCKBURN, supra note 66, at 109 (describing vigorous questioning by judges); GREEN, supra note 20, at 138 (describing how "from medieval times the bench played a leading role in the questioning of defendants"); GEORGE W. KEETON, LORD CHANCELLOR JEFFREYS AND THE STUART CAUSE 21-22 (1965) (discussing the importance of witness examination by judges).

\textsuperscript{91} See Langbein, supra note 20, at 280-84.

\textsuperscript{92} See id. at 278.

\textsuperscript{93} See Albert W. Alschuler, Plea Bargaining and Its History, 79 COLUM. L. REV. 1, 7-12 (1979) (arguing that for many centuries, Anglo-American courts did not encourage guilty pleas, but rather actively discouraged them). Even during the American colonial period, guilty pleas accounted for only a small minority of criminal convictions. See id. at 8-9, 17-18. The practice of plea bargaining evidently did not emerge until the period following the Civil War and was accompanied by condemnation by appellate courts. See Alschuler, supra note 14, at 970-71; see also Griffin v. State, 77 S.E. 1080, 1084 (Ga. Ct. App. 1913) ("The law . . . does not encourage confessions of guilt, either in or out of court."); O'Hara v. People, 3 N.W. 161, 162 (Mich. 1879) ("No sort of pressure can be permitted to bring the party to forego any right or advantage, however slight. The law will not suffer the least weight to be put in the scale against him . . ."); Deloach v. State, 27 So. 618, 618 (Miss. 1900) ("All courts should so administer the law . . . as to secure a hearing upon the merits, if possible."); Wight v. Rindskopf, 43 Wis. 344, 357 (1877) ("[L]itigation is . . . the safest test of justice.").
merits of the case, and even went so far as to compel jurors to reconsider
decisions with which he did not agree."94 The greater level of control
exercised by early English judges over the jury counterbalanced the more
active role that the jury played in the adjudicatory process.95 Both the
judge and the jury took a more active role in the adjudicatory process at
the expense of the lawyers, resulting in less adversarial trials.96 Over
time, judicial control increasingly became less coercive. Originally, jurors
were expected to arrive at a verdict independently, without instruction
from the judge, and might be subject to deprivation of food or water
until they did so.97 Thus, judges originally had a large measure of
coeptive power over the jury in addition to their power to persuade the
jury of the correct outcome. This practice evolved into a process whereby
judges could charge the jury and make them reconsider their verdict by
fining the jury or threatening them with attaint in order to induce a
resolution.98 Through a writ of attaint, a second jury was impaneled to
review the verdict of the first jury for corruptness or false-swearing.99
If the second jury determined that the first jury had perjured itself, severe
penalties might be imposed against members of the first jury. As William
Forsyth noted in his nineteenth-century treatise on the jury, "[o]riginally
a wrong verdict almost necessarily implied perjury in the jurors. They
were witnesses who deposed to facts within their own knowledge, about
which there could hardly be the possibility of error."100 Thus, the

94. Landsman, supra note 20, at 505-06. The role of the judge in questioning witnesses was
one of the primary indicia of the more inquisitorial nature of early English trials. "Judicial
interrogation of witnesses was a prominent feature of criminal courtroom procedure in Tudor and
Stuart times. Such questioning tended to concentrate power in the court's hands, and made it possible
for English judges to act like inquisitors." Id. at 513.
95. See infra Part IV.
96. According to Professor Landsman:
   The judge and jury were active examiners who felt themselves responsible for the
development of the case. Counsel was virtually never present. Such proofs as were
adduced were generally the fruits of the judge's questioning or the altercation rather than
the parties' efforts. There were few rules to constrain the proceedings and there was
virtually no recourse to appellate review.
Landsman, supra note 20, at 506.
97. See JOINER, supra note 3, at 156; Thayer, supra note 34, at 364-83; see also Saul M.
(claiming that similar tactics were used by American judges who "used to urge deadlocked juries
to resolve their disagreements through such coercive measures as the denial of food and drink,
excessive deliberation hours, and the threat of confinement").
98. See Thayer, supra note 34, at 364-77.
99. See id. at 370-74.
100. FORSYTH, supra note 20, at 152; see also 1 HOLDSWORTH, supra note 27, at 333-34
(discussing the use of jurors who had first-hand knowledge of the issue, such as "a jury of cooks
procedure of attaint posed a very real threat that could be used by the judge coercively against the jury.

1. Judicial Coercion of Juries: Bushell’s Case

Although in the sixteenth century the courts in England possessed the power to set aside verdicts and punish jurors at will, this practice was curtailed in 1670 with the famous Bushell’s Case. The case grew out of the trial of William Penn, the future founder of Pennsylvania, who was accused of unlawful assembly, but was acquitted by a jury despite evidence that indicated his guilt. A fine was imposed upon the jurors for disregarding the overwhelming evidence pointing toward conviction. As a result, Edward Bushell, a member of the jury who refused to pay the fine, was sent to prison. Chief Justice Vaughan stated in Bushell’s Case that judges could not punish or threaten to punish jurors for their verdicts. He reasoned that the jury must remain free from such oppressive judicial control because it was liable for attaint, whereby a second jury could convict and punish the first jury for rendering a false verdict. This case established the independence of the English jury and cemented its position as a guarantor of liberty in the face of state oppression. After Bushell’s Case, judges could no longer punish the jury for its verdict, but could set aside verdicts and grant new trials based upon procedural or evidentiary error.

2. Judicial Commentary on the Evidence

Although the English judge could not coerce a verdict after Bushell’s Case, he retained significant power to persuade the jury. Professor Langbein has concluded that during this period, the judge “dominated jury trial” since the judge often served as “examiner-in-chief” due to the absence of lawyers. Judges could therefore guide the production of the evidence that the jury would consider in rendering its verdict. Judges also possessed the power to comment upon evidence and

as to the quality of food sold”); 2 Pollack & Maitland, supra note 20, at 628 (“We may say, if we will, that the old jurors were witnesses; but even in the early years of the thirteenth century they were not, and were hardly supposed to be, eye-witnesses.”).

101. See Plucknett, supra note 27, at 131-33; Arnold, supra note 26, at 9.
103. See id. at 1011.
104. See Plucknett, supra note 27, at 134.
105. See Thayer, supra note 34, at 384-88.
106. Langbein, supra note 20, at 285; see also Langbein, supra note 56, at 22-23 (noting the power of judicial commentary on the evidence documented in the notes of Sir Dudley Ryder).
to express an opinion concerning the credibility of witnesses. They could therefore directly persuade jurors concerning the merits of the evidence and testimony presented at trial. These two powers of questioning witnesses and commenting on the evidence are interrelated, and it may be the case that the judicial comment power derived from the ability of the judges to examine witnesses.

The utility of judicial commentary was said to be found in the greater experience of the judge in observing the testimony of witnesses and weighing the evidence before him. According to one early commentator, the judge was able “in matters of fact to give [to the jury] great light and assistance by his weighing the evidence before them, and by shewing them his opinion even in a matter of fact.” Thus, the use of this persuasive power of the judge over members of the jury was justified on the grounds that it might lead to more accurate factfinding by the jury. The judge represented a valuable source of information since he had experience listening to testimony and receiving evidence in many different cases, whereas the experience of the members of the jury was more limited. Although early English jurors may not have been one-time participants in the system (like modern jurors), and may have had prior trial experience, they certainly were not as experienced as the trial judge.

Another characteristic of early judicial commentary on the evidence was that it was relatively informal. The interaction between the judge and jury during this period might have been as informal as to be described as “plain chatter.” There was less concern that the judge would

At common law it was clearly proper for the judge not merely to state the law and to sum up the evidence, but also to express an opinion on the questions of fact in issue as long as he leaves to the jury the ultimate determination of the issue, and makes it clear that it is not bound to adopt his opinion as its own.

108. See GREEN, supra note 20, at 236-64.

109. HALE, supra note 107, at 291; see also 3 BLACKSTONE, supra note 7, at *375 (discussing the judge's role in summing up and explaining the evidence to the jury).

110. Even though the experience of English jurors was greater than that of the modern American juror, the juror's experience was still inferior to that of the trial judge. See supra notes 55-64 and accompanying text. Thus, it would seem that the rationale behind the judicial comment power is even more persuasive today, where jurors are often relatively inexperienced in trial procedures.

111. Langbein, supra note 20, at 288. Sir Thomas Smith, writing in 1565, similarly described criminal trials as “altercation[s].” THOMAS SMITH, DE REPUBLICA ANGLORUM: A DISCOURSE ON THE
impermissibly influence the jury in its decisionmaking. Perhaps this stemmed from the fact that the judge had originally possessed the power to coerce the jury into making a determination that was in line with the judge’s own views concerning the case. Therefore, the lesser power of using persuasion to influence the jury could not by comparison be problematic.

This traditional common-law power of judges to comment on the evidence has survived in England to this day. English judges are not only permitted, but are obligated, to provide the jury with

a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are [sic] entitled to draw from their particular conclusions about the primary facts.\(^{112}\)

According to one modern commentator,

a judge is permitted to express his opinion freely and, if he wishes, strongly. The only limitation placed upon him is that he must not put any point unfairly and must make it clear to the jury, either expressly or by implication, that on the issues of fact which are left to them they are free to give his opinion what weight they choose.\(^{113}\)

Thus, at least in English practice, the utility of allowing the judge to provide the jury with his insights into the evidence has been recognized from the beginning of the institution of the jury and has remained to this day an essential feature of English practice.

---

\(^{112}\) Regina v. Lawrence, 73 Crim. App. 1, 5 (1981) (Lord Hailsham). It has been argued that the summary and comment powers of the English judge provide the opportunity to “rescue[e] the case from the false glosses of powerful advocates.” David Wolchover, Should Judges Sum Up on the Facts?, 1989 CRIM. L. REV. 781, 788.

\(^{113}\) PATRICK DEVLIN, TRIAL BY JURY 118 (rev. ed. 1966).
However, there are several potential drawbacks in allowing the judge to comment on the evidence and the credibility of the witnesses in the trial. The process of judicial summation and commentary on the evidence may increase the length of trials as well as the workload of the judge. The process of commenting on the evidence occupies a substantial portion of the English trial and may be subject to lawyer objections. Therefore, it might seem inevitable that the process of judicial commentary on the evidence would result in longer trials. However, it might also force the judge to better prepare for the case and therefore streamline other phases of the trial. A better-prepared judge is more likely to efficiently preside over the trial at other times.

Furthermore, it has been argued that the judicial summation is analogous to the American practice of allowing the prosecutor to answer the defense's closing argument and therefore would be redundant in the context of the American criminal trial. However, the viewpoint of the prosecutor cannot be substituted for the relatively unbiased viewpoint of the presiding judge. Allowing judicial commentary on the evidence arguably counteracts the gamesmanship and strategic behavior of the lawyers in the trial, and may therefore lead to a more just adjudication.

3. Other Mechanisms of Judicial Control

The early English judge possessed other mechanisms by which he could control the outcome of the case. For example, in a criminal case, the judge could provisionally terminate the case short of a verdict since jeopardy did not attach until the verdict was entered. By this mechanism, the judge could withdraw a case from the jury if he thought that the jury might reach a result with which he disagreed.

The judge could require the jury to find a special verdict. Evidently, it was not uncommon for the judge to require the jury to return a special verdict. Through this mechanism, the jury stated the

---

114. See Van Kessel, supra note 6, at 524.
115. See id.
116. See id.
117. See Langbein, supra note 20, at 287-88.
118. See id. at 288.
119. See 3 BLACKSTONE, supra note 7, at *377-78 (stating that the jury could employ a special verdict to "state the naked facts, as they find them to be proved, and pray the advice of the court thereon" or "find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the judge or the court above").
120. See Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593, 596 (1897) (stating that at common law "it was not infrequent to ask from the jury a special rather than a general verdict").
facts as it found them, and the judge decided whether liability at-
tached. 121 This procedural mechanism may have been somewhat
advantageous to the members of the jury because it afforded them some
protection from a determination of attaint by a second jury. 122 Howev-
er, this method of judicial control was controversial toward the end of the
eighteenth century. 123

A third mechanism of judicial control possessed by judges in
criminal cases was the ability to recommend a royal pardon in the event
that the jury convicted an individual whom the judge thought was
innocent. 124 This mechanism seems analogous to the ability of a judge
to direct a verdict of innocence. However, it presumably depended on the
discretion of the Crown for its execution.

Finally, in a criminal case, the judge could reject the verdict. 125
Judges could discover the reasons for a proffered jury verdict because “in
many cases the jury either volunteered the information or supplied it
under questioning by the judge.” 126 After the jury had rendered its
verdict, “[i]t was open to the judge to reject a proffered verdict, probe its
basis, argue with the jury, give further instruction, and require redelib-
ration.” 127 Professor Langbein has concluded that “[f]he tradition that the
jury would lightly disclose the reasoning for a verdict became especially
important... because it enabled the court to probe the basis of the
proffered verdict, hence to identify the jury’s ‘mistake’ and to correct
it.” 128 Therefore, the English judge retained procedural as well as
persuasive power over the jury, which he might wield to influence the
outcome of the case.

121. See Langbein, supra note 20, at 295-96.
122. See Mark S. Brodin, Accuracy, Efficiency, and Accountability in the Litigation
Process—The Case for the Fact Verdict, 59 U. Cin. L. Rev. 15, 51-53 (1990); Pamela J. Stephens,
Controlling the Civil Jury: Towards a Functional Model of Justification, 76 Ky. L.J. 81, 95-96
(1987-88).
123. See Langbein, supra note 20, at 296.
124. See id. at 296-97. Langbein concludes: “The jury was not likely to insist on its view when
the judge had a trump that would render the effort futile. So effective was this judicial remedy that
it seems to have virtually eliminated the conviction-against-direction as a sphere of conflict between
judge and jury.” Id. at 297.
125. See id. at 291.
126. Id. at 289. According to Professor Langbein, “[t]he reports often ascribe a highly specific
reason or set of reasons for the jury’s decision, which makes it appear quite unlikely that the source
was other than the jury itself.” Id. at 290.
127. Id. at 291; see also Langbein, supra note 56, at 119 (describing this notable procedural
mechanism for judicial control over the jury in criminal cases).
128. Langbein, supra note 20, at 294-95.
4. Minimal Rules of Evidence

A final important characteristic of early English jury trials was the absence of extensive rules of evidence that could be used by judges to filter evidence from the jury.\textsuperscript{129} Both hearsay and past conviction evidence were used in criminal trials "well into the eighteenth century."\textsuperscript{130} In practice, judges might have pointed out the hearsay character of evidence to the jury, allowing its admission, but letting the jury accord it the weight they deemed appropriate.\textsuperscript{131} As noted above,\textsuperscript{132} the lack of complex evidentiary rules not only increased the power of the jury to accurately carry out its factfinding duty, but was also a primary factor leading to the relatively short length of early English jury trials. There was no need to consume time debating evidentiary points, and the skill of the lawyers in arguing these points could not act as a factor determining the outcome of the trial.

This lack of excessively complex rules of evidence and exclusionary rules has remained a feature of modern English practice. In modern English jury trials, illegally obtained evidence is generally admitted.\textsuperscript{133} For example, physical evidence may be admitted even though it was the product of an unlawful search, detention, or arrest.\textsuperscript{134} Thus, it would

\begin{flushleft}
\textsuperscript{129}. See Keeton, supra note 90, at 21; Langbein, supra note 20, at 315-16.
\textsuperscript{130}. Langbein, supra note 20, at 301. Professor Landsman has similarly concluded that in the Old Bailey during the years 1717, 1722, and 1727 hearsay evidence was routinely admitted. See Landsman, supra note 20, at 565. However, by 1730, hearsay rules had begun to develop that required evidence to be excluded or the party seeking admission to demonstrate the reliability of the evidence. See id. at 567; see also id. at 595 (stating that "[t]he late eighteenth and early nineteenth centuries witnessed the vigorous development of the rules of evidence"); John Henry Wigmore, A General Survey of the History of the Rules of Evidence, in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 691,695 (Comm. of the Ass'n of Am. Law Sch. ed., 1908) ("A.D. 1790-1830. The full spring-tide of the system [of evidence] had now arrived.").
\textsuperscript{131}. See Langbein, supra note 20, at 302. According to Professor Langbein, Old Bailey judges knew that there was something wrong with hearsay, but even as late as the 1730s they do not appear to have made the choice between a system of exclusion or one of admissibility with diminished credit. Even when they disapproved of hearsay, calling it "no evidence," the judges did not give cautionary instructions to the jury to disregard the hearsay as we would require today. Nor was the jury sent from the courtroom in the modern fashion while the judge previewed evidence in order to decide whether to admit it.
\textsuperscript{132}. See supra notes 84-93 and accompanying text.
\textsuperscript{133}. See John H. Langbein, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 69 (1977).
\end{flushleft}
appear that, at least in relative terms, more relaxed evidentiary rules have remained a defining characteristic of English jury trials.

However, even in England, the law of evidence slowly developed such that more information was excluded from the jury. By the seventeenth century, judges had increased their power over juries through the development of the law of evidence. The judge was authorized to resolve questions of admissibility, competency, and privilege.\textsuperscript{135} Furthermore, jurors were forced to hear jury instructions, and the failure to follow these instructions became grounds for overturning jury verdicts.\textsuperscript{136} Thus, the judge obtained power to keep certain evidence from the jury and to persuade the jury through jury instructions, as well as to override its verdict in cases where persuasion was not sufficient. From this evidence, Professor Langbein has concluded that the law of evidence did not grow up as a result of the jury system, but rather was a result of the rise of lawyers—that “the true historical function of the law of evidence may not have been so much jury control as lawyer control.”\textsuperscript{137} Arguably, however, the development of the rules of evidence made it possible for a more talented lawyer to gain an advantage over less talented competition through skillful argument of evidentiary points. Furthermore, whomever the evidentiary rules were designed to control, that power of control ultimately rested with the judge presiding over the trial who resolved evidentiary questions. Thus, the development of the rules of evidence served to empower the judge at the expense of the other legal actors in the trial—the members of the jury and the lawyers.

\section*{D. Role of the Jury}

The role of the jury in the English trial underwent a number of changes over the years. However, some generalizations may be made. First, in England, there appeared to be a relatively sharp distinction drawn between issues of law and issues of fact, with the latter being within the province of the jury and the former being left to the judge’s discretion. Second, the jury was a much more active participant in the adjudicatory process than its modern counterpart. Jurors were originally

\footnote{135. See JOINER, supra note 3, at 158.}
\footnote{136. See id. at 160-61.}
\footnote{137. Langbein, supra note 20, at 306.}
active investigators of the facts who gathered evidence and questioned witnesses. Finally, juries possessed indirect, if not direct, authority to participate in the determination of sanction in criminal trials.

1. The Authority of English Juries Concerning Issues of Fact and Issues of Law

A preliminary issue that must be addressed in assessing the role of the early English jury is the dichotomy drawn between issues of law and issues of fact. To a large extent, this dichotomy served to define the scope of the powers exercised by the jury and those exercised by the judge. It was along this line that the separation of powers between judge and jury was formulated. However, it was not an altogether bright line. Many issues of law might be characterized as issues of fact and vice versa. Furthermore, many issues could be characterized neither as purely legal issues nor purely factual issues. Thus, the resulting boundary between the functions of the judge and those of the jury was equally vague.

It seems that the general rule, as laid down by Lord Coke, was that juries in England possessed the power to judge issues of fact, but not of law.138 William Blackstone, in his *Commentaries on the Laws of England*, argued that although juries were “the best investigators of truth,” they were less well-equipped to determine issues of law, since “if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts.”139 Thus, at least one reason for the law-fact dichotomy was a concern with certainty in the law, which was viewed as being better achieved by leaving legal questions to the judge, who was more likely to render decisions concerning issues of law that were consistent with established legal practice. English juries could and did disregard the instructions of judges. However, they had no official authority to do so. This limitation of English juries to decide only issues of fact is consistent with the large measure of control that judges originally exercised over juries.

138. *See 1 Edward Coke, The First Part of the Institutes of the Laws of England § 234, at 155(b) (Garland Publishing, Inc. 1979) (1832) (“Ad questionem facti non respondent judices . . . ad questionem juris non respondent juratores.”); see also James B. Thayer, “Law and Fact” in Jury Trials, 4 Harv. L. Rev. 147, 148-49 (1890). However, as one commentator has noted, “there could have been no sharp cleavage between law and fact in a country where the testimony consisted of legal conclusions and God was the ruling principle.” R. J. Farley, Instructions to Juries—Their Role in the Judicial Process, 42 Yale L.J. 194, 196 (1932).

139. 3 Blackstone, supra note 7, at *379-80.
However, the allocation of factual issues to the jury with the judge presiding over legal issues was not universally accepted. For example, in the noteworthy trial of John Lilburne for treason, Lilburne disputed the traditional rule that juries were allowed only to determine factual issues, stating that "[t]he jury by law are not only judges of fact, but of law also." After Lilburne's acquittal, there was a great public celebration, and a medal was made bearing the names of the jurors and the inscription: "John Lilburne, saved by the power of the Lord and the integrity of his jury, who are judge of law as well as fact." Thus, although there may have been no legal authority for the proposition that the jury could determine issues of law, there seems to have been some popular support for this notion in England.

Furthermore, the fact that juries could render general verdicts probably resulted, to a certain extent, in a de facto power to determine issues of law. The jury was charged with applying legal principles given by the judge to the factual determinations that it made in the case. Therefore, the jury had the power to consciously misapply the law to the facts in the case. This practical problem illustrates the difficulty in any attempt to assign certain decisions to the judge or the jury based on a distinction between issues of law and issues of fact.

2. The Role of the Jury in the Trial

The early version of the English jury undertook a more active role in the adjudicatory process than that of the modern English or American jury. Part of the function of the early jury was to gather evidence, and as a result, the jury was composed of individuals who were familiar with the disputed facts in the case. Jurors could properly be characterized as not only being more like witnesses, but also as being more like active investigators of the facts in dispute. Not until 1410 was the jury limited to evidence that was offered in open court. At this point in time, the jury started to be viewed more as passive observers of the evidence at trial, rather than as active investigators.

140. GREEN, supra note 20, at 173. The court concluded that Lilburne's statement was unsupported by any English authority. See id. at 175.
141. Id. at 176.
142.See Aeschuler & Deiss, supra note 11, at 903 ("In England, although juries may have often disregarded the instructions of judges, they never acquired de jure authority to do so.").
144. See FORSYTH, supra note 20, at 64-65; 2 POLLOCK & MAITLAND, supra note 20, at 621.
145. See FORSYTH, supra note 20, at 131.
This more active role of the early jury was a product of the historical roots of the English jury in the Norman inquisition. Jury practice under the Norman inquisition differed significantly from modern jury practice. As noted above, jurors were called who possessed relevant facts concerning the matter in question.\textsuperscript{146} Thus, jurors were selected based on their ability to obtain or have knowledge of the relevant facts.\textsuperscript{147} The jury was described as “a body of neighbours . . . summoned by some public officer to give upon oath a true answer to some question.”\textsuperscript{148} Jurors were summoned by royal command to testify on matters concerning property arrangements, local customs, and taxable resources.\textsuperscript{149} Thus, jurors served primarily as knowledgeable witnesses concerning the matter before the court.\textsuperscript{150} As noted above, an implication of the status of jurors as witnesses was that they might be found guilty of perjury should they return the wrong verdict.\textsuperscript{151} Furthermore, trial procedures “were arranged so that jurors would feel at least some ‘duty’ to investigate the questions to be tried.”\textsuperscript{152} Therefore, in early English trials, the role of the jury in factfinding was more active than that of the modern jury, and was not constrained to in-court factfinding.\textsuperscript{153} Jurors could properly be character-

\textsuperscript{146} See supra notes 57-59 and accompanying text; Thayer, supra note 34, at 250; Warner, supra note 29, at 463.

\textsuperscript{147} See Thayer, supra note 34, at 261. The explanation for this method of juror selection may be as follows:

\begin{quote}
In a day when writing was a scarce commodity, important events were conducted with a great ceremony, publicity, festivity, and public outcry. The object was to make witnesses to such events as marriage, birth, death, livery of seisin, payment, gifts, sales, endowment, and crimes. Those in the vill or the hundred would usually remember these events. It was quite natural, therefore, that witnesses from the hundred would not need persons to appear before them to prove a fact. They already knew it.
\end{quote}


\textsuperscript{148} 1 POLLOCK & MAITLAND, supra note 20, at 138.

\textsuperscript{149} See Landsman, supra note 2, at 582-83.

\textsuperscript{150} See THAYER, supra note 20, at 100; see also GEOFFREY GILBERT, THE LAW OF EVIDENCE 95 (Garland Publishing, Inc. 1979) (1754) (“[T]he Jury of their own Knowledge may have further Light in the Fact than what they have from the Witness in Court.”); GREEN, supra note 20, at 245 (“Jurors’ knowledge . . . was . . . an important evidentiary guide.”). However, some modern commentators have argued that by 1670 the jury was no longer supposed to rely on personal knowledge in trying the case. See id. at 239-45; Langbein, supra note 20, at 298-99 & n.105.

\textsuperscript{151} See supra note 101 and accompanying text; see also FORSYTH, supra note 20, at 105.

\textsuperscript{152} Landsman, supra note 2, at 585; see 2 POLLOCK & MAITLAND, supra note 20, at 625.

\textsuperscript{153} See HELLER, supra note 27, at 8 (stating that “[i]t was the jurors’ duty, upon being summoned for jury service, to make inquiry into the facts of the case to be tried, to sift the information and then, in court, to state their conclusion in terms of guilt or innocence”). However, eventually jurors were not allowed to make use of private knowledge. See POTTER’S, supra note 29, at 245 (stating that “[i]n 1650 it was held that a juror might no longer use private knowledge but
ized as both witnesses and active investigators of the facts.

Eventually, the role of the jury as a finder of fact was limited to being presented with evidence at trial. It became a punishable offense to contact or inform jurors of facts and law related to an impending trial.\(^{154}\) However, even after this period, jurors often asked questions of witnesses or the accused, requesting that certain witnesses be called, and made observations concerning the facts and testimony or the character of the witnesses and the accused.\(^{155}\) For example, Blackstone in his *Commentaries on the Laws of England* states that “the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth,”\(^{156}\) and Hale in his *History of the Common Law* states that “by this Course of personal and open Examination, there is Opportunity for all Persons concern’d, viz. The Judge, or any of the Jury . . . to propound occasional Questions, which beats and boults out the Truth.”\(^{157}\) Furthermore, it seems that jurors were permitted, if not required at times, to take notes.\(^{158}\) Thus,


154. See Moore, *supra* note 26, at 70.

155. See Langbein, *supra* note 20, at 288. In the nineteenth century, jurors were permitted to “ask questions for their better information, at any stage of the proceedings.” Dragan D. Petroff, *The Practice of Jury Note Taking—Misconduct, Right, or Privilege?*, 18 Okla. L. Rev. 125, 127 (1965) (quoting R. Phillips, *Powers and Duties of Juries* 206-07 (1811)). Jurors might also interject to admonish counsel. For example, in one of the Old Bailey cases, a juror admonished counsel for his vigorous cross examination of the victim: “We desire his Lordship would please to ask the Questions that are proper, and that the Man may not be interrupted.” Landsman, *supra* note 20, at 512. Similarly, in another case, the jury reacted to the vigorous cross-examination of a child, stating “We consider it only as the evidence of a child, Mr. Garrow, and you should not try to draw things from him.” Id. at 557.

156. 3 Blackstone, *supra* note 7, at *373.


158. According to one commentator:

The propriety of the practice [of notetaking] was never questioned, never doubted; in fact, it was considered to be a must on the part of at least some jurors; and while no juror could be compelled to take notes, every juror was expected to retain and decide upon the evidence.

Petroff, *supra* note 155, at 127. For example, one nineteenth-century source states:

“After a Juryman has been sworn, he takes his seat in the jury-box, where, for the purpose of making minutes, he ought to be provided by the Sheriff with pens, ink, and paper. These memorandums should consist of heads and objects of the trial—of the leading features of the evidence—accompanied by such incidental observations of his own, as he may deem it worthy to urge in debating afterwards on the verdict.”
the early English jury originally possessed greater authority to assume a more active role in the adjudicatory process by questioning witnesses and bringing its own knowledge to bear concerning the disputed issues.

During the twentieth century, the role of the jury was greatly limited in England. The role of the jury in civil cases was severely curtailed in 1933 when the English effectively abolished civil jury trials. Thus, over time the jury moved from being an active investigator of the truth both inside and outside of court, to a passive observer, whose service was no longer utilized in most civil trials.

3. Authority to Determine Sanction in Criminal Cases

Historically, although the jury did not directly determine the sanction in criminal cases, it had an indirect role in determining sanction through application of its factfinding power. The crime under which a defendant was convicted, and therefore the sanction, depended on the particular facts found by the jury in the case. For example, most felonies were punishable by the death penalty. However, defendants could escape execution for committing a felony if the jury found that they had committed a "clergyable offense." Originally, benefit of clergy was a medieval procedural device through which clerics charged with felonies in the royal court were released into ecclesiastical courts, but by the eighteenth century it became a fiction employed to distinguish capital from noncapital felonies.

Id. at 127-28 (quoting R. PHILLIPS, POWERS AND DUTIES OF JURIES 119 (1811)).

159. See Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. 5, ch. 36, § 6; see also Ward v. James, 1 Q.B. 273, 279-304 (C.A. 1966) (discussing the limited number of remaining areas in which the civil jury may preside). Because of this development, the United States presently conducts almost all of the world’s civil jury trials. Furthermore, more than ninety percent of the world’s criminal trials take place in the United States. See Gerhard Casper & Hans Zeisel, Lay Judges in the German Criminal Courts, 1 J. LEGAL STUD. 135, 135-36 (1972).

160. See GREEN, supra note 20, at 282, 365, 383; Langbein, supra note 56, at 41, 55, 121.

161. See Langbein, supra note 56, at 52-55. "The jury not only decided guilt, but it chose the sanction through its manipulation of the partial verdict." Id. at 55.

162. See JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 470-72 (London, MacMillan 1883); Langbein, supra note 56, at 36-37.

163. Langbein, supra note 56, at 37-40.

164. See 4 BLACKSTONE, supra note 7, at *239. By the merciful extensions of the benefit of clergy by our modern statute law, a person who commits a simple larceny to the value of thirteen pence or thirteen hundred pounds, though guilty of a capital offence, shall be excused the pains of death: but this is only for the first offence. Id.; see also Langbein, supra note 56, at 37-41 (discussing the benefit of clergy and its effect on redefining capital and noncapital crimes).
One example of a clergyable offense was grand larceny. While grand larceny was clergyable, other offenses such as burglary, shoplifting of goods valued at five shillings or more, and thefts in dwelling houses of goods valued at forty shillings or more were not clergyable.165 Furthermore, if the value of the goods stolen was less than a shilling, the defendant would be guilty of petty larceny, which was punishable by whipping, rather than grand larceny, which was punishable by transportation to the American colonies for seven years of indentured service.166 The distinction between grand larceny and these other nonclergyable offenses was based on a determination of fact made by the jury. The jury determined whether the theft was committed by breaking and entering at night or whether it was committed in a dwelling house or shop. The jury also returned a special verdict concerning the value of the goods stolen.167 Thus, the jury indirectly had the power to determine not only whether the accused would be guilty of a capital crime or not, but it also possessed a more extensive power to determine the extent of an accused's punishment by finding the facts in such a way as to dictate the crime and the accompanying sentence.

The historical evidence indicates that the jury sometimes employed its fact-finding power to mitigate harsh sentences.168 The fact that most felonies were punishable by execution led juries to find defendants guilty of lesser crimes based on a factual determination. During the nineteenth century, legislative reforms were passed, authorizing the death penalty for only the most serious offenses due to the recognition that juries tended to engage in mitigation of sentences anyway.169 The fact that these reforms defined crimes with great specificity resulted in an increase in the jury's ability to determine sentence, since the jury was still responsible for determining the facts that resulted in conviction.

165. See Langbein, supra note 56, at 40.
166. See id. at 41-52.
167. See id. at 40-41; see also Green, supra note 20, at 277-80 (discussing the valuation function of the jury).
168. See Green, supra note 20, at 356 (stating that the jury was "one of the principal institutions of mitigation" of harsh sanctions); Langbein, supra note 56, at 37, 41, 52-55. For example, Professor Langbein found that in 39 of 171 cases surveyed, the jury downgraded the sentence by downcharging or downvaluing goods. See id. at 52.
169. See Green, supra note 20, at 356 (discussing the well-established jury function of mitigation).
I. THE AMERICAN JURY SYSTEM

The historical development of the American jury has been less studied than that of the English jury. However, even a cursory examination of the historical materials indicates that, like the English jury, the early American jury played an important role within the legal system. It seems that there was great flexibility both among the several states, as well as over time, in the way in which the jury functioned. Despite this variation, some generalization is possible. The early American jury differed significantly from the modern American jury in terms of the nature of judicial control exercised over the jury, the selection of jurors, and the role of the jury in the trial process. Furthermore, the historical evidence indicates that the power that the American jury exercised eclipsed that of the English jury in some respects. For example, early American juries often possessed the power to judge issues of law as well as issues of fact. Therefore, the American jury was empowered to invade what formerly had been the sole province of the judge.

A. Significance of the American Jury

*The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude.*

The right to a trial by jury and the institution of jury trial were deeply rooted in English law prior to the foundation of the American colonies. For the American colonists, the institution of the jury provided an important avenue for community representation in court. As Tocqueville noted, the influence of the jury extended beyond the parties

---


172. See Hyman & Tarrant, supra note 11, at 28-29. In fact, in Rhode Island, there was a right to two jury trials until 1878. See Amasa M. Eaton, The Development of the Judicial System in Rhode Island, 14 Yale L.J. 148, 154-55 (1904-05).
to a case: “It would be a very narrow view to look upon the jury as a mere judicial institution; for however great its influence may be upon the decisions of the courts, it is still greater on the destinies of society at large.”

Consistent with the importance of the jury as an institution, several of the colonial charters guaranteed jury trial as a fundamental right. More importantly, in pre-revolutionary America, the jury was the central instrument of governance, assessing legal claims and enforcing legal rights in American communities. Therefore, from the beginning of English settlement in the colonies, the jury represented an important avenue through which the members of the community might exercise political power.

However, despite the importance of the institution and its almost universal acceptance, there were great differences in the manner in which the right to trial by jury, particularly in civil cases, was exercised among the several colonies. Alexander Hamilton made note of this fact in *The Federalist No. 83*: “It would be extremely difficult, if not impossi-

---


174. The 1606 Charter of the Virginia Company included a right to jury trial that was granted in all civil and criminal cases by 1624. See Hyman & Tarrant, supra note 11, at 24-25. The Massachusetts Bay Colony introduced the jury trial in 1628, which was guaranteed as a fundamental right in the Massachusetts Body of Liberties in 1641. See MASSACHUSETTS BODY OF LIBERTIES ¶ 29 (1641), reprinted in SOURCES OF OUR LIBERTIES 151 (Richard L. Perry & John C. Cooper eds., 1959). The Colony of West New Jersey adopted the jury trial in 1677, and Pennsylvania adopted it in 1682. See Landsman, supra note 2, at 592. Rhode Island adopted trial by jury in 1647; South Carolina adopted it in 1712; and Delaware adopted the language of the Magna Charta in 1727. See 1 J. KENDALL FEW, IN DEFENSE OF TRIAL BY JURY 36 (1993).

175. See NELSON, supra note 170, at 20-23.

176. See Letter from the Federal Farmer to the Republican (Jan. 20, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 323, 326-27 (Herbert J. Storing ed., 1981) (noting “the little different appendages and modifications tacked to [civil jury trial] in the different states”); see also JAMES IREDELL, ANSWERS TO MR. MASON’S OBJECTIONS TO THE NEW CONSTITUTION (1788), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 333, 361 (Paul Leicester Ford ed., 1968) (1888) (discussing the various practices among the states and arguing that “[a] general declaration therefore to preserve the trial by jury in all civil cases would only have produced confusion”); Charles W. Wolfram, THE CONSTITUTIONAL HISTORY OF THE SEVENTH AMENDMENT, 57 MINN. L. REV. 639, 654 (1973). The differences in the types of cases in which the civil jury trial was available as of right and the different practices in the various states was argued to preclude any guarantee of civil jury trial under Article III of the original Constitution. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587-88 (Max Farrand ed., 1966) (Mr. Gorham commented that “[i]t is not possible to discriminate equity cases from those in which juries are proper” and Mr. Sherman argued that “[t]here are many cases where juries are proper which cannot be discriminated”). Mr. Gorham objected to a proposal that “trial by jury shall be preserved as usual in civil cases” by arguing that the “constitution of Juries is different in different States and the trial itself is usual in different cases in different States.” Id. at 628.
ble, to suggest any general regulation that would be acceptable to all the states in the union, or that would perfectly quadrate with the several state institutions. 177 With respect to the civil jury, there were differences in the types of cases that could be tried, the threshold dollar amount necessary for a jury trial, whether the jury possessed the power to determine issues of law as well as issues of fact, and the extent of judicial control over the jury. 178 As Edith Guild Henderson noted in her seminal article concerning the history of the jury trial right under the Seventh Amendment:

Nowhere in the history of the Philadelphia convention, the ratifying conventions of the several states, or the specific “legislative history” of the Bill of Rights can any evidence be found that the relation of judge to jury was considered as affected in any but the most general possible way by the seventh amendment, or even that it was considered at all. Nor can any implicit understanding as to this relationship be presumed, for among the thirteen original states there were at least half a dozen widely differing patterns of civil practice . . . 179

Thus, the right to jury trial was embodied in the organic law of the colonies that would subsequently emerge as states after independence was won from Great Britain. All of the thirteen original states retained the institution of civil jury trial through express constitutional provision,

179. Id. at 290. James Wilson, a member of the Committee on Detail, stated with respect to the right to jury trial in civil cases:

When, therefore, this subject was in discussion, we were involved in difficulties, which pressed on all sides, and no precedent could be discovered to direct our course. The cases open to a jury, differed in the different states; it was therefore impracticable, on that ground, to have made a general rule. The want of uniformity would have rendered any reference to the practice of the states idle and useless: and it could not, with any propriety, be said, that “the trial by jury shall be as heretofore:” since there has never existed any federal [sic] system of jurisprudence, to which the declaration could relate. Besides, it is not in all cases that the trial by jury is adopted in civil questions: for causes depending in courts of admiralty, such as relate to maritime captures, and such as are agitated in the courts of equity, do not require the intervention of that tribunal. How, then, was the line of discrimination to be drawn? The convention found the task too difficult for them; and they left the business as it stands—in the fullest confidence, that no danger could possibly ensue, since the proceedings of the supreme court are to be regulated by the congress, which is a faithful representation of the people: and the oppression of government is effectually barred, by declaring that in all criminal cases, the trial by jury shall be preserved.

by statute, or through judicial practice. However, the particulars of jury practice were not prescribed, at least with respect to civil jury practice. This fact led Professor Landsman to conclude that "[t]he jury has been anything but a simple and unchanging icon of courtroom procedure. Its most pronounced characteristic has been its adaptability." \(^{181}\)

This fundamental right was embodied in the organic law of the newborn nation. For example, the Stamp Act Congress of 1765 declared that "trial by jury is the inherent and invaluable right of every British subject in these colonies." \(^{182}\) The First Continental Congress proclaimed the right to jury trial in the Declaration of Rights of 1774, \(^{183}\) which listed the deprivation of "the benefits of trial by jury" \(^{184}\) as one of the grievances against King George III. Finally, the Declaration of Independence of 1776 listed denial of "the benefits of trial by jury" as a grievance against King George III that led to the American Revolution. \(^{185}\) The right of jury trial was also guaranteed in the Northwest Ordinance in 1787. \(^{186}\) Finally, "[t]he only right secured in all state

---

180. See Wolfram, supra note 176, at 655; see also LEONARD W. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 281 (1963) (stating that "[t]he right to trial by jury was probably the only one universally secured by the first American state constitutions").

181. Landsman, supra note 2, at 580.


183. See JOURNALS OF THE CONTINENTAL CONGRESS: 1774-1789, at 69 (Worthington C. Ford ed., 1904). The fifth resolve of the First Continental Congress in 1774 stated that "the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." Id.; see also DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS, 1774, reprinted in SOURCES OF OUR LIBERTIES 272 (Richard L. Perry & John C. Cooper eds., 1959) [hereinafter DECLARATION AND RESOLVES].

184. DECLARATION AND RESOLVES, supra note 183. This declaration was reiterated during the Second Continental Congress, in which the colonists challenged the English practice of expanding admiralty jurisdiction. See Landsman, supra note 2, at 596; Wolfram, supra note 176, at 654 & n.47.

185. THE DECLARATION OF INDEPENDENCE ¶ 19 (U.S. 1776). England had deprived the colonists of trial by jury in certain cases by enlarging the jurisdiction of the vice-admiralty courts, in which there was no right to trial by jury. See 4 CHARLES M. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY 168-71, 254-69 (1938); CARL UBBELHOIDE, THE VICE-ADMARILTY COURTS AND THE AMERICAN REVOLUTION 209-11 (1960); Arnold, supra note 26, at 14.

186. NORTHWEST ORDINANCE OF 1787 Art. II, reprinted in 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL ChARTERS, AND OTHER ORGANIC LAWS 960-61 (Francis N. Thorpe ed., 1909). "The inhabitants of the said territory shall always be entitled to the benefits of the writs of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law." Id.
constitutions penned between 1776 and 1787 was the right of jury trial in criminal cases."  

This fundamental right to jury trial was embodied in several provisions of the Constitution including Article III, Section 2, which provides that "the trial of all Crimes, except in Cases of Impeachment, shall be by Jury", the Sixth Amendment, which guarantees federal criminal defendants the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed", and the Seventh Amendment, which provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The importance of this fundamental right to the notion of American liberty is illustrated by Alexander Hamilton’s comments in The Federalist No. 83:

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.

187. Akhil Reed Amar, Reinventing Juries: Ten Suggested Reforms, 28 U.C. DAVIS L. REV. 1169, 1169 (1995). Similarly, the civil jury was equally revered in many states. Section 11 of the Bill of Rights of the Virginia Constitution of 1776 provided: "That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred." VA. CONST. of 1776, § 11, reprinted in SOURCES OF OUR LIBERTIES 311, 312 (Richard L. Perry & John C. Cooper eds., 1959).

The North Carolina Constitution of 1776 provided: "That in all controversies at law, respecting property, the ancient mode of trial, by jury, is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." N.C. CONST. of 1776, art. XIV, reprinted in SOURCES OF OUR LIBERTIES 355, 356 (Richard L. Perry & John C. Cooper eds., 1959).

The Massachusetts Constitution of 1780 provided: "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred . . . ." MASS. CONST. of 1780, art. XV, reprinted in SOURCES OF OUR LIBERTIES 373, 376 (Richard L. Perry & John C. Cooper eds., 1959).

188. U.S. CONST. art. III, § 2, cl. 3.

190. Id. amend. VI.

191. THE FEDERALIST No. 83, supra note 177, at 562.
As historian William Nelson has concluded, "[f]or Americans after the Revolution, as well as before, the right to trial by jury was probably the most valued of all civil rights . . . it was the only right universally secured by the first American state constitutions."\(^{192}\) Although its implementation has been criticized, the right to trial by jury in civil as well as criminal cases\(^ {193}\) remains a fundamental feature of American civil liberty.\(^{194}\)

**B. Internal Structure and Composition of the Jury**

The most accurate conclusion concerning the understanding of jury trial in early America is that, although it was deemed a fundamental right of constitutional magnitude, the mode or manner in which it was exercised was subject to great flexibility.\(^ {195}\) However, like the English jury, although there was great variation in jury practice, there seem to have been a few particular aspects of the jury that were well established in traditional notions of jury trial in America. Among these essential elements of jury practice were a jury composed of twelve members of the community,\(^ {196}\) a rule of unanimity in rendering the verdict, and a requirement that the jury be impartial.

1. **Jury Size**

One matter that seems to have been well established in America was a jury composed of twelve jurors. According to Judge Richard Arnold, a jury of fewer than twelve was a "concept both alien and ominous" to early Americans.\(^ {197}\) In contrast, other commentators have argued that the jury, as understood in 1791, need not necessarily be composed of twelve jurors.\(^ {198}\) However, dicta in several early American cases seems

\(^{192}\) Nelson, supra note 170, at 96.

\(^{193}\) See Murphy, supra note 1, at 742 (suggesting that the Founders understood the right to jury trial in civil and in criminal cases to be a single unified "fundamental right").

\(^{194}\) In discussing the right to a trial by jury in civil cases under the Seventh Amendment, the Supreme Court has stated that "[t]he right of jury trial in civil cases at common law is a basic and fundamental feature . . . which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." Jacob v. New York City, 315 U.S. 752, 752-53 (1942).

\(^{195}\) See Henderson, supra note 15, at 289 (arguing that the Seventh Amendment was "not intended to codify a rigid form of jury practice").

\(^{196}\) See supra notes 45-46 and accompanying text.

\(^{197}\) Arnold, supra note 26, at 14.

to indicate that part of the definition of "trial by jury" included a jury of twelve.\footnote{199 See In re Klein, 14 F. Cas. 719, 729 (D. Mo. 1843) (No. 7,866).} Furthermore, colonial criminal juries were generally composed of at least twelve members.\footnote{200 Id. The issue of the number of members of the jury was considered to be of constitutional magnitude early in the history of the United States. See Thompson v. Utah, 170 U.S. 343, 349 (1898); Collins v. State, 7 So. 260, 260-61 (Ala. 1890); Dixon v. Richards, 3 Miss. (2 How.) 771 (1838); Foster v. Kirby, 31 Mo. 496, 498 (1862); Opinion of the Justices of the Supreme Judicial Court, 41 N.H. 550 (1860); Lovings v. Norfolk & W. Ry., 35 S.E. 962, 964 (W. Va. 1900). But see Froelich v. Southern Express Co., 67 N.C. 1, 6 (1872).} Finally, early state constitutions explicitly guaranteed the right to trial by a jury of twelve members of the community.\footnote{201 201 The very first of our state statutes to be held unconstitutional was a New Jersey statute providing for a jury of six, which, in 1780, was held by the Supreme Court of that state to violate the constitutional provision that "the inestimable right of trial by jury shall remain confirmed as a part of the law of this colony, without repeal forever." This idea that the requirement of twelve persons on the jury is of the essence has been frequently affirmed. Scott, supra note 12, at 673 (discussing Holmes v. Walton, 4 Am. Hist. Rev. 456 (N.J. 1780)).} Therefore, when the Constitution was ratified, it is likely that the constitutional guarantee of trial by jury was thought to necessarily include a jury composed of twelve members of the community.\footnote{202 See Scott, supra note 12, at 690 (concluding that questions of fact must be determined by twelve persons).} This sentiment continued late into the nineteenth century, when commentators maintained that the term "jury" encompassed a body
composed of twelve members.\textsuperscript{203}

In the civil context, there may have been more flexibility in the size of the jury during the colonial era prior to ratification of state and federal constitutions. For example, a 1645 Connecticut regulation authorized judges to impanel either six- or twelve-member juries.\textsuperscript{204} Similarly, in Massachusetts, where twelve persons were not available, juries of six persons were allowed in actions of debt or trespass involving less than ten pounds.\textsuperscript{205} Thus, although in the criminal context the number twelve was a constant, in the civil context there seems to have been more room for experimentation, at least during the colonial period. However, once state and federal constitutions were put into place, such minor experimentation may have been prohibited. Just as "experimentation" by the British involving moving cases to admiralty courts without juries was forbidden, experimentation with the size of the jury may have been forbidden as well.

2. Rule of Unanimity

In criminal cases, it seems that "trial by jury" was understood to mandate a rule of unanimity.\textsuperscript{206} As Justice White noted in \textit{Apodaca v. Oregon},\textsuperscript{207} the unanimity requirement had been well established during

\begin{quote}
A petit, petty, or traverse jury is a body of twelve men, who are sworn to try the facts of a case as they are delivered from the evidence placed before them. Any less than this number of twelve would not be a common-law jury, and not such a jury as the constitution preserves to accused parties . . . .

\textsc{Thomas M. Cooley, A Treatise on the Constitutional Limitations} 319 (Boston, Little, Brown & Co. 1868); \textit{see Proffatt, supra} note 12, § 76, at 111 (noting that the term jury "implies a body of twelve men . . . [;] a trial jury of any other number is unknown to the common law, and would not be such as our various Constitutions guarantee").

\textsuperscript{204.} \textit{See} \textsc{Mann, supra} note 170, at 70 n.5.

\textsuperscript{205.} \textit{See Colonial Justice in Western Massachusetts} (1639-1702), at 90, 203 (Joseph H. Smith ed., 1961).

\textsuperscript{206.} \textit{See Scott, supra} note 12, at 690. For example, the first draft of the proposed amendments to the Constitution by the Select Committee chosen by the House of Representatives during the first session of the First Congress contained the following language in Proposition Seven: "The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage with the requisite of unanimity for conviction, the right of challenge and other accustomed requisites . . . ." S. Mac Gutman, \textit{The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right}, 39 \textsc{Brook. L. Rev.} 290, 297 (1972).

Similarly, in discussing the ninth section of the Bill of Rights of the Pennsylvania Constitution, which expressly mandated a rule of unanimity, Chief Justice M'Kean of the Supreme Court of Pennsylvania stated: "I have always understood it to be the law, independent of this section, that the twelve jurors must be \textit{unanimous} in their verdict, and yet this section makes this express provision." \textit{Respublica v. Oswald}, 1 Dall. 319, 323 (Pa. 1788).

\textsuperscript{207.} 406 \textsc{U.S.} 404 (1972).
the Middle Ages and "had become an accepted feature of the common-law jury by the 18th century." Four eighteenth-century state constitutions mandated unanimous jury verdicts in criminal cases, and others "provided for trial by jury according to the course of the common law." For example, early state legislatures were often prevented from changing the rule from unanimity due to constitutional constraints. The Supreme Court recognized this essential element of trial by jury in Thompson v. Utah, where the Court, relying on historical evidence, interpreted the Sixth Amendment as mandating a unanimous verdict of twelve jurors in criminal trials.

This understanding of the jury guarantee continued late into the nineteenth century, after ratification of the Fourteenth Amendment. For example, John Proffatt, in his 1876 treatise on the jury, stated the following:

The unanimity of the twelve members constituting the jury is [an] essential attribute of a trial jury. To accept a verdict of any number less

---

208. Id. at 408.
209. See id. at 408 n.3 (noting that the North Carolina, Pennsylvania, Vermont, and Virginia eighteenth-century state constitutions explicitly provided for unanimous jury verdicts in criminal cases).
210. Id.
211. Some early state constitutions explicitly guaranteed a rule of unanimity in criminal cases. For example, Section 8 of the Bill of Rights of the Virginia Constitution of 1776 guaranteed a trial by jury "without whose unanimous consent [the accused] cannot be found guilty." VA. CONST. of 1776, § 8, reprinted in SOURCES OF OUR LIBERTIES 311, 312 (Richard L. Perry & John C. Cooper eds., 1959). Similarly, the Maryland Constitution of 1776 provided "[t]hat, in all criminal prosecutions, every man hath a right to... a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty." MD. CONSTITUTION OF 1776, art. XIX, reprinted in SOURCES OF OUR LIBERTIES 346, 348 (Richard L. Perry & John C. Cooper eds., 1959). The North Carolina Constitution of 1776 provided "[t]hat no freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men, in open court." N.C. CONST. OF 1776, art. XIV, reprinted in SOURCES OF OUR LIBERTIES 355, 355 (Richard L. Perry & John C. Cooper eds., 1959).

Courts have also upheld a requirement of unanimity as a constitutional norm. See Springville v. Thomas, 166 U.S. 707, 708 (1897); American Publ'g Co. v. Fisher, 166 U.S. 464, 468 (1897).
212. 170 U.S. 343 (1898).
213. See id. at 355; see also Johnson v. Louisiana, 406 U.S. 356, 382 n.1 (1972) (Douglas, J., dissenting) ("The unanimous jury has been so embedded in our legal history that no one would question its constitutional position . . . ."); Patton v. United States, 281 U.S. 276, 288 (1930) (interpreting trial by jury under the Sixth Amendment to be "a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted").
than the whole is quite foreign to the idea suggested by a jury trial as it has been established for centuries, and as now generally presented to us.214

Similarly, Justice Story noted in his Commentaries that “[a] trial by jury is generally understood to mean . . . a trial by a jury of twelve men, impartially selected, who must unanimously concur in the guilt of the accused before a legal conviction can be had. Any law, therefore, dispensing with any of these requisites, may be considered unconstitutional.”215 Thus, the early practice in the states leads one to conclude that the rule of unanimity had risen to the level of a constitutional norm.

During the colonial period, the rule of unanimity, like the number of members of the jury, was not thought to be fundamental in the civil context.216 For example, a 1643 regulation of civil juries in Connecticut authorized a verdict by the majority of jurors if all of the jurors could not reach an agreement.217 A judge could then render a special verdict in a case of disagreement.218 Presumably, a verdict from the majority of the representatives of the community would be preferable to that of a single individual, the judge. However, as with jury size, the fact that colonial practices may have occasionally deviated from the norm of employing a unanimity rule does not mean that the rule was not constitutionalized under early federal and state constitutions.

214. PROFFATT, supra note 12, § 77, at 112. “[T]he practice is so ancient and so long sanctioned, that the idea of unanimity becomes inseparably connected in our minds with a verdict.” Id. § 77, at 113.

215. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 559 n.2 (5th ed. 1891).

216. For discussions of the rule of unanimity in the civil context, see 2 THE WORKS OF JAMES WILSON 503-49 (Robert Green McCloskey ed., 1967).

217. See MANN, supra note 170, at 69. But see NELSON, supra note 170, at 27 (noting that “[m]istrials were ordered and verdicts set aside in civil cases if they had been rendered by eleven instead of twelve jurors”).

218. See MANN, supra note 170, at 69.
3. Method of Selecting Jurors

The conclusions reached concerning English juror selection translate to the American context. It appears that in early America: (1) random selection of jurors was the general rule except where juror experience or knowledge might improve the ability of jurors to act as factfinders; (2) the use of voir dire and peremptory challenges was curtailed; (3) special juries were impaneled where appropriate; and (4) aliens were entitled to the right of a trial *de medietate linguae*. However, as with many of the practices discussed in this Article, the particulars of these procedures were never uniform among the states or over time. 219

a. Experience and Qualifications of the Jury

One feature of the American jury that was deemed important was its impartiality. 220 For example, several Antifederalists, decrying the lack of a Bill of Rights in the original Constitution, quoted Blackstone's statement concerning the utility of the institution of the jury in facilitating the impartial administration of justice. According to Blackstone:

> The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias toward those of their own rank and dignity; it is not to be expected from human nature that the few should be always attentive to the interests and good of the many. 221

This guarantee of impartiality of the jury is also embodied in the text of

219. For example, in discussing proposed jury selection procedures to be incorporated into the Judiciary Act of 1789, James Madison made the following statement:

> "The truth is that in most of the States, the practice is different, and hence the irreconcilable difference of ideas on the subject. In some States, jurors are drawn from the whole body of the community indiscriminately; in others, from larger districts comprehending a number of counties, and in a few only from a single county."


220. See Scott, supra note 12, at 674 (describing the impartiality and competence of the jury as "another fundamental requirement which is clearly of the essence of trial by jury; the jury must be so selected and so constituted as to be an impartial and fairly competent tribunal").

the Constitution in the context of criminal juries under the Sixth Amendment. The Supreme Court has assumed that the impartiality requirement applies in the civil context as well. Although some notion of impartiality has been thought to be inherent in just adjudication of disputes throughout American history, what constitutes an "impartial" jury has since been a matter of great controversy in American law, particularly in the twentieth century.

Despite the fact that juror impartiality was an important characteristic of early American juries, the method for selecting jurors was not always particularly random. Selection procedures were often devised to ensure that better-qualified individuals were impaneled on juries. As John Adams stated, although jurors were the "voice of the people," the "people" were not "the vile populace or rabble of the country, nor the cabal of a small number of factious persons," but rather the more "judicious part" of the citizenry. Consistent with the belief that juries did not necessarily have to be "representative," in the sense that all segments of the population, no matter how potentially incompetent, must serve on juries, American law often ensured that only better-qualified citizens would serve on juries. For example, the American colonies followed the English practice of imposing property qualifications on juries. Early on in the country's history, several states also imposed

222. U.S. CONST. amend. VI. The Seventh Amendment contains no such "impartiality" language. See id. amend. VII.


224. Several commentators have noted the importance of impartiality as a prerequisite to just adjudication. See, e.g., H. L. A. HART, THE CONCEPT OF LAW 156 (1961) ("To say that the law... is justly applied is to say that it is impartially applied..."); Lon L. Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353, 364 (1978) (asserting that "participation through reasoned argument loses its meaning if the arbiter of the dispute is inaccessible to reason because he... has been bribed, or is hopelessly prejudiced").


226. However, at certain times, "bystander" juries were authorized in order to save expense and delay in impaneling jurors. See DAVID J. BODENHAMER, THE PURSUIT OF JUSTICE: CRIME AND LAW IN ANTEBELLUM INDIANA 87 (1986) (describing bystander juries in Indiana and concluding that in practice "[i]t is doubtful whether bystander juries represented the lower classes of the community"). Often individuals impaneled in such juries might be less qualified than those impaneled under normal selection procedures.

227. 4 THE WORKS OF JOHN ADAMS 82 (Charles Francis Adams ed., 1851).

228. See Hyman & Tarrant, supra note 11, at 27. For example, in colonial New York, [the basic requirements were that a juror be a freeman over twenty-one years of age who owned a good house or ten acres of freehold. In New York City and Albany one dwelling house free from encumbrances or a net personal estate of fifty pounds would suffice.
JURY REFORM

qualifications that potential jurors had to meet.\textsuperscript{229} For example, Georgia
required that potential jurors be drawn from those qualified to vote.\textsuperscript{230}
Connecticut required that potential jurors be freeholders until 1818.\textsuperscript{231}
During the latter half of the nineteenth century, many states began to
abandon property qualifications, allowing those individuals qualified to
vote to serve on juries.\textsuperscript{232} However, some states retained property
qualifications until relatively recently.\textsuperscript{233} For example, New York had

Aliens were excluded. Roughly two-thirds of adult white males were disqualified.
Farmers and craftsmen predominated in county juries, and merchants and artisans in those
of the city.

COURTS AND LAW IN EARLY NEW YORK: SELECTED ESSAYS 123 n.28 (Leo Hershkowitz & Milton
M. Klein eds., 1978). In fact, property qualifications were almost constitutionalized as prerequisites
for jury service by the Select Committee of the House of Representatives, which drafted proposed
amendments to the Constitution. In its first draft, Proposition Seven guaranteed an impartial jury trial
of "freeholders of the vicinage." Gutman, supra note 206, at 297.

Jury selection in the colonial decades was, almost universally, related to property
ownership. In Virginia, under a 1699 law, jurors in the General Court, and in the higher
criminal courts of Oyer and Terminer under a 1734 law, had to be freeholders who
possessed at least £100 in property. In the county courts, jurors were also required to be
freeholders, but they had to possess only £50 worth of property.

Hyman & Tarrant, supra note 11, at 27.

\textsuperscript{229} See Richard C. Baker, In Defense of the "Blue Ribbon" Jury, 35 IOWA L. REV. 409, 415
(1950) (arguing that the jury has never been considered a purely democratic institution . . . . It is
common knowledge that in all our states many people who vote and even hold high public office
are nevertheless deprived of the privilege of serving on juries"). But see MANN, supra note 170, at
78 (noting that there were property qualifications for jurors in early Connecticut); 2 TOCQUEVILLE,
supra note 173, at 359-60 (describing the powers of sheriffs charged with summoning jurors as "very
extensive and very arbitrary"); Alschuler & Deiss, supra note 11, at 879 (arguing that in practice
"formal qualifications offered no clear indication of who served on juries in fact"). As Alschuler and
Deiss have argued:

Just as formal eligibility for jury service did not always mean eligibility in fact,
statutory disqualification did not always mean real disqualification. When qualified jurors
failed to appear, statutes permitted court clerks or sheriffs to impanel unqualified
"bystanders." In a number of jurisdictions, the nonappearance of qualified jurors and the
use of bystanders was common.

Id. at 880; see also BODENHAMER, supra note 226, at 83-88 (discussing bystander juries); DOUGLAS
GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691-1776, at 172-73
(1976) ("[A] number of bills were proposed and passed in order to assure 'the returning of able and
sufficient jurors.").

\textsuperscript{230} See An Act to Revise and Amend the Judiciary System § 27 (Feb. 9, 1797), Digest of the
Laws of the State of Georgia 271, 278 (Marbury & Crawford 1802).

\textsuperscript{231} See 1836 Conn. Pub. Acts 5, ch. 6 ( repealing freeholding requirement); see also KIRK H.
PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 110 (1918).

\textsuperscript{232} See PROFFATT, supra note 12, § 115, at 161 (noting that the Mississippi Constitution of
1870 abandoned property qualifications, that Connecticut abandoned property qualifications in 1837,
and that Alabama abandoned property qualifications in 1868).

\textsuperscript{233} See id. at 161-62 (noting that property qualifications remained in California, Indiana,
Kansas, New Jersey, Michigan, North Carolina, Oregon, Pennsylvania, Tennessee, Texas, Rhode
a $250 property-holding requirement until 1967. Thus, as in England, property qualifications ensured that the better-educated members of society were chosen for jury service. Furthermore, it was common for states to maintain requirements that individuals serving as jurors be well-informed and intelligent. Therefore, the principle of random selection was often abandoned in order to improve the ability of juries to carry out their factfinding roles. These early practices indicate that there has always been a diversity in jury selection procedures, and therefore, no single selection methodology rose to constitutional magnitude.

b. Voir Dire and Peremptory Challenges

As in England, extensive utilization of voir dire and peremptory challenges was curtailed in early American jury trials. Furthermore, attorney-conducted voir dire was less prevalent early in the history of the

---


235. See PROFFATT, supra note 12, § 118, at 164 (describing statutes prescribing such qualifications).

236. The fact of diversity in jury selection procedures was reflected in the laws concerning federal jury selection procedures passed by the First Congress:

[J]urors in all cases to serve in the courts of the United States shall be designated by lot or otherwise in each State respectively according to the mode of forming juries therein now practised, so far as the laws of the same shall render such designation practicable by the courts or marshals of the United States; and the jurors shall have the same qualifications as are requisite for jurors by the laws of the State of which they are citizens, to serve in the highest courts of law of such State, and shall be returned as there shall be occasion for them, from such parts of the district from time to time as the court shall direct, so as shall be most favourable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burthen the citizens of any part of the district with such services.

An Act to Establish the Judicial Courts of the United States § 29, ch. 20, 1 Stat. 73, 88 (1789). Similarly, a number of courts have held that a statute that changes jury selection procedures is not unconstitutional provided that the selection method is fair. See People v. Harding, 18 N.W. 555, 560 (Mich. 1884); Dowling v. State, 13 Miss. (5 S. & M.) 664, 685 (1846); State ex rel. Kansas City & S. Ry. v. Slover, 36 S.W. 50, 51 (Mo. 1896); People v. Meyer, 56 N.E. 758, 759 (N.Y. 1900).

237. See supra notes 65-71 and accompanying text.

238. Evidently, voir dire became an increasingly lengthy process toward the end of the nineteenth century. For example, one commentator made the following observation:

[W]e find the process [of voir dire] lengthened to a tedious and exasperating extent in trials of great importance, as for instance in the impanelling of the jury in the late trial of Tilton v. Beecher, when the examination was extended over a period of four days, and twenty-four jurors were examined on a challenge for principal cause.

PROFFATT, supra note 12, § 166, at 220.
United States. Thus, lawyers were prevented from utilizing these procedures to gain a strategic advantage, and trial delay was lessened.

Despite the fact that the use of peremptory challenges was curtailed, the ability of the criminal defendant to exercise challenges for cause was thought to be inherent in the definition of an "impartial jury." For example, Article 30 of the Massachusetts Body of Liberties, adopted in 1641, explicitly mentioned this right of challenge. Similarly, the Frame of Government of Pennsylvania of 1682 guaranteed that "reasonable challenges shall be always admitted against the said twelve men, or any of them." This understanding also prevailed after ratification of the Fourteenth Amendment. The right to challenge for cause was thought to be inherent in what was meant by "trial by jury."

Although peremptory challenges were not constitutionally guaranteed, defendants in criminal trials often had the statutory right to exercise
a certain number of them. This number varied from state to state and over time. However, in several cases there is dicta to the effect that, although there was a constitutional right to exercise challenges for cause, there was no such right to exercise peremptories. For example, Justice Clifford stated in United States v. Plumer that "[c]hallenge for cause is doubtless a constitutional right, as without its exercise the prisoner might be deprived of an impartial jury, but the peremptory challenge is a privilege conferred by law, which may be enlarged, abridged, or annulled by the legislative authority." Furthermore, courts held that a statute changing the maximum number of peremptory challenges allowed did not violate constitutional prohibitions. Even after ratification of the Fourteenth Amendment, commentators expressed the view that the legislature could regulate the number of peremptory challenges without impairing due process or jury trial guarantees. The single exception seems to have been when a criminal defendant was accused of a capital crime. In such a case, it seems that it was thought that the defendant was entitled to exercise peremptory challenges.

244. See NELSON, supra note 170, at 21 (noting that in colonial Massachusetts, defendants received a certain number of peremptories that varied with the charge).

245. See PROFFATT, supra note 12, § 158, at 209-11 (noting that the number of peremptory challenges allowed in state criminal cases varied between thirty-five and six). Evidently, the right to peremptorily challenge jurors in civil cases arose in the late nineteenth century. As Proffatt noted, "[t]he right [to peremptorily challenge jurors in civil cases] is becoming more extended and recognized here, and late enactments have given it where it did not exist before." Id. § 163, at 215. The number of peremptories allowed was generally between two and four. See id. § 163, at 216.

246. 27 F. Cas. 561 (C.C.D. Mass. 1859) (No. 16,056).

247. Id. at 575-76.

248. See, e.g., Walter v. People, 32 N.Y. 147, 159-60 (1865).

249. See, e.g., PROFFATT, supra note 12.


The court is of opinion that the power conferred upon the federal courts to adopt "rules and regulations for conforming the designation and impanelling of juries to the laws and usages in force at the time in the State," enables them to adopt the laws and usages of the State in respect to the challenges of jurors, whether peremptory or for cause, and in cases both civil and criminal, with the exception, in criminal cases, of treason and other crimes, of which the punishment is declared to be death.

Id. at 590. Similarly, the Concessions and Agreements of West New Jersey of 1677 provided the following:
c. Special Juries

Like the English practice, the principle of random juror selection in the United States was abandoned in certain circumstances in order to facilitate juror factfinding and to reach a more just outcome. For example, special juries could be impaneled in certain cases that required special juror expertise. Several American states provided for special juries. For example, an 1807 Louisiana law provided for special juries composed of members of certain professions when the issues to be tried were “of such a nature as to require certain information peculiar to certain occupations or professions.” Similarly, New York provided...
for a struck jury as far back as 1741. Provision for special juries continued in many states after ratification of the Fourteenth Amendment, indicating that there were apparently no constitutional concerns under the Due Process Clause of that Amendment.

d. Trial de Medietate Linguae

As in England, the right to trial de medietate linguae was available in America to aliens involved in legal proceedings. The right to a trial de medietate linguae was recognized in Massachusetts, Pennsylvania, New York, Virginia, South Carolina, and Kentucky between 1674 and 1911. An extreme example of this sort of practice was to be found in colonial America where Professor Thayer observed that "two centuries ago the Puritans of our Plymouth Colony used now and then, out of policy, when they were trying a case relating to an

255. See Baker, supra note 229, at 411. The struck jury even presided in some criminal cases: "There are not many criminal cases where a struck jury was used, but it should be observed that it was employed in some of the most important quasi-political trials of the eighteenth century." JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776), at 620 (1944).

256. See PROFFATT, supra note 12, § 72, at 106-07 (noting that New York, Michigan, Pennsylvania, Ohio, and New Jersey, among others, provided for special juries given certain conditions); see also 2 Mich. COMP. LAWS 1724; 2 New Jersey Nixon’s Dig. 4532; 2 N.Y. REV. STAT. 1829, pt. 3, ch. 7, tit. 4, § 46-52; 1 Ohio REV. ST. 758; An Act to Regulate Arbitrations and Proceedings in Courts of Justice, ch. 147, 1806 Pa. Laws 184. The special jury was available in both criminal and civil suits. See PROFFATT, supra note 12, § 72, at 107; see also State v. Murat, 9 N.J.L. 3 (1827); Sutton v. State, 9 Ohio 133, 135 (1839).

257. See supra note 81 and accompanying text.

258. See LaRue, supra note 81, at 850-51; Ramirez, The Mixed Jury, supra note 82, at 782 ("After English colonists settled in North America, bringing with them the common law and its ancient custom of the mixed jury, trial by jury de medietate linguae for a time became an active part of practice in the colonies and, after the revolution, the United States." (footnote omitted)).

259. See Ramirez, An Overview of the Mixed Jury, supra note 82, at 1220 & n.28; Ramirez, The Mixed Jury, supra note 82, at 790. Chief Justice John Marshall recognized the right to a trial de medietate linguae in United States v. Cartacho, 25 F. Cas. 312, 313 (C.C.D. Va. 1823) (No. 14,738). Similarly, Thomas Jefferson recognized the practice in a letter to James Madison, stating that "[i]n disputes between a foreigner and a native, a trial by jury may be improper. But if this exception cannot be agreed to, the remedy will be to model the jury, by giving the mediatas linguae, in civil as well as criminal cases." Letter from Thomas Jefferson to James Madison (July 31, 1788), in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 450,451 (Adrienne Koch & William Peden eds., 1944). Noteworthy is the fact that Jefferson looked to procedural reform of jury practices where the propriety of trial by jury was in question.

However, in United States v. Wood, 299 U.S. 123 (1936), the Supreme Court subsequently held that the Sixth Amendment did not require a trial de medietate linguae in a criminal case. See id. at 145. According to the Court, "[a]lthough aliens are within the protection of the Sixth Amendment, the ancient rule under which an alien might have a trial by jury de medietate linguae, 'one half denizens and the other aliens,'—in order to insure impartiality—no longer obtains." Id.
Indian, to add Indians to the jury, as in a criminal case in 1682.\(^{260}\) Thus, besides the goal of facilitating juror factfinding, the goal of ensuring the appearance of fairness in the adjudicatory process could justify deviation from the principle of random selection of jurors.

4. Trial Length
As in England, it appears that American trials were fairly short until recent times. For example, colonial trials often lasted only a single day.\(^{261}\) This reduction in the length of trials may have been due to factors similar to those that reduced the length of early English trials. Jurors were generally among the more educated members of society, except perhaps if they were bystanders; there was less in the way of procedural formalism; and there were not the extensive voir dire and use of peremptory challenges characteristic of modern American trials.

C. Judicial Control of the Jury

Judicial control of the jury in America seems to have been, on the whole, less than that exercised by judges in England.\(^{262}\) As in England,\(^{263}\) American trial judges were generally prohibited from coercing the jury. Similarly, judges were forbidden in many cases from utilizing procedural mechanisms to erode the power of the jury. For example, it was agreed that judges could not direct verdicts of conviction in criminal cases or reverse jury acquittals.\(^{264}\) Also, judges could not require juries to return “special verdicts.”\(^{265}\) Therefore, both coercive and procedural

\(^{260}\) Thayer, supra note 34, at 307 & n.1.

\(^{261}\) See Arthur P. Scott, Criminal Law in Colonial Virginia 101 (1930) (noting that in colonial Virginia, felony trials were supposed to last only a single day); Hyman & Tarrant, supra note 11, at 26 (same); Murrin, supra note 170, at 169 (concluding that “juries probably disposed of most cases in ten or fifteen minutes, to judge from the case load they dispatched. But in Rhode Island, a few juries sat for days unable to reach a verdict.”).

\(^{262}\) See Lettow, supra note 3, at 515 (“In contrast to their English counterparts, American colonial judges generally exercised little control over juries. New trials were rarely granted, and other mechanisms of control seldom used.”). But see Henderson, supra note 15, at 336 (stating that in the case of the civil jury “[i]n some states there was much less judicial control of the jury than in England, and in some states rather more” and that this was the “reason why the seventh amendment was drafted in such general terms”).

\(^{263}\) See supra notes 101-05 and accompanying text.

\(^{264}\) See Mortimer R. Kadish & Sanford H. Kadish, Discretion to Disobey: A Study of Lawful Departures from Legal Rules 50 (1973).

\(^{265}\) See id. at 52. However, jurors could elect themselves to render a special verdict instead of a general verdict. See Scott, supra note 12, at 684 (concluding that “[i]n the American colonies the special verdict was well known”). For example, Article 31 of the Massachusetts Body of Liberties of 1641 provides:
power over juries were limited to a greater extent in early American jury trials.

The greater power of the jury in early America is evidenced by the practices of certain colonies. For example, judicial control over the jury in Rhode Island has been characterized as slight; the judges were present "not for the purpose of deciding [cases] . . . but merely to preserve order, and see that the parties had a fair chance with the jury." 266 Similarly, in Massachusetts, judges could offer their opinions concerning the state of the law to the jury, but the jury could disregard the judges' opinions. 267 Therefore, judicial control of the jury in many of the colonies was less than that exercised by judges in England.

1. Judicial Coercion of Juries

As in England, there was a prohibition in America against the exercise of coercive power by the judge over the jury. During early colonial times, it appears that judges in some of the colonies utilized coercive tactics in order to influence the jury's verdict. 268 However, by the time the Constitution was ratified, such practices were frowned upon. For example, in 1771, John Adams stated that it was "an Absurdity to suppose that the Law would oblige [the jury] to find a Verdict according to the Direction of the Court, against their own Opinion, Judgment and Conscience." 269 Americans took to heart the principle that Chief Justice Vaughn had laid down in Bushell's Case that juries could not be

In all cases where evidences is so obscure or defective that the Jurie cannot clearly and safely give a positive verdict, whether it be a grand or petit Jurie, It shall have libertie to give a non Liquit, or a spatiaal verdict, in which last, that is in a spatiaal verdict, the Judgement of the cause shall be left to the Court, And all Jurors shall have libertie in matters of fact if they cannot finde the maine issue, yet to finde and present in their verdict so much as they can, If the Bench and Jurors shall so suffer at any time about their verdict that either of them cannot proceede with peace of conscience the case shall be referred to the Generall Court, who shall take the question from both and determine it.


266. Mark DeWolfe Howe, Juries as Judges of Criminal Law, 52 HARV. L. REV. 582, 591 (1939) (quoting Daniel Chipman).

267. See NELSON, supra note 170, at 3, 13-35.

268. See SCOTT, supra note 261, at 101 (noting that jurors were locked up and kept without food until they rendered their verdict); Hyman & Tarrant, supra note 11, at 26 (noting that in colonial Virginia the jury "was locked up without food or water until it reached a verdict"). "[T]he jury 'shall be kept together in some convenient private place without meat, drink, fire or lodging until they all agree upon a verdict.'" SCOTT, supra note 12, at 674 n.21. Evidently, during colonial times, the attaint was used as another method of judicial control. See id. at 681.

269. 1 LEGAL PAPERS OF JOHN ADAMS 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).
punished or threatened with punishment for their verdicts. 270

2. Jury Instructions

Jury instructions represent one way in which a judge may exercise persuasive control over the jury. However, in some of the colonies, American judges did not always give jury instructions. For example, the Earl of Bellomont, in a report to the English government, noted that judges in colonial Rhode Island "give no directions to the jury nor sum up the evidence to them." 271 In Massachusetts, jurors were free to disregard the judges' views of the law. 272 Furthermore, jury instructions in Massachusetts often were not given. When they were, they were not particularly elaborate. 273 Similarly, Professor Bruce H. Mann concluded from a study of civil cases in seventeenth century Connecticut the following:

There is no indication that judges instructed juries on the law to apply, although by the end of the century judges may have made a general charge to identify for the jury the questions they were to consider. . . . . . .

. . . There were no issues to be "framed" for a jury because the entire dispute was within the province of the jury. 274

Besides often being brief, there is evidence that jury instructions were


271. Eaton, supra note 172, at 153 n.* (speculating that the lack of instructions may have been due to the fact that judges had no greater legal knowledge than jurors).

272. See Nelson, supra note 170, at 3, 13-35 (noting that panels of multiple judges who each may have given their opinions concerning the legal issues in the case may have given rise to the practice of jurors resolving disputes among the judges with respect to the correct legal opinion). There is some evidence that there were occasional collegial trial benches in England. See Langbein, supra note 56, at 33 (concluding that "in some Old Bailey cases we can be confident that more than one judge was sitting. Yet these manifestations of collegiality look more incidental than systematic, and there are a variety of indications that the norm was trial before a single judge"). Professor Langbein hypothesizes that the reason that a collegial bench was not adopted in most English trials was that the jury was deemed a sufficient guarantor against the arbitrary exercise of power by the government. See id. at 35 ("The main reason that the English were not particularly concerned to have a collegial bench was, of course, that the jury system served as an alternative safeguard against judicial excesses, since it divided the adjudicative power and allocated much of it away from the bench.").

273. See Nelson, supra note 170, at 26. "In colonial Massachusetts, . . . instructions were scarcely an effective means of jury control . . . [I]t appears that in many civil cases no instructions were given at all and that even in those cases where the jury was charged the charges were often brief and compressed." Id. (endnote omitted); see Lettow, supra note 3, at 523 ("American judges . . . with the notable exception of Connecticut judges, tended not to send jurors back for reconsideration."); Nelson, supra note 143, at 910-11.

274. Mann, supra note 170, at 74, 85.
often contradictory, which reduced their effectiveness.\footnote{275}{See Nelson, supra note 143, at 911-12 (noting that judges often gave conflicting instructions).} However, the weight of authority seems to indicate that the jury was bound to follow jury instructions, if given, and almost always did in civil cases.\footnote{276}{See Henderson, supra note 15, at 302. But see Nelson, supra note 143, at 913-15 (collecting cases from Massachusetts, Connecticut, Maryland, Pennsylvania, South Carolina, New Jersey, Georgia, and Virginia).} Despite this fact, the historical evidence indicates that even persuasive control over the jury might not have existed to any great degree in some of the states.\footnote{277}{In the nineteenth century, instructions were actually required to be in writing in many states. See PROFFATT, supra note 12, §§ 349-50, at 416-18.}

3. Judicial Commentary on the Evidence

Another method by which judges may exercise persuasive control over the members of the jury is through their power to comment on the evidence. As in England, initially American judges had the power to comment on the evidence and to express an opinion concerning the credibility of witnesses.\footnote{278}{See THAYER, supra note 20, at 188-89 n.2; 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2551, at 664 (James H. Chadbourn rev. ed. 1981). A number of courts held that judges retained their power to comment on the evidence even though trial by jury was guaranteed by the Constitution. See Simmons v. United States, 142 U.S. 148, 155 (1891); Lovejoy v. United States, 128 U.S. 171, 173 (1888); United States v. Philadelphia & Reading R.R., 123 U.S. 113, 114 (1887); Vicksburg & Meridian R.R. v. Putnam, 118 U.S. 545, 553 (1886).} However, this practice was phased out beginning in 1795.\footnote{279}{See MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876, at 85 (1976) (noting that during the nineteenth century “new procedural rules in some jurisdictions gave laymen a more decisive role in the outcome of jury trials, as judges were forbidden to comment on the evidence or otherwise to assist the jury in reaching a verdict”); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 137 (1973) (noting that the power of trial judges to comment on the facts and law of cases was gradually diminished); HANS & VIDMAR, supra note 2, at 39 (noting that “state legislatures passed laws that forbid the judge to comment on the evidence”); PROFFATT, supra note 12, § 322, at 387 (“Commenting on the weight of evidence is an abuse to which a charge is often liable—an abuse which is condemned by authority as well as positively prohibited by statute in a great many places.”); Kenneth M. Johnson, Province of the Judge in Jury Trials, 12 J. AM. JUDICATURE SOC'Y 76, 78 (1928) (noting that in 1796, the North Carolina legislature passed a statute providing that “judges are forbidden in the charge to the jury to express any opinion as to whether a fact was fully or sufficiently proved”); Kenneth A. Krasity, The Role of the Judge in Jury Trials: The Elimination of Judicial Evaluation of Fact in American State Courts from 1793 to 1913, 62 U. DET. L. REV. 595, 595 (1985).} By 1913, the practice was almost dead, with forty-one states or territories having abandoned it.\footnote{280}{See Krasity, supra note 279.} The practice was eliminated by constitutional provision, statute, and judicial decision.
largely during the period spanning 1835 to 1860. Therefore, although in early American jury trials it was not uncommon for the judge to comment on the evidence and the credibility of the witnesses, this practice fell into disuse toward the end of the nineteenth century. Arguably, the removal of the judge's ability to comment on the evidence increased the power of the juries to a small extent. However, it also deprived the members of the jury of a source of guidance in evaluating the evidence and testimony of witnesses given at trial.

4. Other Mechanisms of Judicial Control

Besides persuasive authority over the jury, judges also had procedural mechanisms at their disposal that they could employ to lessen the power of the jury. Soon after ratification of the Constitution, judges possessed the power to direct a verdict in civil cases. Several state courts exercised the power to direct verdicts, including those in Maryland, North Carolina, Pennsylvania, South Carolina, and Virginia. The constitutionality of this practice was affirmed early in the history of the new nation. In the federal courts, the United States Supreme Court affirmed directed verdicts sub silentio in the case of Kempe’s Lessee v. Kennedy, decided in 1809. Furthermore, the Court explicitly recognized the power of judges to direct a verdict in Drummond v. Executors of George Prestman, decided in 1827, in which the Court held that the failure of the judge to instruct the jury with regard to the plaintiff’s entitlement to a verdict was reversible error. By the middle of the nineteenth century, the directed verdict had become even more accepted. In 1828, Justice Story explained that a statement that the verdict “ought...
to be for the defendants" was not "merely in the nature of advice to the jury" but "imposed an obligation upon the jury." Thus, there was a trend toward greater judicial control of the jury that originated at the end of the eighteenth and beginning of the nineteenth centuries.

5. Minimal Rules of Evidence

As in England, American evidentiary rules were originally less restrictive, allowing a greater amount of information to reach the jury. There were, however, certain restrictions that prevented evidence that was thought to be inherently unreliable from reaching the jury. Many of the rules of evidence had developed in England by the time the colonies were founded and were transported to America. For example, in colonial Massachusetts, testimony from persons interested in the disputed matter was excluded. Along the same lines, testimony from persons convicted of serious crimes was also excluded. Finally, the rule against hearsay was observed in early Massachusetts courts. Similarly, in colonial Virginia, although the rules of evidence were fairly minimal, hearsay evidence was not admissible. Therefore, by the time the American colonies were founded, the law of evidence had begun to develop, restricting the information available to jurors in rendering their verdict.

6. Erosion of the Jury’s Power

During the nineteenth century, the role of the jury was restricted while that of the judge was enlarged, a development similar to that which had occurred in England at an earlier time. As discussed below,

---

287. See supra notes 129-37 and accompanying text.
288. See NELSON, supra note 170, at 24 ("[T]he rule contemplated the exclusion of testimony of witnesses who would be directly and immediately subject to a legally enforceable gain or liability as a result of the outcome of the case."); see also Allison v. Cockran, Quincy 94, 99 n.3 (Mass. 1764); Barnes v. Greenleaf, Quincy 41 (Mass. 1763); Wrentham Proprietors v. Metcalf, Quincy 36 (Mass. 1763).
289. See NELSON, supra note 170, at 25; see also Rex v. Pourksdorff, Quincy 104, 105 (Mass. 1764).
290. See NELSON, supra note 170, at 25 (stating that in colonial Massachusetts "lawyers honored rules against the admission of hearsay more in the breach than in the observance").
291. See SCOTT, supra note 261, at 97 (noting the observation of rules against hearsay and the best evidence rule).
292. See HORWITZ, supra note 252, at 27-28. "By enlarging the domain of 'legal questions,' by recognizing devices that facilitate second-guessing of jury decisions, and by redefining the circumstances under which that interference may occur, the legal system has quietly but unquestionably eroded the power of the jury." Laura Gaston Dooley, Our Juries, Our Selves: The
the power of the jury to pass judgment on issues of law was curtailed through judicial decision. Furthermore, the mechanism of the directed verdict became available in civil trials to keep questions of fact from the jury. Finally, judges began developing rules that kept certain cases from the jury.294 Thus, the judiciary was able to contain the decisionmaking power of the jury by determining what evidence could be heard by the jury, as well as by determining what were issues of fact within the purview of the jury, as opposed to issues of law, which were within the province of the judge’s decisionmaking authority.

This trend of increasing judicial control over the jury was perhaps a response to the greater distrust of the jury that accumulated during the nineteenth century. Juries were originally viewed as protectors of the liberties of the people against government infringement, and as embodying the common sense of ordinary members of the community. However, over time, there was some feeling that juries tended to act irrationally and could not function well when the issues to be tried were complex. Thus, it is not altogether surprising that as legal principles (and society in general) grew increasingly complex, the role of the jury in adjudicating disputes decreased. Furthermore, one must not forget that two powerful interest groups had a vested interest in seeing certain aspects of the jury’s power curtailed. Both judges and lawyers would fill the vacuum left by the erosion in the jury’s power. These interest groups disproportionately influenced the development of legal principles in the United States. Therefore, it is not surprising that erosion of jury power occurred since it was beneficial to both these groups.

---

Power, Perception, and Politics of the Civil Jury, 80 CORNELL L. REV. 325, 334-35 (1995) (footnotes omitted). As Professor Langbein has noted, this shift in the balance of power between the judge and the jury may have been due in part to a realization of the “unavoidable complexity” of legal rules and the jury’s limited ability to deal with this complexity:

In the first decades of American independence there occurred a titanic struggle about the character of American law . . . . Arrayed on one side were people who were hostile to lawyers and legal doctrine. They viewed the legal system as serving an essentially arbitral function: Ordinary people, applying common sense notions of right and wrong, could resolve the disputes of life . . . . Opposing this vision of folk law were those who understood that the intrinsic complexity of human affairs begets unavoidable complexity in legal rules and procedures. With legal complexity comes legal professionalism.


293. See infra notes 298-333 and accompanying text.

294. See Wolfram, supra note 176, at 644.
D. Role of the Jury

As in England, the role of the American jury underwent a number of changes over the years. Originally, the American jury was a much more active participant in the adjudicatory process than its modern counterpart. However, unlike under English law, no sharp distinction was drawn in American law between the power of the jury to decide issues of law and the power of the jury to decide issues of fact. Originally, at least, it seems that the jury often possessed the power to decide both issues of law as well as issues of fact. Moreover, like English juries, it appears that American juries possessed indirect, if not direct, authority to participate in the determination of sanction in criminal trials. Furthermore, in certain instances, the jury may have even been vested with the authority to directly determine the sentence.

1. The Authority of American Juries Concerning Issues of Fact and Issues of Law

In contrast to the traditional English jury, American juries were often granted the authority to resolve issues of law as well as issues of fact. This authority was recognized in constitutions, statutes, (discussing the power of juries to determine law as well as to find facts); Alschuler & Deiss, supra note 11, at 903 (“In America following the Revolution, ... the authority of juries to resolve legal issues was frequently confirmed by constitutions, statutes, and judicial decisions.”); Howe, supra note 266, at 583-84, 589 (noting that juries could disregard the court's opinion, and that judges and justices have specifically instructed juries that they were “the judges both of the law and the fact in a criminal case”). Nelson has noted:

[The various eighteenth-century procedural devices for controlling the power of the jury were only infrequently used and partially effective. It accordingly seems safe to conclude that juries in most, if not all, eighteenth-century American jurisdictions normally had the power to determine law as well as fact in both civil and criminal cases.

Nelson, supra note 143, at 916. However, Thayer concluded that this was not a right of the jurors, but rather a rule of common sense:
JURY REFORM

and judicial decisions following the Revolution. Furthermore, it was emphasized in a variety of celebrated eighteenth century cases involving

I am disposed to think that the common-law power of the jury in criminal cases does not indicate any right on their part; it is rather one of those manifold illogical and yet rational results, which the good sense of the English people brought about, in all parts of their public affairs, by way of easing up the rigor of a strict application of rules. Thayer, supra note 138, at 171; see also Letter from the Federal Farmer to the Republican (Jan. 18, 1788), in 2 THE COMPLETE ANTI-FEDERALIST, supra note 176, at 315, 320 (arguing that civil and criminal juries should be able to "decide both as to law and fact, whenever blended together in the issue put to them"). But see Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 282, 283 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958) [hereinafter Arnoux Letter] (stating that juries "are not qualified to judge questions of law"). However, Jefferson also stated:

It is left . . . to the juries, if they think the permanent judges are under any bias [sic] whatever in any cause, to take upon themselves to judge the law as well as the fact. They never exercise this power but when they suspect partiality in the judges, and by the exercise of this power they have been the firmest bulwarks of English liberty.

Id. at 283.

300. See, e.g., GA. CONST. of 1777, art. XLI ("The jury shall be judges of law, as well as of fact, and shall not be allowed to bring in a special verdict . . . ."); PA. CONST. of 1790, art. IX, § 7 ("[I]n all indictments for libels the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases."). After adoption of the Bill of Rights, several states amended their constitutions to allow for determination of issues of law as well as issues of fact by juries. See IND. CONST. of 1851, art. I, § 19 ("In all criminal cases whatever, the jury shall have the right to determine the law and the facts."); TENN. CONST. of 1796, art. XI, § 19 ("In all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court as in other cases.").

Other state constitutions proclaimed merely the right of juries to determine issues of fact. See, e.g., MASS. CONST. of 1780, pt. I, art. XIII, reprinted in SOURCES OF OUR LIBERTIES 373, 376 (Richard L. Perry & John C. Cooper eds., 1959) ("In criminal prosecutions, the verification of facts, in the vicinity where they happen, is one of the greatest securities of life, liberty, and property of the citizen."). Some nineteenth-century courts held that the constitutional right of juries to determine issues of law meant that lawyers could argue points of law and issues of constitutionality, and not just fact, to the jury. See Note, The Changing Role of the Jury in the Nineteenth Century, 74 YALE L.J. 170, 176 (1964) [hereinafter The Changing Role] (acknowledging that in the past there was a general acceptance of the jury's right to decide matters of law in criminal cases); see also Lynch v. State, 9 Ind. 541, 542 (1857) (recognizing a constitutional grant of power to jurors to decide both law and facts); NELSON, supra note 170, at 3 (noting that lawyers in early Massachusetts could "argue law to the jury").

301. See, e.g., Howe, supra note 266, at 602 (stating that in criminal cases, the court must "state their opinion to the jury, upon all questions of law . . . and . . . submit to their consideration both the law and the facts, without any direction how to find their verdict" (quoting the REVISION OF THE LAWS OF CONN., tit. 22, § 112 (1821))]. Additionally, it was believed that petit juries should "decide at their discretion, by a general verdict, both the fact and the law, involved in the issue." Id. at 606 (quoting 13 LAWS OF MASS., ch. 139, § 15 (1808) (repealed in 1836)); see also id. at 611 ("[J]uries in all [criminal] cases shall be judges of the law and fact." (quoting ILL. CRIM. CODE § 188 (1827))).

302. According to one commentator, "[t]here was only one judge in the United States who, between 1776 and 1800, was to deny the jury the right to decide law in criminal cases." MOORE, supra note 26, at 107.
HOFSTRA LAW REVIEW

political crimes during English rule of the colonies. For example, in the trial of John Peter Zenger, a New York printer who was accused of seditious libel for criticizing the royal governor of New York, Andrew Hamilton stated that juries had "the right . . . to determine both the law and the fact." According to Hamilton, this authority was "beyond all dispute":

I know they [the jury] have the right beyond all dispute to determine both the law and the fact, and where they do not doubt of the law, they ought to do so. . . . [L]eaving it to the judgment of the Court whether the words are libelous or not in effect renders juries useless . . .

Thus, the right of the jury to determine issues of law as well as issues of fact seems to have been accorded some measure of popular sanction.

In some of the states, procedural devices may have contributed in solidifying the jury's power to determine issues of law. For example, in Massachusetts, as Professor Nelson has noted, the jury's ability to determine issues of law, as well as issues of fact, was facilitated by the fact that trials were conducted before three judges who could state different opinions concerning the law in their closing instructions. Jurors were apparently free to choose among differing opinions where these occurred. From this, Professor Nelson has concluded that the jury had broad control over both legal and factual issues and was therefore vested with the ultimate decisionmaking authority in the adjudicatory process. Finally, as in England, the fact that juries could enter a general verdict without having to give any reason for their verdict gave them a de facto ability to determine issues of law as well as issues of fact. As John Adams stated, a juror could "find the Verdict according to his own best Understanding, Judgment and Conscience, tho in Direct opposition

303. See James Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal 4-8 (Stanley Nider Katz ed., 1963); see also Pope, supra note 147, at 445 (recounting the American jury's resistance against royal courts by making independent determinations of law and fact).
304. Alexander, supra note 303, at 78.
305. Id.
306. Id.
307. See Nelson, supra note 170, at 28-30. According to Nelson:
   As one looks generally over the various rules regulating the division between the functions of judge and jury, it becomes clear that although the jury's power to find facts was limited by rules excluding relevant evidence and keeping the jury from weighing probability and credibility, its power to find law was virtually unlimited.
   Id. at 28.

http://scholarlycommons.law.hofstra.edu/hlr/vol25/iss2/1
to the Direction of the Court."\(^{308}\)

This understanding of jury competency to determine issues of law as well as issues of fact was extended into the early years of the United States government. For example, in 1794, in one of the few jury trials before the Supreme Court, *Georgia v. Brailsford*, \(^{309}\) Chief Justice John Jay stated in his charge to the jurors that "it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court[s] are the best judges of law."\(^{310}\) However, he added that "by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy."\(^{311}\) Similarly, in 1807, Chief Justice John Marshall stated to the jury in the treason trial of Aaron Burr that "'[t]he jury have now heard the opinion of the court on the law of the case. They will apply that law to the facts, and will find a verdict of guilty or not guilty as their own consciences may direct.'"\(^{312}\) Therefore, at least in the early years of the Republic, the jury was recognized as possessing the power to judge both issues of law as well as issues of fact. This power contributed to the independence of juries in early America.\(^{313}\)

Part of the early willingness to allow juries to pass judgment on issues of law may have been the perceived or actual parity in the

\[\text{References}\]


309. 3 U.S. 1 (1794).

310. *Id.* at 4.

311. *Id.*


313. See *Nelson*, supra note 170, at 3, 28-30 (concluding that the jury had broad control over legal, as well as factual, issues and therefore ultimate authority in the trial process).
knowledge of the law upon the part of ordinary citizens and the professional lawyers and judges. For example, John Adams stated in a diary entry:

The general Rules of Law and common Regulations of Society, under which ordinary Transactions arrange themselves, are well enough known to ordinary Jurors. The great Principles of the Constitution, are intimately known, they are sensibly felt by every Briton—it is scarcely extravagant to say, they are drawn in and imbibed with the Nurses Milk and first Air.

Often, judges themselves had little legal knowledge or possessed limited access to the law. Thus, the authority of juries to pass judgment on issues of law may have been a peculiar feature of the American system that was a result of the ignorance of early American legal professionals, and which, therefore, disappeared as knowledge of law possessed by legal professionals increased over time relative to that possessed by the general public.

During the nineteenth century, the power of the jury became less clear. As Professor Landsman notes, there was judicial pressure to

314. See Alschuler & Deiss, supra note 11, at 904 (“In the absence of law books and law-trained judges, jurors may have seemed about as well suited to resolve legal issues as anyone else.”); see also Nelson, supra note 170, at 33 (noting that between 1760 and 1774 nine of eleven judges who sat on the Supreme Court of Massachusetts had never practiced law, and six of these nine had no legal training); Alschuler & Deiss, supra note 11, at 906 (observing that limited access to legal materials may also have evened the playing field between judges and jurors). As Alschuler and Deiss have concluded, jurors initially resolved legal issues at a time when lawbooks and legal professionals were in short supply. Although some people resisted displacement of the jury’s power after real “law” became available, most consumers of governmental dispute-resolution services preferred the guidance of legal rules to the uncertainties of ad hoc community judgments. Commercial interests may have valued the greater certainty offered by professional law, but they were not alone.

Id. at 917.

315. Adams’ Diary Notes, supra note 308, at 230.

316. See Alschuler & Deiss, supra note 11, at 905-06. It has been suggested that “the authority of American juries to judge questions of law may have arisen from haphazard practice at a time when most judges lacked legal training.” Id. at 906.

317. For example, Professor Radin argues that during the beginning of the nineteenth century, the power of the jury was increased.

[In the several states the power of the judge became more and more restricted in the era that accompanied the rise of Andrew Jackson and the reorganized Democratic Party. . . . [T]he emphasis shift[ed] more and more to the jury. In many jurisdictions, judges were prevented from commenting on the evidence. In some, juries were made the judges of law as well as fact.

Radin, supra note 29, at 217. However, another commentator argues that any increase in the power
curtail the power of the jury. "The judiciary came to believe that the jury was incapable of comprehending the new industrial reality. Judges also assumed that jurors were irremediably biased against corporate defendants. Based on these assumptions, judges sought to curtail the jury's authority." \cite{Landsman2} There was a sharpening of the law-fact dichotomy that led to the disparate roles of judge and jury. \cite{ChangingRole} Between 1850 and 1931, courts in at least eleven states rejected the notion that juries had the power to pass on issues of law as well as issues of fact. \cite{Howe} In 1835, Justice Joseph Story, sitting as a trial judge, seemed to disagree with the notion that the jury could judge both issues of law and fact. Nevertheless, he recognized that the general verdict of a jury was "compounded of law and of fact." \cite{UnitedStatesvBattiste} In United States v. Battiste, Justice Story disputed the idea that

in any case, civil or criminal, [jurors] have the moral right to decide the law according to their own notions, or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law.

of the jury was offset by corresponding decreases in jury power.

On the one hand, the jury's right to decide questions of law, a colonial heritage acknowledged earlier in the century, was lost. The directed verdict and the special verdict, both methods of limiting the jury's function to fact-finding, were introduced. On the other hand, attempts were made in a majority of the states to preclude trial judges from commenting on the evidence. By the end of the [nineteenth] century, jury trial was a substantially different process from what it had been in the early days of the Republic. The Changing Role, supra note 300, at 170 (footnote omitted); see also Nelson, supra note 170, at 8 (noting that by 1830 in Massachusetts, law was "stated to juries by the court, and their verdicts were set aside if they failed to follow the court's instructions"); Martin A. Kotler, Reappraising the Jury's Role as Finder of Fact, 20 Ga. L. Rev. 123, 127 (1985) (noting the decline of the jury's law-finding power during the nineteenth century).

318. Landsman, supra note 2, at 607. After ratification of the Fourteenth Amendment, one commentator stated that "[t]he preponderance of judicial authority in this country is in favor of the doctrine that the jury should take the law from the court and apply it to the evidence under its direction." Proffatt, supra note 12, § 376, at 440.

319. As one commentator has noted:

An attempt was made to sharpen the law-fact dichotomy and give it concrete institutional expression. On the one hand, the jury's right to decide questions of law was denied; and the special verdict at the discretion of the judge and the directed verdict were developed to keep determinations of law from the jury. The Changing Role, supra note 300, at 173; see also Kotler, supra note 317, at 127 ("The eighteenth century conception of the jury's function as that of finder of law evolved during the early nineteenth century into the modern notion that the jury is essentially a finder of fact.").

320. See Howe, supra note 266, at 592-613 (noting that Connecticut, Georgia, Illinois, Louisiana, Maine, Massachusetts, New York, Pennsylvania, Tennessee, Vermont, and Virginia rejected the notion that juries had the power to decide issues of law).

It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court. Therefore, it would seem that the law-fact dichotomy became elevated to the level of a constitutional imperative during the nineteenth century, whereas prior to this time, such a dichotomy and restriction on the power of the jury to determine issues of law may have been seen as constitutionally impermissible.

It does appear, however, that even in the nineteenth century there was still some support for the notion that the jury possessed the power to determine issues of law. Even in 1851, several states declared the authority of juries to decide questions of law in their constitutions or statutes, including Connecticut, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Pennsylvania, and Tennessee. Six states established the authority of the jury to determine issues of law through judicial practice. Therefore, the power of the jury to determine issues of law was not one that vanished overnight, but rather was gradually rolled back over a period spanning at least one hundred years.

This erosion of the power of juries to decide questions of law culminated in 1895 when the Supreme Court held in Sparf v. United States that in the federal courts “it is the duty of juries in criminal cases to take the law from the court.” The Court reasoned that “the functions of court and jury . . . cannot be confounded or disregarded without endangering the stability of public justice, as well as the security of private and personal rights.” Thus, it appears that the value of legal certainty stood as the purported rationale for the erosion of the jury’s power, which had originally been conceived of as extending to the determination of issues of law as well as issues of fact. The power of the jury was thus significantly curtailed relative to that of the other participants in the adjudicatory process—the judges and the lawyers who controlled the rules of the legal system and had seemingly enlarged their respective powers to the jury’s detriment.

Today, as a formal matter, there is still no complete uniformity among the states concerning the power of juries to decide issues of law.

322. Id.
324. The following states established this authority: Maine, New Hampshire, New York, Rhode Island, Vermont, and Virginia. See id. at 590-96, 596 n.57.
325. 156 U.S. 51, 102 (1895). But see id. at 114 (Gray & Shiras, JJ., dissenting) (arguing that the jury in a criminal case has an inherent right to decide both questions of fact and law).
326. Id. at 106.
as well as issues of fact, although the general rule is that the jury lacks
the power to determine questions of law.\(^{327}\) The state constitutions of
Georgia, Indiana, and Maryland all provide that jurors shall judge
questions of law as well as questions of fact.\(^{328}\) However, the effect of
these constitutional provisions has been virtually eliminated by judicial
decisions.\(^{329}\) Thus, it would seem that the erosion of the jury’s power
to determine issues of law is complete.

The vagueness of the law-fact dichotomy may be seen not only in
what questions are left for the jury, but also in what questions are left for
the judge. Just as early judges did not possess the power to determine all
questions of law, early juries did not have the authority to pass on every
question that might be characterized as one of fact. As James Thayer
noted over a century ago, “there is not and never was any such thing as
an allotting of all questions of fact to the jury.”\(^{330}\) Thayer defined the
“fundamental conception” of a fact as that of “a thing as existing, or
being true.”\(^{331}\) Thayer defined “law” as “a rule or standard which it is
the duty of a judicial tribunal to apply and enforce.”\(^{332}\) According to
Thayer, judges traditionally employed several mechanisms for removing
questions of fact from the province of the jury. Judges could fix the
definition of legal terms, employ a demurrer upon evidence, change the
forms of pleading, urge (and perhaps compel) special verdicts, and guide
and supervise the jury.\(^{333}\) These mechanisms illustrate the fact that the
separation of powers between the judge and jury, based largely on the
law-fact dichotomy, has never been a razor-sharp separation, but one that
has existed in a state of flux. Gradually, the power of the jury along this

\(^{327}\) See Kadish & Kadish, supra note 264, at 50.

\(^{328}\) See Ga. Const. art. I, § 1, ¶ 11 (“In criminal cases . . . the jury shall be the judges of the
law and the facts.”); Ind. Const. art. I, § 19 (“In all criminal cases whatever, the jury shall have the
right to determine the law and the facts.”); Md. Const., Declaration of Rights, art. 23 (“In the trial
of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court
may pass upon the sufficiency of the evidence to sustain a conviction.”).

made it clear that curious constitutional relic has, through the interpretive process, been shrivelled
up to almost nothing.”); see also Conklin v. State, 331 S.E.2d 532, 543 (Ga. 1985) (reading the
Georgia Constitution narrowly with regard to jurors as judges of law).

\(^{330}\) Thayer, supra note 138, at 148.

\(^{331}\) Id. at 152. Thayer continues by stating that the fundamental conception “is not limited to
what is tangible, or visible, or in any way the object of sense; things invisible, mere thoughts,
intentions, fancies of the mind, propositions, when conceived of as existing or being true, are
conceived of as facts.” Id.

\(^{332}\) Id. at 153.

\(^{333}\) See id. at 161-67. For a detailed discussion of such mechanisms of judicial control of the
jury, see infra Part III.D.2.
line has been eroded in favor of the judge with issues increasingly being characterized as legal rather than factual, and with additional procedural mechanisms such as the directed verdict, summary judgment, and judgment notwithstanding the verdict developing in the civil context that remove questions from the jury's factfinding province on the grounds that there is no real issue of fact.

2. The Role of the Jury in the Trial

The role of the jury in the adjudicatory process has been curtailed in other ways. As in England, the role of the jury during the course of a trial in America originally was much greater than that of the modern American jury. Traditionally, jurors undertook a more active role in gathering facts and questioning witnesses. Early jurors were given wide latitude in consulting with individuals who might aid them in their decisionmaking process. During the nineteenth and early twentieth centuries, courts allowed jurors to question witnesses. This practice

334. See supra notes 138-69 and accompanying text.


336. It is interesting to note that in the Massachusetts Body of Liberties of 1641, jurors were actually guaranteed the right to consult with anyone in order to render their verdict. Article 76 provides as follows:

> Whensoever any Jurie of trialls or Jurours are not cleare in their Judgements or consciences concerning any cause wherein they are to give their verdict, They shall have libertie in open Court to advise with any man they thinke fitt to resolve or direct them, before they give in their verdict.


337. See Pacific Improvement Co. v. Weidenfeld, 277 F. 224, 227 (2d Cir. 1921) (reversing the trial court's allowance of juror questioning); Superior & Pittsburg Copper Co. v. Tomich, 165 P. 1101, 1104 (Ariz. 1917), aff'd, 250 U.S. 400 (1919); Chicago, Milwaukee & St. Paul R.R. v. Krueger, 23 Ill. App. 639, 643 (1887) (discussing whether juror questioning of witness was biased); Schaeffer v. St. Louis & S. Ry., 30 S.W. 331, 333 (Mo. 1895) (approving juror questions); State v. Kendall, 57 S.E. 340, 341 (N.C. 1907) (stating that allowing juror questions "has always been followed without objection . . . in the conduct of trials in our superior courts"); Michael A. Wolff, Comment, Juror Questions: A Survey of Theory and Use, 55 MO. L. REV. 817, 817 (1990); see also Chicago Hansom Cab Co. v. Havelick, 22 N.E. 797 (Ill. 1889) (finding no cause for complaint in allowing jurors to ask questions); Chicago, M. & St. P. Ry. v. Harper, 21 N.E. 561, 561 (Ill. 1889) (finding no error in failing to exclude juror who questioned witness).
was mentioned in appellate opinions dating back to 1825.\footnote{338} At least some Antifederalists also intended that the jury have a "strong and significantly independent role."\footnote{339} Thus, within a significant segment of society, the jury was perceived as an active institution. Finally, there is evidence that early juries were at least permitted to take notes during trial.\footnote{340} Thus, it is likely that the role of the early American jury closely paralleled the active role of the early English jury.

3. Authority to Determine Sanction in Criminal Cases

Although scant research has been done on the subject, from what is known, it seems that early colonial juries had authority to indirectly determine sentencing much as the early English jury did. Furthermore, some colonies conferred on juries greater authority to determine sentences in criminal cases explicitly.\footnote{341} Even toward the middle of the twentieth century, state statutes authorized juries to determine sentencing in capital and noncapital cases.\footnote{342} Thus, as in England, the American jury frequently played a broader role in the trial process by determining criminal sanction as well as issues of guilt or innocence.

IV. CONSTITUTIONAL CONSTRAINTS AND HISTORICAL ANALYSIS

Although many of the proposed reforms of the jury system discussed in this Article have not met with much opposition on

\footnote{338} See Jonathan M. Purver, Annotation, Propriety of Jurors Asking Questions in Open Court During Course of Trial, 31 A.L.R. 3d 872, 878-80 (1970). In the case of United States v. Burr, 25 F. Cas. 55, 97-98, 101, 105-13 (C.C.D. Va. 1807) (No. 14,693), several members of the grand jury asked questions of witnesses as did the accused.

\footnote{339} Wolfram, supra note 176, at 723.

\footnote{340} See Petroff, supra note 155, at 128-29. For example, in the trial of Aaron Burr before a grand jury, the reporter made the following observation:

After the indictment was read, Mr. Hay [the district attorney] requested that the jury should be furnished with implements necessary to enable them to take notes on the evidence, and also on the arguments if they should think proper; that as the cause was important, and would require their attention, it would be proper to afford them this assistance. This was accordingly done.

\textit{Burr}, 25 F. Cas. at 89.

\footnote{341} See National Comm'n on Law Observance and Enforcement, Report on Criminal Procedure 27 (1931); Michael H. Tonry, Jury Sentencing, in 4 Encyclopedia of Crime and Justice 1465 (Sanford H. Kadish ed., 1983) ("The original reasons for jury sentencing in America included colonial distrust of judges appointed by the Crown, a democratic faith in citizen involvement in the justice system, and the general lack of differences in training and competence between the judge and the jury during much of the nineteenth century.").

\footnote{342} See Comment, Consideration of Punishment by Juries, 17 U. Chi. L. Rev. 400, 405 n.21 (1949-50).
constitutional grounds, any proposed reform of jury procedures must fit within the confines of due process and jury guarantees. Reforms of federal jury procedures must be consistent with Fifth, Sixth, and Seventh Amendment guarantees, while states are constrained by the Fourteenth Amendment’s guarantee of due process and trial by jury in criminal cases. States may be further constrained by jury trial and due process guarantees found in state constitutions. Therefore, what was meant by “trial by jury” and “due process” at the time of the founding \(^{343}\) (in the case of the federal government) and at the time of ratification of the Fourteenth Amendment (in the case of the states) are critical issues.

Several commentators have noted that there may be constitutional objections to reform of the jury system.\(^{344}\) However, most of the reforms discussed in this Article have never been found to be constitutionally objectionable, and are actually authorized by current procedural rules in some jurisdictions. Under the most charitable evaluation, it seems that professional inertia on the part of lawyers and judges has resulted in their disuse. In order to overcome some of this inertia, it may be beneficial to demonstrate the constitutionality of the proposed reforms as well as their historical pedigree.

The constitutional and historical analysis proceeds as follows: Subpart IV.A discusses the internal structure and composition of the jury, arguing that jurors should be selected for their experience and that the use of peremptory challenges and extensive voir dire be curtailed or eliminated. As noted above,\(^{345}\) the practice in early English and American jury trials was to select jurors in a way that was relatively random except where special characteristics of potential jurors, such as their level

\(^{343}\) For example, in analyzing whether or not the number and qualifications of jurors were prescribed under the constitution of Mississippi, Chief Justice Sharkey stated:

\[\text{[T]he right of trial by jury, being of the highest importance to the citizen, and essential to liberty, was not left to the uncertain fate of legislation, but was secured by the constitution of this and all the other states as sacred and inviolable. The question naturally arises, how was it adopted by the constitution? that [sic] instrument is silent as to the number and qualifications of jurors; we must, therefore, call in to our aid the common law for the purpose of ascertaining what was meant by the term jury.} \]

\[\text{Byrd v. State, 2 Miss. (1 Howard) } 163, 177 \text{ (1835) (reargument of the case).} \]

\(^{344}\) For example, several commentators have noted potential constitutional objections to the more radical reform of replacing the jury with a mixed panel similar to that found in continental systems. \textit{See supra} note 14. \textit{But see} Alschuler, \textit{supra} note 14, at 995-1011 (arguing that constitutional requirements could be met without resort to constitutional amendment or “radical” judicial reinterpretation if reforms such as implementing a mixed court of professional and lay judges were found to adequately serve the purposes of the guarantees in the Bill of Rights).

\(^{345}\) \textit{See supra} notes 55-64, 219-39 and accompanying text.
of education or experience with issues to be adjudicated, warranted a departure from the principle of random selection. In contrast, in the United States, extensive voir dire and the use of peremptory challenges not only increase delay, but also lead to undesirable strategic behavior on the part of lawyers who use these procedures in order to gain an unfair advantage at trial.

The analysis of this Subpart illustrates that the following reforms are not constitutionally problematic and are consistent with historical practices in England and America: (1) selecting jurors for their level of education or previous trial experience as well as impaneling special juries when necessary to improve jury functioning; (2) abandoning the practice of extensive lawyer-conducted voir dire and peremptory challenges, except perhaps in capital cases where peremptory challenges exercised by the defendant were traditionally viewed as essential to the notion of “trial by jury”; (3) insisting on a jury of twelve as being inherent in the jury guarantee; and (4) insisting on a rule of unanimity as inherent in the jury guarantee.

Subpart IV.B examines judicial control of the jury and proposals to allow more extensive judicial commentary on the evidence and the credibility of witnesses, as well as to relax the rigid rules of evidence that keep probative evidence from the jury. As noted above, early English and American judges possessed greater power to comment on the evidence and credibility of witnesses. The fact that this is not often done in modern American jury trials deprives the jury of a valuable source of information concerning the weight they should assign the evidence in rendering their verdict. Furthermore, this judicial power authorizes the exercise of merely persuasive authority over the jury, and not coercive authority. Therefore, its exercise would not seem to impair the rights of the parties.

The analysis of this Subpart illustrates that the following reforms would not be constitutionally problematic and would be consistent with historical practices in England and America: (1) simplifying jury instructions and making the interaction between judge and jury less formal; (2) allowing judicial summary and comment on the evidence; (3) eliminating many of the complex and truth-defeating rules of evidence found in the American system; and (4) cutting back on procedures such as the directed verdict and judgment notwithstanding the verdict that constrain the power of the jury.

346. See supra notes 106-16, 278-81 and accompanying text.
Finally, Subpart IV.C examines the role of the jury in the adjudicatory process and proposals that allow jurors to question witnesses, communicate with each other prior to deliberations, and take notes. The jury has evolved from an active investigator of the facts to a passive observer of the evidence in court. This is arguably an undesirable procedural development, for it deprives the jury of its ability to accurately carry out its factfinding duty. It also deprives the other participants in the trial of information concerning the jury’s view of the case.

The following reforms would be constitutional as well as consistent with historical English and American practices: (1) allowing juror questioning of witnesses; (2) allowing communication among the jurors prior to deliberation; (3) allowing jurors to take notes; and (4) giving the jury a greater role in determining sanctions in criminal trials.

A. Internal Structure and Composition of the Jury

The internal structure and composition of the modern American jury has evolved away from the internal structure and composition of early English and American juries. Modern jurors are less experienced than their counterparts in early English and American juries. Extensive voir dire and the use of peremptory challenges eliminate some of the most qualified potential jurors from consideration. Furthermore, there is pressure to reduce the size of the jury and abandon the requirement of unanimity—procedural aspects of jury practice that were historically relatively constant and therefore probably viewed as being essential to trial by jury.

1. Experience and Qualifications of the Jury

Selection of modern jurors is not particularly random in the sense that modern procedures result in the exclusion of many categories of individuals, particularly those who are better educated or have heavy demands on their time.347 In contrast, jurors in early English and

---

347. See Stephen J. Adler, The Jury: Trial and Error in the American Courtroom 219-20 (1994). Despite the fact that jury selection often results in jurors being less educated than the average member of the population, courts have at times exhibited a great deal of confidence in their abilities. For example, the Ninth Circuit made the following remarks concerning jurors in complex civil cases:

The opponents of the use of juries in complex civil cases generally assume that jurors are incapable of understanding complicated matters. This argument unnecessarily and improperly demeans the intelligence of the citizens of this Nation. We do not accept such an assertion. Jurors, if properly instructed and treated with deserved respect, bring collective intelligence, wisdom, and dedication to their tasks, which is rarely equalled in
American trials had greater trial experience and were probably better educated relative to the average member of society than are modern jurors. The fact that modern American jurors are deficient in these areas can only lead to problems in the functioning of the jury. This prediction is supported by empirical evidence concerning the functioning of the jury. Thus, there have been calls for reform of procedural mechanisms that tend to reduce the average education and level of trial experience of jurors.

Jurors in early English and American juries were on average more experienced in trial practice than modern jurors because of the large number of trials for which they were impaneled and previous experience they often had serving on juries. The relatively short length of these early trials made it practical to follow such a procedure. Requiring jurors to sit for multiple trials was only practical where trials were relatively short and jurors would not be drawn away from their roles in society for long periods of time.

Not only were jurors more experienced with trial practice than modern jurors, but they were also, unlike modern jurors, among the other areas of public service.

In re United States Fin. Sec. Litig., 609 F.2d 411, 429-30 (9th Cir. 1979).

348. Empirical studies support the conclusion that often the members of the jury do not possess the requisite experience or ability necessary to understand the issues that they are charged with resolving. For example, a number of studies have indicated that jurors do not understand specific words used in jury instructions or their overall meaning, which may result in misapplication of the law to the facts in a case. See, e.g., REID HASTIE ET AL., INSIDE THE JURY 80-81 (1983) (noting that jurors tried to follow the judge's instructions, but often made a number of mistakes of law); Amiram Elwork et al., Toward Understandable Jury Instructions, 65 JUDICATURE 432, 440 (1982) (concluding that jurors with higher educational levels were more likely to answer questions correctly).

Furthermore, there is empirical evidence that educated jurors tend to participate in deliberations more frequently and remember more than other jurors. See HASTIE ET AL., supra, at 135-47 (noting that jurors who participated more during deliberations were also more open-minded).

Finally, as might be expected, empirical studies also tend to indicate that more educated or more experienced jurors tend to better comprehend jury instructions. See Robert P. Charrow & Veda R. Charrov, Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions, 79 COLUM. L. REV. 1306, 1320-21 (1979) ("[T]he only factor that consistently and significantly correlated with performance was the amount of education that a subject had had . . . . "[C]omprehension rose as education level rose."); Laurence J. Severance et al., Toward Criminal Jury Instructions that Jurors Can Understand, 75 J. CRIM. L. & CRIMINOLOGY 198, 224 (1984) ("[J]urors with greater experience and learning apparently comprehend and apply jury instructions better than those who are less experienced and/or less well educated."); David U. Strawn & Raymond W. Buchanan, Jury Confusion: A Threat to Justice, 59 JUDICATURE 478, 483 (1976) (concluding that "those jurors with some previous college experience tended to score higher [on juror comprehension tests] after receiving instructions than those without college experience").

349. See supra notes 55-64, 219-36 and accompanying text.
better-educated members of society. Property qualifications and the prohibition against women serving on juries, although negative aspects of traditional practice when viewed through modern eyes, probably helped to ensure that the members of the jury would be among the most educated members of society. While it is true that not all property holders necessarily were more educated than the average citizen (and the same might be said of women), on average, property holders could be expected to have the requisite wealth and leisure time necessary to obtain a greater amount of education. Therefore, the selection of jurors for the average jury was not particularly random, reflecting a perfect "cross-section" of the whole community, but rather was skewed in favor of selection of the better-educated segment of society.

In contrast to the early English or American juror, the modern juror is often relatively uneducated in relation to the general population. The modern selection process is skewed in favor of selection from less educated and experienced segments of society. Members of society who are better educated often escape jury duty. Furthermore, more educated members of society are sometimes excused from jury service for cause, and there is some evidence that lawyers may attempt, in certain instances, to utilize peremptory challenges to strike more educated jurors. The result is a less-qualified jury. For example, in a 1973 commercial suit, alleging various antitrust and patent violations in which the plaintiff asked for damages of up to one and one-half billion dollars, the members of the jury had an average of a tenth-grade education. In such cases, the education and experience of the jurors is a factor in reaching an accurate outcome, due to the complexity of the issues and the length of the trial.

Furthermore, under early selection procedures, individuals having knowledge or expertise that might be useful in understanding the facts and issues involved in the case were often favored to serve on juries. In contrast, the modern American jury is composed of jurors who are not

351. See Ell, supra note 350, at 780-81.
353. See Ell, supra note 350, at 776. The jury heard evidence in the trial for approximately 215 days and deliberated for another 38 days. See SCM Corp., 463 F. Supp. at 986.
selected for their expertise in areas that will be dealt with at trial. Instead, modern jurors may bring an array of experiences to the trial process that may have nothing to do with the issues to be tried, or which may randomly influence their decisions in unexpected ways. These advantages of the early jury have been eroded due to modern innovations. Modern exemption statutes and peremptory challenges both serve to remove individuals who might be experienced in the field that is the subject of the lawsuit or who might be more qualified to serve as jurors. Furthermore, individuals who might overcome inexperience due to having better educational backgrounds, for example, are often weeded out of the jury pool.

Finally, early English juries were expected to rely on personal knowledge concerning issues to be tried. This is unlike the modern

---

354. This is a particularly salient problem in the area of complex civil cases. For example, Professor Lempert has noted:

[T]he qualities of those who serve as jurors affect the quality of jury decision-making . . . . The time demands of complex cases mean that employed workers tend disproportionately to be missing from the juries that hear them. This is unfortunate because the employed include people with special knowledge regarding the issues that the jury must resolve as well as higher status, better educated individuals who, when they sit on juries, tend to make particularly valuable contributions.

Lempert, supra note 4, at 117-18 (footnote omitted).

355. As Professors Kalven and Zeisel observed in their study of the American jury:

Interviews with jurors and access to experimental jury deliberations abundantly show that jurors bring to their deliberations much extra knowledge—some of which certainly would not be known to the judge. The jury’s extra information tends to be some item of personal experience not part of the trial, or some generalization about human nature, such as “people drink a good deal at Polish weddings” or “the very inability of the doctor to find anything wrong with a person’s back is really good evidence that there is something seriously wrong,” to take two vivid examples from our files for other parts of the jury study.

Kalven & Zeisel, supra note 2, at 131-32 (footnote omitted).


358. In support of this contention, Professor Broeder makes the following observation: “The body of law governing the selection of jurors, rather than recognizing and attempting to reduce the effects of the juror’s inexperience in handling legal matters, has instead exempted from service many of the groups who might best be expected to overcome this handicap.” Id. at 390.

359. See supra notes 57-59 and accompanying text. As one commentator noted in discussing the ancient mode of jury trial in England:

The jury rendered their verdict upon their own private beforehand knowledge of the facts in the case, and were selected because they possessed such knowledge . . . .

Under the modern jury system all this is changed; jurors are now selected because of their lack of beforehand knowledge of the facts in controversy, and the jury in rendering its verdict, so far as these facts are concerned, can only act upon knowledge
American approach, which rigidly prohibits the use of personal knowledge by jurors in the resolution of factual issues arising during trial. This modern approach is perhaps unduly naive in that it is likely that jurors will utilize personal knowledge to some extent in every trial. Jurors cannot come to trial with a completely blank slate. Furthermore, the modern approach perhaps unduly restricts the power of the jury, much like the presence of complex and technical rules of evidence that keep relevant information from the jury and prevent the jury from basing its decisionmaking process on such information.

Even though historical jury selection procedures were not particularly random, there are some potential constitutional objections to abandonment of random selection of jury members under the Supreme Court's modern case law. In the context of the criminal trial, impartiality of the jury is constitutionally mandated by the Sixth Amendment. Impartiality and representativeness of the jury have been of particular concern to the Supreme Court in recent years. However,
the Court has not recognized a fundamental requirement of a representa-
tive jury. Nor has the Court held that the Constitution requires random selection of the jury. The Court has, however, interpreted the
right of an individual not to be assumed incompetent for or excluded from jury service on account of race, and (3) the need to maintain "public confidence in the fairness of our system of justice." Id. at 85-87; see also Taylor v. Louisiana, 419 U.S. 522, 530-31 (1975) (emphasizing the public confidence rationale as well as the need to guarantee "diffused impartiality"). The rule in Batson has been extended to gender-based peremptories. See J. E. B. v. Alabama ex rel. T. B., 511 U.S. 127 (1994). Furthermore, in recent years, the Court has decided a number of cases concerning racial discrimination in jury selection. See Georgia v. McCollum, 505 U.S. 42 (1992) (prohibiting criminal defendant from exercising race-based peremptories); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (prohibiting private civil litigants from exercising race-based peremptories); Hernandez v. New York, 500 U.S. 352 (1991) (upholding a finding by the trial court that the prosecutor's explanation for peremptory challenges of Hispanic jurors was sufficiently race-neutral); Powers v. Ohio, 499 U.S. 400 (1991) (holding that a white criminal defendant has standing under the Equal Protection Clause to challenge the prosecutor's striking of racial minorities); Holland v. Illinois, 493 U.S. 474 (1990) (holding that a white criminal defendant has standing under the Sixth Amendment to challenge the prosecutor's striking of black jurors, but rejecting a claim on the merits because the Sixth Amendment's cross-section requirement is inapplicable in the context of peremptory challenges).

364. See, e.g., Taylor, 419 U.S. at 522. In Taylor, the majority explicitly stated:

[We impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.]

Id. at 538 (citations omitted). Similarly, in Thiel v. Southern Pacific Co., 328 U.S. 217 (1946), a civil case involving the exclusion of individuals working for a daily wage from jury lists, the Court stated:

The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups.

Id. at 220 (citations omitted).

365. For example, in Carter v. Jury Commission, 396 U.S. 320 (1970), the Court upheld the constitutionality of an Alabama requirement that jurors be "generally reputed to be honest and intelligent and . . . esteemed in the community for their integrity, good character and sound judgment." Id. at 323 (quoting ALA. CODE § 12-16-60 (1967)); see also Turner v. Fouche, 396 U.S. 346, 354-55 (1970) (upholding another Georgia law allowing jury commissioners to eliminate persons found not to be "upright" and "intelligent").

Courts have also upheld age-based criteria for jury selection. See, e.g., United States v. Garrison, 849 F.2d 103, 105-06 (4th Cir. 1988); Barber v. Ponte, 772 F.2d 982, 1000 (1st Cir. 1985) (en banc); Donald H. Zeigler, Young Adults as a Cognizable Group in Jury Selection, 76 MICH. L. REV. 1045, 1047 (1978) ("Judges have lamented the underrepresentation caused by the unwillingness of the young to serve but have declined to remedy it . . . ."). But see Vikram David Amar, Jury Service as Political Participation Akin to Voting, 80 CORNELL L. REV. 203, 204 (1995) (interpreting the Court's case law as suggesting that the use of wealth classifications in jury selection is disturbing). Professor Amar continues by arguing that age-defined groups are essential participants
impartiality requirement of the Sixth Amendment to mean that a jury must be derived from a cross-section of the community.\textsuperscript{366} Juries "must be drawn from a source fairly representative of the community,"\textsuperscript{367} and in the jury process and that the Court should protect against jury service discrimination on the basis of age. See id. at 206.

Even when the Court has indicated that group-based selection criteria such as wealth might be problematic, it has indicated that competence is important and that competence as measured individual-by-individual would be a permissible selection factor. For example, in \textit{Thiel}, the Court stated:

Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.

\ldots

Jury competence is not limited to those who earn their livelihood on other than a daily basis. One who is paid $3 a day may be as fully competent as one who is paid $30 a week or $300 a month. In other words, the pay period of a particular individual is completely irrelevant to his eligibility and capacity to serve as a juror. Wage earners, including those who are paid by the day, constitute a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system. Were we to sanction an exclusion of this nature we would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status. \ldots That we refuse to do.

328 U.S. at 220, 223-24 (footnote omitted).

\textsuperscript{366} See, e.g., \textit{Thiel}, 328 U.S. at 220; \textit{Glasser} v. United States, 315 U.S. 60, 86 (1942); \textit{Smith} v. Texas, 311 U.S. 128 (1940). However, as two commentators have noted, the fact that the jury must be drawn from a cross-section of the community does not mean that non-random jury selection procedures and special juries are necessarily unconstitutional:

In ascertaining the scope of permissible action Congress might take to alter current jury selection practices in an effort to improve juror competence, constitutional cross-section requirements must be considered carefully. At the same time, however, the limits of the cross-section doctrine itself must be recognized. The Court's discussions of the need for a representative jury in the context of civil litigation have been infrequent, and significantly, the Supreme Court has never used the Constitution to condemn civil jury selection practices that result in deviation from the fair cross-section standard.

\textit{Luneburg & Nordenberg}, supra note 4, at 922. The commentators continue:

Although any plan for special juries necessarily would involve the systematic exclusion of those persons eligible for "regular" jury service but unable to meet the more demanding standards set for service on a special jury, such a plan need not result in a cross-section violation as defined by the Court.

\textit{Id.} at 927.

\textsuperscript{367} \textit{Taylor}, 419 U.S. at 538. At least one commentator has noted that it is not at all clear why juries must necessarily be representative of the community:

As an initial matter, it is not obvious that a jury should be representative at all. Democracy requires that citizens be the ultimate decisionmakers on questions of policy—questions of what the law should be. Such decisions are reached through the political process, and for its legitimacy, that process must represent the people. Juries, however, do not decide what the law should be; they decide facts. Their role is the technical one of applying the law and not making it. Once the people have decided political issues through the legislative process, it might seem that the need to represent
there may be no systematic exclusion of any "distinctive groups in the community" from the jury. As the Court has stated, "[r]ecognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system." In *Duren v. Missouri*, the Court enumerated the elements necessary to show a cross-section violation:

[T]he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

This cross-section requirement has been justified by the Court on the grounds that it guards "against the exercise of arbitrary power" that might occur where certain groups are excluded from the pool of potential jurors. Furthermore, the Court has attempted to justify the fair cross-

the citizenry has been satisfied.


368. Castaneda v. Partida, 430 U.S. 482, 510 (1977) (Powell, J., dissenting) (quoting Taylor, 419 U.S. at 538); see also Peters v. Kiff, 407 U.S. 493, 503 (1972) (plurality opinion) (concluding that "[w]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable").

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government. Smith v. Texas, 311 U.S. 128, 130 (1940) (footnote omitted).

This preoccupation with group bias is somewhat problematic in the sense that it may be too simplistic to assume that every individual in some way identifies with a particular group and therefore is somehow representative of that group. See T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1050, 1076 ("The allure of colorblindness is strong...[I]t fits with liberal, individualistic principles that each person should be assessed on individual merits, not upon the basis of group membership.").

371. Id. at 364.
372. *Taylor*, 419 U.S. at 530. In *Taylor*, the Court recognized that the cross-section requirement might also prevent governmental abuse:

The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps
section requirement in terms of the advantages of the jury as an adjudicatory body. The Court has stated that the requirement "make[s] available the commonsense judgment of the community," helps to further "public confidence in the fairness of the criminal justice system," enables a broad section of the populace to share responsibility for the administration of justice, and ensures that the jury's deliberations will be characterized by "a diffused impartiality."

The problematic nature of the impartiality requirement was noted by the Court in *Batson v. Kentucky*, a case striking down racially-based peremptory challenges as unconstitutional under the Fourteenth Amendment.

Though the Sixth Amendment guarantees that the petit jury will be selected from a pool of names representing a cross section of the community, we have never held that the Sixth Amendment requires that "petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society. Such impossibility is illustrated by the Court's holding that a jury of six persons is not unconstitutional.

However, there has been pressure to read a representativeness requirement into the requirement of an impartial jury. In general, litigants have a right to a jury that is selected at random from a fair cross-section of the community. The purported rationale behind this requirement

---

overconditioned or biased response of a judge. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.

*Id.* at 530 (citation omitted).

373. *Id.*
374. *Id.*
375. See *id.*
376. *Id.*
378. Id. at 85-86 n.6 (citations omitted) (quoting *Taylor*, 419 U.S. at 538).
380. See 28 U.S.C. § 1861 (1982) ("Litigants . . . have the right to . . . petit juries selected at random from a fair cross section of the community . . . ."); see also *Ballard v. United States*, 329 U.S. 187, 193 (1946) (reversing a conviction by an all-male jury where women were excluded); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946) (holding that the American tradition of trial by jury necessarily contemplates an impartial jury drawn from a cross-section of the community);
JURY REFORM

is "to guard against the exercise of arbitrary power"\textsuperscript{381} that might result "if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool."\textsuperscript{382}

However, arguably the selection of jurors based on nonarbitrary criteria does not run afoul of the impartiality requirement as enunciated by the Court. Criteria such as intelligence, educational background, or trial experience may be perfectly suitable and constitutional criteria by which to select jurors when necessary to serve the goal of just adjudication.\textsuperscript{383} As one lower court has stated:

The less educated, like the young, are a diverse group, lacking in distinctive characteristics or attitudes which set them apart from the rest of society. They are of varying economic backgrounds, and races, and of many different ages. We believe the interests of this group can be adequately protected by the remainder of the populace.\textsuperscript{384}

Such criteria do not resemble impermissible criteria such as race or gender with which the Court has been concerned. In many cases, the

\begin{flushleft}
\textsuperscript{381} Taylor, 419 U.S. at 530.
\textsuperscript{382} Id.
\textsuperscript{383} It is noteworthy that several states already permit the selection of jurors based on criteria such as whether the person is "experienced, intelligent, and upright." Nancy J. King, Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection, 68 N.Y.U. L. REV. 707, 715 (1993).
\textsuperscript{384} Smith v. Texas, 311 U.S. 128, 130 (1940) (holding that a state policy excluding blacks from jury service violated the Equal Protection Clause of the Fourteenth Amendment because resulting juries were not representative of the community).
\end{flushleft}
above criteria will be directly relevant to achieving an accurate result from the jury. Although there are potential constitutional objections to utilizing selection criteria that put a premium on education level or trial experience in some cases, they may be obviated.

For example, the Supreme Court has specifically addressed the constitutionality of special juries. In upholding the constitutionality of the New York special jury selection procedure in 1947, the Supreme Court stated that "[e]ach of the grounds of elimination is reasonably and closely related to the juror's suitability for the kind of service the special panel requires or to his fitness to judge the kind of cases for which it is most frequently utilized." However, in the same case, dissenting Justice Murphy voiced the following concerns:

The constitutional vice inherent in the type of "blue ribbon" jury panel here involved is that it rests upon intentional and systematic exclusion of certain classes of people who are admittedly qualified to serve on the general jury panel. Whatever may be the standards erected by jury officials for distinguishing between those eligible for such a "blue ribbon" panel and those who are not, the distinction itself is an invalid one. It denies the defendant his constitutional right to be tried by a jury fairly drawn from a cross-section of the community. It forces upon him a jury drawn from a panel chosen in a manner which tends to obliterate the representative basis of the jury.

Therefore, although there are serious issues regarding the constitutionality of special juries and other nonrandom selection procedures, it is unlikely that such procedures run afoul of traditional notions of due process or trial by a jury of one's peers, even under the Court's modern case law.

The Court's statements concerning the competency of jurors seem to leave the door open to selection based on educational background as a factor indicating an individual's competence as a juror, rather than


Special juries, it need scarcely be said, were familiar adjuncts and adjuvants in the administration of justice from the earliest period of the common law. This is but the assertion of what might almost be termed a prehistoric legal truism, since their origin is too remote in the mists of authority to be now successfully traced.

State v. Withrow, 36 S.W. 43, 46 (Mo. 1896) (emphasis added).

386. Fay, 332 U.S. at 270.
387. Id. at 297-98 (Murphy, J., dissenting).
JURY REFORM

singling out a certain group as incompetent to serve as jurors. Furthermore, although jury selection is designed to result in a jury reflecting a representative cross-section of the community, there is no right to a representative cross-section of the community on any given jury.\textsuperscript{388} There is also no right to a randomly selected jury.\textsuperscript{389} Finally, it must be noted that textually, the impartiality requirement only applies in the context of the criminal jury.\textsuperscript{390}

However, even if the Court's current position cannot be reconciled with the selection of jurors based on some criterion indicating an ability to reach a just outcome in deciding cases, arguably such a selection procedure would better reflect principles embodied in the constitutional protections of due process and jury trial. As one commentator has noted:

> [W]hile the cross-section requirement ensures that the jury is representative of the community and has the full moral weight of the community behind it, if juries were composed of specially qualified individuals or groups—for example, those selected on different grounds, such as intelligence—a jury decision arguably would be more accurate. The cross-section impartiality requirement thus appears to sacrifice the competence of the individual decisionmaker for representative, group decisionmaking.\textsuperscript{391}

Such an abandonment of the goal of accuracy in favor of a blind adherence to the principle of representativeness arguably tramples on the litigants' due process rights in the civil context, and a defendant's right to a fair trial in the criminal context.

\textsuperscript{388} See Holland v. Illinois, 493 U.S. 474, 478 (1990) (holding that the Sixth Amendment does not preclude the use of peremptory challenges to strike members of particular groups from the jury); Frazier v. United States, 335 U.S. 497, 507-08 (1948) (holding that if a jury is selected lawfully, it does not matter that the jury is not representative of the community).

\textsuperscript{389} See United States v. Wellington, 754 F.2d 1457, 1468 (9th Cir. 1985) (explaining that the Sixth Amendment does not compel random selection of jurors).

\textsuperscript{390} However, Congress has statutorily imposed a fair cross-section requirement with regard to civil cases in federal courts. See Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 (1994) ("It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes."). Furthermore, statements by the Attorney General indicate that this cross-section requirement should be construed to prevent special juries. See Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States: Hearings on H.R. 14765 Before the Subcomm. No. 5 of the House Comm. on the Judiciary, 89th Cong., 2d Sess. 1078 (1966) (statement of Nicholas Katzenbach). As two commentators have concluded, "[a]ny move toward more stringent standards in the selection of federal jurors would seem. . . to require congressional modifications of the present jury selection act." Luneburg & Nordenberg, supra note 4, at 915.

\textsuperscript{391} Friedland, supra note 4, at 195-96.
2. Voir Dire and Peremptory Challenges

The American system of extensive voir dire and peremptory challenges may be starkly contrasted with early English and American practice. In the United States, selection of the jury often adds to excessive delay and may be subject to strategic abuse by lawyers. Historically, in both England and America, impartiality was not thought to encompass a right to extensively interrogate jurors or to exercise peremptory challenges against jurors who were thought to be biased. Peremptory challenges were not often utilized in early English jury trials, and have now been abolished in England. The excessive voir dire that is a component of modern American criminal trials has been inefficient and may result in greater gamesmanship among lawyers attempting to select jurors who they believe will be predisposed to find in favor of their client.

Several commentators have criticized the American system of extensive voir dire and the use of peremptory challenges. Eliminating extensive voir dire would be consistent with traditional understandings of jury trial and due process in England and the United States, and would incorporate the advantages found in the modern English and civil law systems of procedure. Furthermore, eliminating these procedures would increase the legitimacy of jury decisions by removing the

392. See Alschuler, supra note 66, at 157; Van Kessel, supra note 6, at 535-36.
393. See supra Parts II.B, III.B; see also Moore, supra note 66, at 449 (noting that in early English cases "it was not uncommon for the judge to examine jurors as to their qualifications, even in the absence of challenge, where he had reason to doubt their impartiality").
394. See supra notes 70-71 and accompanying text.
395. For example, the University of Chicago Jury Project found that most of voir dire time is spent preparing jurors for the case rather than in selecting jurors. See HANS ZEISEL ET AL., DELAY IN THE COURT 103 n.9 (2d ed. 1959) (citing a study by Professor Saul Mendlovitz).
396. See, e.g., KASSN & WRIGHTSMAN, supra note 8, at 51-52 (arguing that voir dire is used by lawyers to create bias rather than to discover it); Bradley, supra note 6, at 659; Dale W. Broeder, Voir Dire Examinations: An Empirical Study, 38 S. CAL. L. REV. 503, 522 (1965) (observing in a study of lawyer-conducted voir dire that "most of the questions and statements were either wholly or chiefly intended to indoctrinate," and estimating that "about eighty per cent of the lawyers' voir dire time was spent indoctrinating, only twenty per cent in sifting out the favorable from the unfavorable veniremen"); Levit et al., supra note 69, at 942-44 (discussing lawyer abuse of voir dire); Van Kessel, supra note 6, at 535 (arguing that "[s]ubstantial time could be saved by simply shifting responsibility for jury voir dire from lawyers to judges").
397. One commentator has also noted that "the elimination of extensive voir dire would not change the basic adversary character of our criminal trial. There is nothing inherent in the adversary system that necessitates the American-style extended voir dire." Van Kessel, supra note 6, at 462.
possibility that they are merely the result of skillful lawyering at the voir
dire stage.

Despite the advantages that might arise from eliminating extensive
lawyer-conducted voir dire and the exercise of peremptory challenges, some commentators have argued that peremptory challenges are essential
to maintaining the guarantee of an impartial jury. These commentators
argue that the exercise of peremptory challenges is not only necessary to
maintain substantive impartiality of the jury, but also to maintain the
appearance of impartiality, and thereby increase the perceived legitimacy
of judicial proceedings. 398

However, other commentators, most notably Justice Marshall, have
advocated the abandonment of the peremptory challenge, evidently
thinking that this would not run afoul of existing constitutional con-
straints. 399 Furthermore, the Supreme Court has emphasized that it does
not believe that there is a constitutional right to exercise
peremptories. 400 Most commentators who have advocated the elimina-
tion of the peremptory challenge have been primarily concerned with its
use as a tool of racial or gender discrimination. However, peremptory
challenges may be utilized in other ways that may serve to destroy the
impartiality of the jury. Although traditional notions of impartiality were
evidently consistent with the exercise of peremptory challenges in
whatever matter the parties saw fit, the issue of whether or not the
exercise of peremptory challenges can lead to an impartial jury must be

398. See, e.g., Stephen A. Saltzburg & Mary Ellen Powers, Peremptory Challenges and the
that “not only impartiality, but also the appearance of impartiality, is an important goal of the
exercise of peremptories”). In fact, commentators have gone so far as to suggest that the existence
of the right to exercise peremptories is not only sufficient, but also necessary in maintaining an
impartial jury: “[I]t appears that the peremptory challenge is more than just a traditional statutory
right that may be helpful in obtaining a fair jury. The inadequacies of random selection and
challenges for cause strongly suggest that the peremptory challenge is essential to the impartial jury
right.” Id. at 357.

argued for the abolition of the peremptory challenge: “The decision today will not end the racial
discrimination that peremptories inject into the jury-selection process. That goal can be accomplished
only by eliminating peremptory challenges entirely.” Id. at 102-03. Some commentators have
endorsed Justice Marshall’s position. See, e.g., Alschuler, supra note 66, at 208. But see Saltzburg
& Powers, supra note 398, at 370 (stating that although “[m]inority participation in the administra-
tion of justice . . . creates respect for the system and contributes to the legitimacy of the re-
result[,] . . . it cannot take precedence over the need for impartiality in any particular case”).

400. See, e.g., Georgia v. McCollum, 505 U.S. 42, 58 (1992); Ross v. Oklahoma, 487 U.S. 81,
88 (1988) (stating that “peremptory challenges are not of constitutional dimension”); Batson, 476
U.S. at 91; Swain v. Alabama, 380 U.S. 202, 219 (1965); Stilson v. United States, 250 U.S. 538, 586
(1919).
considered in a modern light.

Elimination of peremptory challenges, although not constitutionally mandated, would be constitutionally permissible. As the Court has noted, peremptory challenges were not thought to be inherent in the notion of "trial by jury," except perhaps in the isolated case of a criminal defendant's right to exercise peremptory challenges in a capital case. Thus, elimination or reduction in the use of peremptories would represent a trend toward the historically more constrained use of peremptories, which in turn might have beneficial effects in terms of reducing the delay and strategic behavior on the part of lawyers that are features of modern American trials.

3. Jury Size

A third issue that has been important in modern debate over the jury is its size. There has been a trend toward allowing smaller juries, even in criminal cases. The impetus behind the move toward smaller juries has been a concern with judicial economy. However, commentators have argued that this move toward smaller juries is not desirable. Furthermore, it is inconsistent with traditional jury trial procedures, which

401. See supra note 400 and accompanying text.
402. See supra notes 240-43 and accompanying text.
403. See supra note 250 and accompanying text.
405. Several commentators have noted that the interaction among jury members is an essential advantage of the jury that may be curtailed if the size of the jury is reduced. See Michael J. Saks, Jury Verdicts: The Role of Group Size and Social Decision Rule 32-34 (1977); Broder, supra note 2, at 388-89 (arguing that "[a] fundamental tenet of the jury tradition... lies in its assumption that controverted factual issues are best resolved through reasoned discussion and debate," and that "a judgment proceeding from several persons is probably as good or even better than the judgment of [the judge] whose unconscious mental and emotional processes cannot be checked against the reactions of others"); Richard O. Lempert, Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases, 73 Mich. L. Rev. 644, 705-07 (1975); Hans Zeisel... And Then There Were None: The Diminution of the Federal Jury, 38 U. Chi. L. Rev. 710, 724 (1971) (concluding that reductions in the number of jurors and the margin necessary for a verdict "make for differences in adjudication"). But see Paul Lermack, No Right Number? Social Science Research and the Jury-Size Cases, 54 N.Y.U. L. Rev. 951, 967-72 (1979) (questioning the results of empirical studies concerning jury size); Ralph Black, Comment, The Impact of Jury Size on the Court System, 12 Loy. L.A. L. Rev. 1103, 1103 (1979) (same); cf. Alschuler, supra note 14, at 1016-17 (arguing that the debate over juror dynamics and jury size is "myopic" given the realities of the Court's decisions).
remained unchanged for hundreds of years. From the foregoing discussion of American juries, there is strong evidence that a jury of twelve persons was thought to be an essential feature of the early American jury. Thus, despite the Court's decisions in this area, abandonment of the twelve-member jury seems to run afoul of traditional constitutional guarantees.

Earlier Supreme Court decisions recognized that the Sixth Amendment guarantees a jury of twelve in federal criminal cases. In Thomp- son v. Utah, Justice Harlan noted that "[w]hen Magna Charta declared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors." However, the Court has subsequently moved away from this position. In 1970, the Supreme Court held that a jury of six persons in state criminal cases is not unconstitutional. In 1973, the Court held that the Seventh Amendment does not require twelve-person juries in civil cases. Therefore, it appears that in this area the Court has

406. See supra notes 45-47, 197-205 and accompanying text. As Richard S. Arnold has aptly noted:

When the Founders drafted the Bill of Rights to include the Seventh Amendment, a jury of twelve was what they contemplated: the common law of England had fixed the number at twelve over four hundred years before the drafting of the Bill of Rights. Furthermore, it was a scholarly axiom at the time the Bill of Rights was drafted that a jury was comprised of twelve. This clearly was the understanding of the Founding Generation and continued to be the understanding in this country until Williams.

Arnold, supra note 26, at 5 (referring to Williams v. Florida, 399 U.S. 78 (1970)); see also Pierce v. Patterson, 1 Del. Cas. 541 (1815); Gillaspy v. Garrat, 2 Del. Cas. 225 (1805); Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1, 4 (1851); Whitehurst v. Davis, 3 N.C. (2 Hayw.) 134 (1800) (holding that it was constitutional error to try a case with more than twelve jurors); State v. Simons, 29 S.C.L. (2 Spera) 761, 767 (1844); Bennett v. Commonwealth, 2 Va. (2 Wash.) 154, 155 (1795) (stating that a jury of twelve was required in cases triable by juries at common law); 3 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 727 (6th ed. 1807); 2 HALE, supra note 107, at 141; Jerome L. Edelstein, Comment, The Jury Size Question in Pennsylvania: Six of One and a Dozen of the Other, 53 Temp. L.Q. 89, 112 (1980) (recognizing that the Bill of Rights requires no less than twelve members to constitute a jury (citing 2 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 296 (B. Singerly ed., 1873))).

407. See supra notes 197-205 and accompanying text.

408. See Thompson v. Utah, 170 U.S. 343, 355 (1898) (striking down a conviction by a jury of eight in the territory of Utah).

409. Id. at 349.

410. See Williams v. Florida, 399 U.S. 78, 102-03 (1970). Justice White, writing for the majority, stated the following: "We conclude [that] the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics.'" Id. at 102 (citing Duncan v. Louisiana, 391 U.S. 145, 182 (1968) (Harlan, J., dissenting)).

ignored the weight of the historical evidence in allowing juries with less than twelve members.

4. Requirement of Unanimity

The requirement of unanimity is important for maintaining the representativeness of the jury. However, as with jury size, the Supreme Court has allowed the states to deviate from the historically mandated unanimity rule. The decisions of the Court in this area indicate that votes of 9-3 or 6-0 do not violate the constitutional right to jury trial, while votes of 5-0 or 5-1 do.\(^{412}\) Furthermore, one of the Justices has stated in dicta that a conviction based on a 7-5 vote would be unconstitutional.\(^{413}\) Thus, like the jury size issue, erosion of the prohibition against nonunanimity rules seems to be at odds with traditional understandings of "trial by jury."

B. Judicial Control of the Jury

The modern jury is subject to greater control in certain ways and less control in other ways compared to its early English and American counterparts. Modern juries do not give reasons for their opinions. Therefore, jury errors in understanding the evidence or applying the law are not ordinarily evident from the verdict. This fact has led to the development of certain "prophylactic safeguards at the trial stage."\(^{414}\) Rules of evidence prevent certain information from reaching the jury, including the rule against hearsay and the rule excluding evidence of past criminal convictions. Therefore, as in the case of juror experience, the fact that jurors provide no explanation for their verdicts has led to the development of procedural mechanisms that result in more lengthy trials and impede the jury in discovering the truth and arriving at just outcomes.

This state of affairs differs from that found in the early American and English jury systems.\(^{415}\) In early English and American jury trials, 

\(^{412}\) See Burch v. Louisiana, 441 U.S. 130, 139 (1979) (striking down 5-1 verdict); Ballew v. Georgia, 435 U.S. 223, 245 (1978) (rejecting 5-0 verdict); Johnson v. Louisiana, 406 U.S. 356, 362 (1972) (approving 9-3 verdict); Williams, 399 U.S. at 103 (approving 6-0 verdict).

\(^{413}\) See Johnson, 406 U.S. at 366 (Blackmun, J., concurring).

\(^{414}\) Langbein, supra note 20, at 273.

\(^{415}\) Langbein has noted the following:

[1] in the Old Bailey of that day, as in the German or French courtroom of our own day, there was no law of evidence in our sense—no body of rules designed to exclude probative information for fear of the trier's inability to evaluate it. Hearsay and prior conviction evidence were received about as freely as in the modern Continental systems.
the professional judge was allowed to give jurors greater guidance in rendering their decisions. Modern jury practice has evolved away from this tradition, arguably to the detriment of jury functioning.

1. Jury Instructions

A number of scholars have commented on the instructions that judges give to jurors, identifying several problems with current practice. Jurors often have difficulty understanding the judge's instructions, which are crafted in the archaic rubric of the legal system. Jurors have difficulty remembering their instructions since they often are not provided with written copies of these instructions. Jurors typically are not given any instructions when they might be most useful—namely, at the very beginning of the trial when jurors may be completely unaware of the nature of their role in the adjudicatory process and the issues that will be important in resolution of the dispute. Finally, in complex or lengthy trials, this procedural defect is magnified—jurors must remain passive and uninstructed through trials that may last years and involve complex technical or legal issues.

In early American and English trials these problems were not as apparent. Informal communication between judge and jury was a defining characteristic of early English and American trials. Furthermore, there is evidence that judges often did not even charge juries in early American trials. Thus, there was less of a problem with juror com-

---

416. See, e.g., AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 4 (1982) (arguing that "there is no justification for juries, out of ignorance, to reach verdicts that are inconsistent with the law"); KASSIN & WRIGHTSMAN, supra note 8, at 141-56; William W. Schwarzer, Communicating with Juries: Problems and Remedies, 69 CAL. L. REV. 731, 759 (1981) (concluding that "proper communication with juries is the most direct and effective way of mobilizing [jurors'] qualities to further the cause of intelligent administration of justice"); see also Charrov & Charrov, supra note 348, at 1359 (stating that "if many jurors do not properly understand the laws that they are required to use in reaching their verdicts, it is possible that many verdicts are reached either without regard to the law or by using improper law"); Severance et al., supra note 348, at 233 (concluding that "simplified language and organized presentations of legal concepts can effectively help jurors, particularly when coupled with the opportunity to discuss and deliberate"); Walter W. Steele, Jr. & Elizabeth G. Thomburg, Jury Instructions: A Persistent Failure to Communicate, 67 N.C. L. REV. 77, 77 (1988) (stating that "[j]uror comprehension of instructions... is essential to the jury's ability to fulfill its role as contemplated by the law").

417. See supra notes 106-16, 271-81 and accompanying text.

418. See MANN, supra note 170, at 74 (discussing juries in seventeenth-century Connecticut); NELSON, supra note 170, at 26 (discussing Massachusetts juries). As Bruce Mann has concluded: Juries in Connecticut in the seventeenth century decided cases on the basis of the evidence submitted to them, on their personal knowledge of the dispute, on their understanding of the law in a formal sense, and doubtless also on their sense of what the
prehension of judicial instructions. Excessive procedural formalism did not trump the practical necessities of the trial.

a. Form of Instructions

One potential improvement on the modern system advocated by reformers would be to encourage jury instructions to be drafted in plain English.419 This would be consistent with the tradition of more informal communications between judge and jury in England and the United States. There is no reason to rigidly craft jury instructions in order to ensure affirmance on appeal when, historically, instruction from the judge was informal. More informal communication should also satisfy the constraints of due process.

b. Furnishing Written Copies of the Instructions

A second potential improvement of the current system advocated by reformers is to furnish the jurors with a written copy of their instructions.420 Generally, courts have found this practice to be acceptable as long as the judge instructs the jury that they must consider the written law ought to be. There is no indication that judges instructed juries on the law to apply, although by the end of the century judges may have made a general charge to identify for the jury the questions they were to consider.

MANN, supra note 170, at 74.

419. See GUINther, supra note 8, at 70-73; KASSIN & WRiGHTSMAN, supra note 8, at 151-53; Complex Cases, supra note 8, at 43-52; B. Michael Dann, "Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries, 68 Ind. L.J. 1229, 1256 (1993) ("Complaints about jurors' difficulties in understanding and following the judge's final legal instructions have been around for some time . . ."). Some commentators have argued, however, that more is needed to overcome the problem of lack of juror comprehension than drafting instructions in plain English. For example, Judge Jerome Frank noted the following, concerning the ability of jurors to understand the law:

To comprehend the meaning of many a legal rule requires special training. It is inconceivable that a body of twelve ordinary men . . . could, merely from listening to the instructions of the judge, gain the knowledge necessary to grasp the true import of the judge's words. For these words have often acquired their meaning as the result of hundreds of years of professional disputation in the courts. The jurors usually are as unlikely to get the meaning of those words as if they were spoken in Chinese, Sanskrit, or Choctaw.

FRANK, supra note 2, at 116.

420. A number of commentators have suggested this as a possible reform. See, e.g., Complex Cases, supra note 8, at 51-52; Comm. on Fed. Courts of the New York State Bar Ass'n, Improving Jury Comprehension in Complex Civil Litigation, 62 St. John's L. Rev. 549, 564 (1988) [hereinafter Improving Jury Comprehension]; Dann, supra note 419, at 1256 (decrying the "absence of written copies for each juror" which "contributes to confusion and poor recall").
instructions in their entirety, and not narrowly focus on one part of the instructions.\textsuperscript{421} Furthermore, many nineteenth-century cases held that it was permissible to give the jury written instructions that they could take with them into deliberations.\textsuperscript{422} Thus, even after ratification of the Fourteenth Amendment, this practice was viewed as constitutionally permissible.

The practice of giving the jury a copy of the charge at the end of the trial has been discussed by the Supreme Court twice. In \textit{Hopt v. People},\textsuperscript{423} the Court seemed to approve of a Utah statute that required the charge to be reduced to writing.\textsuperscript{424} Similarly, in \textit{Haupt v. United States},\textsuperscript{425} the Court ruled that submitting a copy of the charge to the jury did not constitute "unfairness or irregularity."\textsuperscript{426} Thus, such a procedure probably falls within the range of constitutionally permissible reforms.

c. Preinstructing the Jury

A third potential improvement in communications between the judge and the jury advocated by reformers is to give jury instructions at the beginning, as well as at the end, of the trial and to furnish the jury with a written copy of its instructions at the beginning of the trial so that the jury may have some idea of what issues are important in the trial.\textsuperscript{427}

\textsuperscript{421} See Dann, \textit{supra} note 419, at 1259 (stating that there are not "many reversals on appeal for furnishing copies of instructions to jurors"); Warren K. Urbom, \textit{Toward Better Treatment of Jurors by Judges}, 61 Neb. L. Rev. 409, 422-26 (1982).

\textsuperscript{422} See, e.g., \textit{Hopt v. People}, 104 U.S. 631, 635 (1881); \textit{State v. Bennington}, 25 P. 91, 92 (Kan. 1890); \textit{State v. Tompkins}, 71 Mo. 613, 617 (1880); \textit{State v. Bungardner}, 66 Tenn. 163, 165 (1874) (following state statute mandating the practice); \textit{Newman v. State}, 65 Tenn. 164 (1873) (same); \textit{Manier v. State}, 65 Tenn. 595, 603 (1872) (same); \textit{Edwards v. Washington Territory}, 1 Wash. Terr. 195, 197 (1862) (stating that "[t]he jury had a right to the instructions given, and to a copy of the statutes"); \textit{Loew v. State}, 19 N.W. 437, 439 (Wis. 1884). \textit{But see Hall v. State}, 8 Ind. 439, 443 (1856) (expressing the view in dictum that written instructions were probably not appropriate).

\textsuperscript{423} 104 U.S. at 631.

\textsuperscript{424} See \textit{id.} at 634-35.

\textsuperscript{425} 330 U.S. 631 (1947).

\textsuperscript{426} \textit{Id.} at 643. However, at least one circuit court has stated that providing the jury with a written copy of the charge may be problematic. See, e.g., \textit{United States v. Schilleci}, 545 F.2d 519, 526 (5th Cir. 1977).

\textsuperscript{427} See \textit{Austin}, \textit{supra} note 8, at 101 (noting potential increases in juror comprehension); \textit{Charting a Future for the Civil Jury System: Report from an American Bar Association/Brookings Symposium} 23 (1992); \textit{Hans & Vidmar, \textit{supra}} note 2, at 122-23; \textit{Complex Cases, supra} note 8, at 49-51; Dann, \textit{supra} note 419, at 1248; Amiram Elwork et al., \textit{Juridic Decisions: In Ignorance of the Law or in Light of It?}, 1 Law & Hum. Behav. 163, 172 (1977); Larry Heuer & Steven D. Penrod, \textit{Instructing Jurors: A Field Experiment with Written and Preliminary Instructions,}
Judges are authorized to instruct the jury at the beginning of the trial in both civil and criminal cases. Courts that have considered this procedure have concluded that it is permissible, particularly when instructions are given again at the end of the case.428 Furthermore, the current federal rules already provide for this procedure. Federal Rule of Criminal Procedure 30 and Federal Rule of Civil Procedure 51 authorize preinstruction of the jury.429 Under both Rule 30 and Rule 51, instructions may be given to the jury before the presentation of the evidence during trial. In practice, this is seldom done. However, it might aid the jury to better understand the issues to be tried, and would force the judge and lawyers to be better prepared for the trial so that they will be in a position to carry out this procedure at the start of the trial. Not only are

13 LAW & HUM. BEHAV. 409, 412-16 (1989); Saul M. Kassin & Lawrence S. Wrightsman, On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts, in IN THE JURY BOX 143, 145 (Lawrence S. Wrightsman et al. eds., 1987); E. Barrett Prettyman, Jury Instructions—First or Last?, 46 A.B.A. J. 1066, 1066 (1960); Sand & Reiss, supra note 8, at 437-42; see also Albert J. Moore, Trial by Schema: Cognitive Filters in the Courtroom, 37 UCLA L. REV. 273, 278 (1989) (suggesting that an advocate "learn to utilize a new, more explicit form of oral speech which accommodates the jurors' limited information-processing capabilities").

428. See United States v. Ruppel, 666 F.2d 261, 274 (5th Cir. Unit A 1982) (approving trial judge's decision to follow the "better practice of instructing the jury on the fundamentals of a criminal trial prior to taking any evidence"); Jerrold Elecs. Corp. v. Wescoast Broad. Co., 341 F.2d 653, 665 (9th Cir. 1965) (holding that preinstructions were not prejudicial when given both before and after argument).

429. In criminal cases, Federal Rule of Criminal Procedure 30 provides:
At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties . . . . The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.
FED. R. CRIM. P. 30. Similarly, in civil trials, Federal Rule of Civil Procedure 51 authorizes the judge to issue jury instructions. However, unlike Rule 30, under Rule 51, parties do not have to furnish their adversaries with copies of their requested instructions. Rule 51 provides:
At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.
FED. R. CIV. P. 51.
there no perceived constitutional objections to such a procedure, but current procedural rules actually facilitate such a practice.

d. Interim Statements or Instructions

Similarly, several commentators have advocated giving interim statements or instructions in complex or lengthy cases in order to improve juror understanding of the evidence, enhance juror recall of the evidence, facilitate more coherent presentation of the evidence by counsel, and keep jurors focused on the trial. The arguments concerning interim statements are substantially the same as those for preinstruction of the jury. As with preinstruction, interim statements would be consistent with the traditionally more informal communication between judge and jury found in early English and American trials.

2. Judicial Commentary on the Evidence

Both the modern English and continental legal systems allow for judicial commentary on the evidence for the benefit of the lay participants in adjudication. In the United States, at least in civil trials, the judge may also freely comment on the evidence. Commentators

430. See Improving Jury Comprehension, supra note 420, at 557.
431. See Complex Cases, supra note 8, at 34-37; Improving Jury Comprehension, supra note 420, at 557.
433. See Kassin & Wrightman, supra note 8, at 136-37; Improving Jury Comprehension, supra note 420, at 558.
434. Commentators have noted that the English judge's power to comment on the evidence stands in place of the prosecutor's summation in criminal trials, replacing the prosecutor's more partisan arguments with the judge's potentially more balanced arguments. For example, Professor Van Kessel has noted:

[S]ince the English prosecutor is generally not allowed to answer defense counsel's final argument as in our system, the judicial summary takes the place of the prosecutor's closing argument. Since our trial system was largely derived from the English, it would be . . . accurate to say that we have replaced the balanced judicial summary and evaluation of the evidence with the prosecutor's closing argument—a partisan presentation which is probably the most powerful tool in the prosecutor's trial arsenal. Lawyer power has replaced judicial power. Balance has been sacrificed for partisan advocacy.

Van Kessel, supra note 6, at 434.
435. The professional judge in the continental system may comment upon the evidence during the deliberations with the lay judges. See Casper & Zeisel, supra note 159, at 150-52.
436. See also United States v. Philadelphia & Reading R.R., 123 U.S. 113, 116-17 (1887) (stating that judicial charge to the jury that the evidence raised a presumption of liability does not infringe on the functioning of the jury); Vicksburg & Meridian R.R. v. Putnam, 118 U.S. 545, 553 (1886) (stating that a judge may "comment upon the evidence, call [the jury's] attention to parts of
have argued that such a practice may aid in improving the rationality of jury factfinding.\textsuperscript{437} Allowing the judge to comment on the evidence provides the members of the jury with a valuable guide to measure the weight to accord the different pieces of evidence presented at trial.

However, there are currently some constitutional restraints hampering the judge's ability to comment on the evidence, particularly in criminal trials where the defendant is entitled to an "impartial" hearing.\textsuperscript{438} In the criminal context, trial judges must "satisfy the appearance of justice."\textsuperscript{439} The appearance of bias alone is enough to constitute grounds for reversal even if the trial judge is completely impartial.\textsuperscript{440} In a criminal trial, the trial judge compromises, if not negates, the appearance of impartiality if the judge's appearance, conduct, or behavior indicates to the jury that the judge believes that the accused is guilty.\textsuperscript{441}

\textsuperscript{437} A number of commentators have addressed the desirability of judicial commentary on the evidence. See, e.g., Stephen A. Saltzburg, \textit{The Unnecessarily Expanding Role of the American Trial Judge}, 64 \textit{Va. L. Rev.} 1, 28 (1978); Urbom, \textit{supra} note 421, at 409; \textit{see also} Philadelphia & Reading R.R., 123 U.S. at 114 (stating that a judge may comment on the evidence when "in his judgment the due administration of justice requires it"); \textit{Vicksburg & Meridian R.R.}, 118 U.S. at 553 ("in the courts of the United States, as in those of England, from which our practice was derived, the judge . . . may . . . comment upon the evidence, call [the jury's] attention to parts of it which he thinks important, and express his opinion upon the facts . . .").

\textsuperscript{438} See \textit{U.S. CONST.} amend. VI.


\textsuperscript{440} See \textit{Bollenbach v. United States}, 326 U.S. 607, 614-15 (1946); State v. Lamond, 244 N.W.2d 233, 236 (Iowa 1976); Blanck et al., \textit{The Appearance of Justice}, \textit{supra} note 439, at 89-90 & nn.4-5; Blanck, \textit{What Empirical Research Tells Us}, \textit{supra} note 439, at 776.

\textsuperscript{441} \textit{See United States v. Beaty}, 722 F.2d 1090, 1093 (3d Cir. 1983); \textit{United States v. Frazier}, 584 F.2d 790, 794 (6th Cir. 1978) (stating that "the basic requirement [of a trial judge] is one of impartiality in demeanor as well as in actions"); \textit{United States v. Nazzaro}, 472 F.2d 302, 310 (2d
Furthermore, due process requires that a trial be "fair." Due process violations, sufficient to reverse criminal convictions, have been found where a trial judge's behavior appeared impartial. A judge's nonverbal behavior in a criminal trial may even be problematic in terms of unconstitutionally biasing the outcome of the trial.

Despite potential constitutional limitations placed on the judge's ability to comment on the evidence, the general rule in the United States is that federal judges may summarize and comment on the evidence, even in a criminal trial, as long as their comments do not constitute advocacy. The trial judge is merely prevented from assuming a "prosecu-
torial role. Courts have looked at the following factors in assessing the constitutionality of a trial judge's behavior: (1) the materiality or relevance of the behavior or comment; (2) the emphatic or overbearing nature of the behavior or comment; (3) the efficacy of any curative instruction used to correct the error; and (4) the prejudicial effect of the behavior or comment in light of the trial as a whole. In contrast to the federal rule, many state courts prohibit judicial summarizing and commenting on the evidence.

Although it has been argued that judicial commentary on the evidence similar to that allowed in England might violate certain constitutional guarantees, it certainly would be consistent with a provision that permitted judicial commentary on the evidence, consistent with the practice in the federal courts and common law practice. However, this proposed Rule 105 was rejected by Congress in part because it was considered to be more of a procedural provision than an evidentiary one. See 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5081 (1977).

446. United States v. Bland, 697 F.2d 262, 265-66 (8th Cir. 1983) ("The trial judge's attitude may have unconsciously driven him to assume a prosecutorial role in the trial, a role which destroyed fair process for the accused."); see also Beaty, 722 F.2d at 1095 ("The court's vigorous participation in examining the defendant's witnesses, especially when contrasted with the complete freedom from hostile interruption of the prosecution's witnesses, must certainly have conveyed the judge's skepticism about [the defendant's] alibi to the jury."); United States v. Hickman, 592 F.2d 931, 935 (6th Cir. 1979) (noting that the trial judge's "brilliant redirect examination would have been entirely proper had it been done by the prosecutor"); United States v. Hill, 332 F.2d 105, 106 (7th Cir. 1964) (stating that "the court should be careful to preserve an attitude of impartiality and guard against giving the jury any impression that the court was of the opinion that defendant was guilty"); Jackson v. United States, 329 F.2d 893, 893 (D.C. Cir. 1964) (stating that a "claim of undue intervention in the trial by the judge in a manner prejudicial to the defendant" is grounds for reversal). But see United States v. Tilton, 714 F.2d 642, 644 (6th Cir. 1983) (the trial judge's interruption of counsel 28 times did not have a prejudicial effect on the jury).

447. See United States v. Olgin, 745 F.2d 263, 269-70 (3d Cir. 1984); United States v. Anton, 597 F.2d 371, 374-75 (3d Cir. 1979) (utilizing the judge's comment on the defendant's credibility as a factor in reversing the conviction).

448. See Stevens v. United States, 306 F.2d 834, 838 (5th Cir. 1962) (holding that the following statement of the trial judge was prejudicial: "All right. I don't believe I want to hear any more testimony from this witness. I want to certify in the record that the Court wouldn't believe him on oath, and I don't want to waste the jury's time taking any more testimony from him.").

449. See id. (stating that "[a] comment by the judge that a witness is not to be believed is prejudicial error unless instructions are given which make it clear that the court's observation is not binding on the jury").

450. See Olgin, 745 F.2d at 269.

451. See KALVEN & ZEISEL, supra note 2, at 420.

452. See Quiqia v. United States, 289 U.S. 466, 470-72 (1933); United States v. Spock, 416 F.2d 165, 181 (1st Cir. 1969) (stating that in the criminal context "not only must the jury be free from direct control in its verdict, but it must be free from judicial pressure, both contemporaneous and subsequent"); Blanck et al., The Appearance of Justice, supra note 439, at 89; Van Kessel, supra note 6, at 491. For a federal decision discussing the limits of the trial judge's power to comment on
traditional constitutional notions of jury trial and due process. As discussed above, there was not always a rigid distinction made between the judge as trier of law and the jury as trier of fact in early English or American practice. Thus, it would not be inconsistent with traditional notions of jury trial to allow judicial commentary on the evidence. As we have seen with respect to the power of juries to determine issues of law as well as issues of fact, this principle of division of functions between judge and jury was not strongly rooted in traditional notions of jury trial. Over time, there has been a fluctuation in the line dividing the finder of fact from the finder of law. In particular, in early American trials there was no clear division between the judge as finder of law and the jury as finder of fact.

3. Complex and Truth-Defeating Rules of Evidence

As noted above, the modern American system, made up of complex rules of evidence designed to prevent the jury from obtaining information that it might misuse, stands in contrast to early English and American practice. These rules have not been constitutionalized in the United States. However, Justice Clarence Thomas recently warned that, while the Supreme Court had disavowed an attempt to "constitutionalize the hearsay rule and its exceptions," the Court's decisions "have edged ever further in that direction." Besides rules against hearsay, character evidence, and evidence of past convictions, modern American procedure is also characterized by a variety of exclusionary rules "designed to serve collateral purposes, such as policing the police, which hide reliable evidence from the jury and undercut reliable fact-finding." Eliminating some of these rules would serve to increase the efficiency and accuracy of the trial.

4. Other Mechanisms of Judicial Control

There are a number of procedural devices used to restrict the power of the civil jury, which the Supreme Court has approved. Among these procedural devices are summary judgment, the directed verdict, special

453. See supra notes 138-43, 298-333 and accompanying text.
454. See supra notes 129-37, 287-91 and accompanying text.
455. One commentator has noted the danger that "[c]onstitutionalizing the hearsay rules deters, if not forecloses, development of flexible, Continental-style admissibility rules that might reduce the importance of technical rules of evidence." Van Kessel, supra note 6, at 496.
457. Van Kessel, supra note 6, at 465.
questions to the jury, and judgment notwithstanding the verdict. However, in the criminal context, the Court has been more careful in restricting the powers of the jury. In general, the Court has been more concerned with maintaining the jury's role as a finder of fact than with maintaining the jury's overall power in the process of adjudication. Time and again, the Court has emphasized the jury's role as factfinder in both the civil and criminal contexts.

458. See Peter Westen, The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, 78 Mich. L. Rev. 1001, 1013-15 (1980). Although civil and criminal juries "have inviolate constitutional authority to find facts, the civil jury can be confined to the province of fact-finding." Id. at 1013; see also Henderson, supra note 15, at 336 (noting that even though the Supreme Court has cut back on the civil jury's power to decide questions of law, the Court has "preserv[ed] the substance of the common law trial by jury and particularly the jury's power to decide serious questions of fact"). As the Supreme Court stated in Patton v. United States:

[T]he maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant.

281 U.S. 276, 312 (1930).

459. See Standefer v. United States, 447 U.S. 10, 22 (1980) (noting that "[t]he absence of these remedial [jury control] procedures in criminal cases permits juries to acquit out of compassion"); United States v. Martin Linen Supply Co., 430 U.S. 564, 573 (1977) (stating that neither trial nor appellate judges may attempt "to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused"); Gregg v. Georgia, 428 U.S. 153, 200 n.50 (1976) (plurality opinion) (stating that it would be unconstitutional to prevent juries from engaging in "discretionary act[s] of jury nullification" through the use of jury control procedures). Some commentators have lamented the deference paid to criminal jury verdicts and the wider degree of independence allowed the criminal jury.

Our adversary system's absolutist approach toward jury independence reflects the low respect we hold for the accuracy of verdicts. In contrast to Continental systems, our courts reject any requirement that the fact-finder explain or otherwise provide the basis for its decision. We prohibit both special verdicts and interrogatories to the jury on the ground that their use would allow the judge to intrude upon the independence of the jury.

Van Kessel, supra note 6, at 454.

460. See, e.g., Martin Linen Supply Co., 430 U.S. at 572 (noting that "in a [criminal] jury trial the primary finders of fact are the jurors"); Colgrove v. Battin, 413 U.S. 149, 157 (1973) (noting that the role of the criminal jury is "assur[ing] a fair and equitable resolution of factual issues"); United States v. Gainey, 380 U.S. 63, 77 (1965) (Black, J., dissenting) ("It has always been recognized that the guaranty of trial by jury in criminal cases means that the jury is to be the factfinder."); Berry v. United States, 312 U.S. 450, 453 (1941) (noting that the jury has exclusive power to weigh evidence and determine contested factual issues); Barney v. Schmeider, 76 U.S. (9 Wall.) 248, 253 (1869) (acknowledging the jury's role in weighing and balancing testimony); Luther v. Borden, 48 U.S. (7 How.) 1, 41-42 (1849) (noting that the Seventh Amendment requires the jury to assess credibility of witnesses and weight of testimony in common-law actions).
a. Special Interrogatories

Because of their tendency to unduly control the jury's factfinding power, special verdicts and special interrogatories are generally not used to determine issues of guilt in criminal cases. However, Federal Rule of Civil Procedure 49 allows a judge to require the jury to answer written interrogatories on issues of fact, in addition to returning a general verdict. If the jury's responses to the special interrogatories are consistent with one another, but inconsistent with the jury's general verdict, the judge can ignore the general verdict and enter judgment in accordance with the jury's specific findings.

Although one could argue that this practice does not tread upon the jury's factfinding power, it does not have a common-law analogue. At common law, a judge could not disregard the jury's general verdict and enter judgment based on the jury's responses to special interrogatories. The judge could merely set aside the general verdict and order a new trial before a new jury if the jury's specific findings were inconsis-


To ask the jury special questions might be said to infringe on its power to deliberate free from legal fetters; on its power to arrive at a general verdict without having to support it by reasons or by a report of its deliberations; and on its power to follow or not to follow the instructions of the court. Moreover, any abridgment or modification of this institution would partly restrict its historic function, that of tempering rules of law by common sense brought to bear upon the facts of a specific case.

149 F. Supp. 272, 276 (S.D.N.Y. 1957) (footnote omitted). However, special interrogatories are sometimes used in sentencing. See United States v. McNeese, 901 F.2d 585, 605-06 (7th Cir. 1990); United States v. Buishas, 791 F.2d 1310, 1317 (7th Cir. 1986); United States v. Dennis, 786 F.2d 1029, 1038 (11th Cir. 1986).

462. "The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict." Fed. R. Civ. P. 49(b); see also Kotler, supra note 317, at 130-31 (noting that the use of special interrogatories and special verdicts is increasingly common).

463. Under Rule 49(b), the judge may enter judgment consistent with the jury's responses to the special interrogatories or "return the jury for further consideration of its answers and verdict or may order a new trial." Fed. R. Civ. P. 49(b).


The power to enter judgment on findings consistent with each other but inconsistent with the general verdict is a constitutional one and does not violate the Seventh Amendment since the jury's findings of fact are not being reexamined. Rather, as a reasonable regulation of practice, the jury's more specific findings of fact are allowed to control their general conclusion embodied in the general verdict.

Id. ¶ 49.04, at 58.
tent with its general verdict. Thus, the jury as an institution retained the power to determine factual issues. Even though this practice was not known at common law, the Supreme Court upheld a similar procedural provision in *Walker v. New Mexico & Southern Pacific Railroad*. The Court reasoned that the "aim [of the Seventh Amendment] is not to preserve mere matters of form and procedure but substance of right" and emphasized the utility of the procedure and the fact that the factfinding ability of the jury was not impaired under this new procedure. Thus, the Court's decision appears to have cut back on the jury's power while disregarding historical jury practices. The use of special interrogatories serves to check the power of the jury.

b. Special Verdict

A second practice authorized by Rule 49 is the special verdict, where a jury is requested to answer only certain specific questions on the material factual issues in the case. The court then applies the law to the jury's factual determinations. As noted above, this practice was accepted under English common law in civil cases. There is evidence that it was also available in America during the early colonial period. Because this practice was known at common law, the Supreme Court has not explicitly addressed its constitutionality.

However, this practice removes from the jury, to a certain extent, the power to determine issues of law. As a practical matter, many of the "questions of fact" submitted to the jury may be in reality mixed

466. 165 U.S. at 593.
467. *Id.* at 596.
468. See *id.* at 598 ("[T]he very thought and value of special interrogatories is . . . to end the controversy so far as the trial court is concerned upon that single response from the jury.").
469. See *Kotler*, supra note 317, at 130-31 (discussing the effect of special interrogatories and the special verdict on the jury's power).
470. Rule 49 provides in relevant part that "[t]he court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact." *Fed. R. Civ. P.* 49(a).
471. See supra notes 120-23 and accompanying text.
472. See *MANN*, supra note 170, at 74.
473. See *Brodin*, supra note 122, at 56-57 (noting that Supreme Court decisions strongly indicate that the special verdict is consistent with the Seventh Amendment jury trial guarantee); *Stephens*, supra note 122, at 109-10 (advocating that the special verdict violates the Seventh Amendment because it impairs the power of the jury to render a general verdict and "the compulsory nature of Rule 49 limits the jury-trial right as it existed at common law").
questions of fact and law.\textsuperscript{474} However, it is unlikely that purely legal questions will be submitted to the jury under this procedure. For example, when the issue is whether a defendant acted negligently, the question may be submitted to the jury.\textsuperscript{475}

Under both Rule 49 procedures, courts have stressed that the jury’s factfinding power remains intact. For example, the Supreme Court has held that the Seventh Amendment requires that a judge attempt to reconcile seemingly inconsistent answers in special verdicts\textsuperscript{476} and in jury responses to special interrogatories accompanying a general verdict.\textsuperscript{477} The jury’s factfinding power must be preserved in the face of inconsistencies in special findings of fact by either resubmitting the facts to the original jury or by ordering a new trial before a new jury.

Rule 49 has been criticized as being “but another means utilized by courts to weaken the constitutional power of juries and to vest judges with more power to decide cases according to their own judgments.”\textsuperscript{478}

\textsuperscript{474} See 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2506, at 179 (2d ed. 1995) (noting that in such cases, there must be an accompanying instruction by the court explaining the legal standards to be applied by the jury); see also Westen, supra note 458, at 1013-14 n.44 (noting that if the jury may determine mixed questions of law and fact, the jury arguably has “just as much authority to find facts, and to apply the law to the facts, as juries enjoy under a general verdict procedure”). As Professor Broeder has noted:

The determination of whether certain conduct falls within a particular legal category has frequently been left to the jury on the theory that such a determination involves a “mixed question of law and fact.” In one sense, at least, all such questions are “mixed questions of law and fact.” Yet in a very large number of cases, the fitting of facts into a legal rule is held to involve a “pure question of law.” Thus, the question raised by a demurrer to an indictment in an ordinary criminal case on the ground that the facts alleged do not charge an offense is the same type of question as that involved in determining whether a book is obscene or whether a defendant acted as a reasonably prudent man. On demurrer, all three cases raise the issue of whether certain conceded facts fall within a general rule of law. Yet the first of these issues is everywhere held to be a “pure question of law,” while the latter two issues are denominated “mixed questions of law and fact.” It is apparent that the use of such labels is merely a convenient method of characterizing which of such questions are for the court and which are for the jury.

Broeder, supra note 357, at 405 (footnotes omitted).

\textsuperscript{475} See, e.g., Carmel v. Clapp & Eisenberg, P.C., 960 F.2d 698, 700 (7th Cir. 1992); Abercrombie v. Osteopathic Hosp. Founders Ass’n, 950 F.2d 676, 678-79 (10th Cir. 1991).

\textsuperscript{476} See Gallick v. Baltimore & Ohio R.R., 372 U.S. 355, 364 (1962) (finding that “a search for one possible view of the case which will make the jury’s [answers to special interrogatories] inconsistent results in a collision with the Seventh Amendment”).

\textsuperscript{477} See Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364 (1962) (holding that the state appellate court improperly invaded the jury’s factfinding function by reading answers as inconsistent).

As Justices Black and Douglas noted in opposing Rule 49, "[o]ne of the ancient, fundamental reasons for having general jury verdicts was to preserve the right of trial by jury as an indispensable part of a free government." Thus, maintaining the ability of the jury to return a general verdict is consistent with maintaining the jury's role in the adjudicatory process. The special verdict erodes the power of the jury and places greater power in the hands of the judge.

c. Summary Judgment

Another mechanism allowing for judicial control of the jury in the civil context is the summary judgment procedure, codified in Federal Rule of Civil Procedure 56. The Supreme Court has upheld the constitutionality of summary judgment in the context of civil jury trials. However, there appears to have been no analogue to the summary judgment procedure at common law prior to 1791. The rationale for upholding the constitutionality of this procedure has instead been that it does not interfere significantly with the jury's role as finder of fact. However, this rationale is not entirely without criticism. It is the judge who makes the determination of whether or not there is a material factual issue that must go to the jury for resolution. Therefore, the power of judge over jury is increased under the summary judgment procedure. The procedure represents a further erosion of the jury's

479. Id. at 867-68.
480. See Fidelity & Deposit Co. v. United States, 187 U.S. 315, 320-21 (1902); see also Poller v. CBS, 368 U.S. 464, 467 (1962) (upholding the constitutionality of the summary judgment procedure under Federal Rule of Civil Procedure 56 so long as it did not "cut litigants off from their right of trial by jury if they really have [factual] issues to try" (quoting Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944))).
481. See 10 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2711, at 364 (1973) (stating that "[a] device with some of the characteristics of the contemporary summary judgment first was introduced in England in the Bills of Exchange Act of 1855").
482. See Fidelity & Deposit Co., 187 U.S. at 320; Fleming James, Jr. & Geoffrey C. Hazard, Jr., CIVIL PROCEDURE § 5.19, at 273 (3d ed. 1985) (arguing that summary judgment "is not intended to resolve issues that are within the traditional province of the trier of fact, but rather to see whether there are such issues").
483. See Order, supra note 478, at 867 (statements in opposition by Justices Black and Douglas); see also First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 304 (1968) (Black, J., dissenting) (arguing that summary judgment "tempts judges to take over the jury trial of cases, thus depriving parties of their constitutional right to trial by jury").
484. See Dooley, supra note 292, at 334 n.44 (noting that "[t]he strengthening of the summary judgment device as a method of case resolution . . . decreases the impact of jury participation in civil cases").
d. Directed Verdict

Another mechanism by which the judge may control the jury is through the directed verdict provided for in Federal Rule of Civil Procedure 50(a). However, a trial judge may not direct a verdict against a defendant in a criminal trial under the Sixth Amendment even if there is overwhelming evidence of guilt.\footnote{See, e.g., Rose v. Clark, 478 U.S. 570, 578 (1986) (asserting that the prohibition against directing a verdict against the defendant in a criminal trial "stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases"); United States v. Martin Linen Supply Co., 430 U.S. 564, 572 (1977) (recognizing that because the criminal jury's "overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government . . . a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict"); United Bhd. of Carpenters & Joiners of Am. v. United States, 330 U.S. 395, 408 (1947) (noting that "a judge may not direct a verdict of guilty no matter how conclusive the evidence"); Sparf & Hansen v. United States, 156 U.S. 51, 105 (1895) (stating that "it is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offence charged or of any criminal offence less than that charged").} The Supreme Court has upheld the constitutionality of the directed verdict in the context of civil jury trials as not unconstitutionally abridging the factfinding power of juries.\footnote{See Galloway v. United States, 319 U.S. 372, 395-96 (1943); also Hepner v. United States, 213 U.S. 103, 115 (1909) (noting that the right to civil jury trial under the Seventh Amendment is "subject to the condition, fundamental in the conduct of civil actions, that the court may withdraw a case from the jury and direct a verdict, according to the law if the evidence is uncontradicted and raises only a question of law"); Commissioners of Marion County v. Clark, 94 U.S. 278, 284 (1877) (a judge is allowed to question, before evidence is left to the jury, whether there is any evidence "upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed"); Pleasants v. Fant, 89 U.S. (22 Wall.) 116, 120-21 (1875) (same); Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442, 448 (1872) (same); Parks v. Ross, 52 U.S. (11 How.) 362, 373 (1850) (noting that "a jury has no right to assume the truth of any material fact, without some evidence legally sufficient to establish it").}

However, the directed verdict did not exist in its modern form prior to 1791.\footnote{At common law, an English judge could "direct" the jury to find for one of the parties, but if they did not, the only remedy was a new trial before a different jury. See Edward H. Cooper, Directions for Directed Verdicts: A Compass for Federal Courts, 55 MINN. L. REV. 903, 910 (1971) (noting, however, that "obedience [to the judge's charge] was expected and ordinarily must have followed"). The Supreme Court has noted that this practice bears little similarity to the modern directed verdict. See Galloway, 319 U.S. at 391-92 n.23 (remarking that this eighteenth-century practice of directing a verdict did not "even approximate[] in character the present directed verdict").} If a party wanted to challenge the sufficiency of its opponent's evidence, it could move for a new trial after the jury returned its verdict\footnote{See Galloway, 319 U.S. at 390-94.} or file a demurrer to the evidence and argue that its...
opponent was not entitled to prevail as a matter of law.\textsuperscript{489} Thus, the power to determine issues of fact remained with the jury as an institution under traditional procedures. Despite this historical evidence, the Supreme Court has reasoned that the directed verdict does not impair the jury’s factfinding function.\textsuperscript{490}

e. Judgment Notwithstanding the Verdict

Finally, Federal Rule of Civil Procedure 50(b) authorizes a “judgment as a matter of law,” made by the judge after the jury has returned its verdict.\textsuperscript{491} However, in the criminal context, a trial judge may not, under the Sixth Amendment or the Double Jeopardy Clause of the Fifth Amendment, set aside or reverse a jury’s verdict of acquittal.\textsuperscript{492} The power of the judge was traditionally limited to granting a new trial in situations where the jury returned a verdict that was against all the evidence or against the law.\textsuperscript{493}

\textsuperscript{489}. See Cooper, supra note 487, at 911.

\textsuperscript{490}. See Galloway, 319 U.S. at 395 (reasoning that the “essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked”); see also 5A Moore & Lucas, supra note 464, \S 50.02[1], at 50-29 to -30 (noting that lower courts have held that “substantial evidence must be in conflict to create a jury question”).

\textsuperscript{491}. FED. R. Civ. P. 50(b).

\textsuperscript{492}. See, e.g., Swisher v. Brady, 438 U.S. 204, 227 n.8 (1978) (Marshall, J., dissenting) (“Not only would it offend the Double Jeopardy Clause for a jury’s verdict of acquittal to be set aside . . . but it would also dilute the constitutional right to a jury trial in criminal cases.”); Gregg v. Georgia, 428 U.S. 153, 200 n.50 (1976) (plurality opinion) (“The suggestion that a jury’s verdict of acquittal could be overturned and a defendant retried would run afaul of the Sixth Amendment jury-trial guarantee and the Double Jeopardy Clause of the Fifth Amendment.”); Capital Traction Co. v. Hof, 174 U.S. 1, 14 (1899) (“[E]xcept on acquittal of a criminal charge,” a trial judge may set aside the jury’s verdict if it is “against the law or the evidence.”); see also Jackson v. Virginia, 443 U.S. 307, 317 n.10 (1979) (stating that the factfinder’s ability “to enter an unassailable but unreasonable verdict of ‘not guilty’ . . . is the logical corollary of the rule that there can be no appeal from a judgment of acquittal, even if the evidence of guilt is overwhelming”); Sparf v. United States, 156 U.S. 51, 106 (1895) (stating that “if the court can direct a verdict of guilty, it can do indirectly that which it has no power to do directly”).

\textsuperscript{493}. See Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 497 (1931) (remarking that at common law “[i]f the verdict was erroneous with respect to any issue, a new trial was directed as to all”); Capital Traction Co., 174 U.S. at 13 (holding that under the Seventh Amendment “no other mode of reexamination [of the jury’s factfinding] is allowed than upon a new trial”); Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593, 596 (1897) (discussing a court’s authority to grant a new trial if the jury misinterpreted or misapplied instructions on the law); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830) (recounting the two methods under the common law by which jury factfinding could be reexamined: “the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings”); see also Henderson,
Despite the lack of a historical analogue to the judgment notwithstanding the verdict, the Supreme Court has approved the constitutionality of this procedure.\textsuperscript{494} Under this procedure, the judge must determine as a matter of law that the evidence is insufficient to support the jury's verdict\textsuperscript{495} or that a "reasonable jury" could not have rendered the verdict on the facts presented.\textsuperscript{496} Like the directed verdict, in finding that the judgment notwithstanding the verdict is constitutional, the Court has argued that it does not give judges "any part of the exclusive power of juries to weigh evidence and determine contested issues of fact."\textsuperscript{497} Despite this determination, the judgment notwithstanding the verdict does indeed represent an erosion of the jury's factfinding power, much like the directed verdict and summary judgment procedures.

\textbf{C. Role of the Jury}

From the foregoing discussion of early English and American juries,\textsuperscript{498} it is evident that the modern jury is far more passive than its historical antecedents. The passivity of the modern American jury has been argued to impede its ability to discover the truth and arrive at just outcomes. It has been suggested that, in general, a more active jury would have the following advantages: (1) the jury would better serve as a check on the power of judges and lawyers; (2) the accuracy of the decisionmaking process would be improved; (3) jury credibility would be increased; (4) jury decisions would be perceived as being more legitimate; and (5) jurors would possess a better understanding of the importance of their responsibility.\textsuperscript{499} Thus, commentators have recognized the potential advantages that can be derived by allowing the jury to take a more active role during the trial.

\textsuperscript{494} See Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 322 (1967); Berry v. United States, 312 U.S. 450, 452-53 (1941); Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 660 (1935) (reasoning that the practice of taking jury verdicts subject to a ruling on questions of law "was well established when the Seventh Amendment was adopted, and therefore must be regarded as a part of the common-law rules to which resort must be had in testing and measuring the right of trial by jury").


\textsuperscript{496} See Berry, 312 U.S. at 453.

\textsuperscript{497} See supra notes 137-69, 295-342 and accompanying text.

\textsuperscript{498} See supra note 15, at 311 ("In eighteenth-century England a general verdict found 'against all the evidence' or 'against law' could be set aside and a new trial awarded."). But see Oldham, supra note 57, at 146-47 (concluding that "the freehold requirements were, if not a complete failure as a method to ensure honest and intelligent jurymen, of very limited value").

\textsuperscript{499} See Friedland, supra note 4, at 192, 206-20.
The current passivity of the modern American jury does not seem to be justified by constitutional concerns of due process. As noted above, traditionally, both American and English juries played a more active role in the adjudicatory process. Thus, a more active jury could not be inconsistent with due process or trial by jury as traditionally understood.

Consequently, this passivity does not appear to be mandated by the Federal Rules of Evidence. The current Federal Rules of Evidence do not seem to preclude a more active role for the jury in certain areas. For example, Federal Rule 611(a) provides that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . make the interrogation and presentation effective for the ascertainment of the truth." Federal Rule 102 provides that the "rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Thus, the Federal Rules of Evidence emphasize the goal of ascertainment of truth through the trial process and do not explicitly preclude a more active role for the jury through questioning of witnesses or taking notes.

1. The Authority of American Juries Concerning Issues of Fact and Issues of Law

Formally, at least, the Supreme Court has in recent times suggested that the civil jury has the constitutional authority to find facts and that judges possess the authority to decide questions of law. Similarly, in

500. See supra notes 137-69, 295-342 and accompanying text.
501. FED. R. EVID. 611(a). The advisory committee's note to this rule states that detailed rules governing the interrogation of witnesses were neither desirable nor feasible, but instead left such questions up to the "judge's common sense and fairness in view of the particular circumstances." Id. (advisory committee's notes); see also United States v. Carlisi, 32 F. Supp. 479, 483 (E.D.N.Y. 1940) ("There is no legal reason why . . . notes should not be made by jurors. Judges and lawyers make notes, why not jurors?"); Dudley v. State, 263 N.E.2d 161, 164 (Ind. 1970) ("Judges and lawyers alike . . . consistently take notes during trial proceedings . . . . We see no reason why, normally, a juror should be deprived of this assist or help in arriving at his verdict.").
502. FED. R. EVID. 102.
503. See id.; see also DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512, 515 (4th Cir. 1985) (stating that "[t]he Federal Rules of Evidence neither explicitly allow nor disallow the practice of permitting jurors to question witnesses").
504. See, e.g., Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935) (stating that "issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court"); Slocum v. New York Life Ins. Co., 228 U.S. 364, 387-88 (1913) (noting that juries decide questions of fact).
the criminal context, the Supreme Court has indicated that the criminal jury should follow judicial instructions on the law in rendering its general verdict.\footnote{505} According to the Court, "it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence."\footnote{506} The Court has argued that this is consistent with common law tradition\footnote{507} and that it furthers the goal of certainty in the law.\footnote{508} However, the Court has also stated that the criminal jury may disregard legal rules and rule in favor of the defendant in a criminal trial.\footnote{509}

As legal realists have noted, the distinction between issues of fact

\footnote{505. See Sparf & Hansen v. United States, 156 U.S. 51, 102 (1895).}
\footnote{506. Id.}
\footnote{507. See id.}
\footnote{508. See id. at 101 ("Public and private safety alike would be in peril, if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves.").}
\footnote{509. See Harris v. Rivera, 454 U.S. 339, 346 (1981) (per curiam) (discussing the "unreviewable power of a jury to return a verdict of not guilty for impermissible reasons"); Standefer v. United States, 447 U.S. 10, 22 (1980) (stating that the criminal jury may "acquit out of compassion or compromise"); Jackson v. Virginia, 443 U.S. 307, 317 n.10 (1979) (stating that the jury may enter an "unreasonable verdict of 'not guilty'"); Gregg v. Georgia, 428 U.S. 153, 200 n.50 (1976) (plurality opinion) (implying that the criminal jury may engage in "discretionary act[s] of jury nullification"); Steckler v. United States, 7 F.2d 59, 60 (2d Cir. 1925) (stating that juries in criminal cases may acquit because of "their assumption of a power which they had no right to exercise, but to which they were disposed through lenity"); see also Irwin A. Horowitz, The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials, 9 LAW & HUM. BEHAV. 25, 25 (1985) (noting that one model of jury functioning suggests that a "jury can . . . acquit defendants who are legally guilty but morally upright"); Irwin A. Horowitz, Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making, 12 LAW & HUM. BEHAV. 439, 439 (1988) (stating that juries have the implicit power, embedded in the doctrine of jury nullification, "to acquit defendants despite evidence and judicial instructions to the contrary"); Alan W. Schefflin & Jon M. Van Dyke, Merciful Juries: The Resilience of Jury Nullification, 48 WASH. & LEE L. REV. 165, 165 (1991) ("The power of a jury to soften the harsh commands of the law and return a verdict that corresponds to the community's sense of moral justice has long been recognized."); Gary J. Simson, Jury Nullification in the American System: A Skeptical View, 54 TEX. L. REV. 488, 489 (1976) (noting that various defense lawyers and legal commentators have urged that the jury has a common law right "to be informed by the judge . . . that it may acquit a defendant who, though guilty under a strict application of the law laid down by the judge, has done nothing in the jury's view that is morally wrong"); Chaya Weinberg-Brodt, Note, Jury Nullification and Jury-Control Procedures, 65 N.Y.U. L. REV. 825, 828 (1990) (discussing methods through which jury nullification is prevented). Professor Poulin offers the following observation: It is clear in our criminal justice system that the jury has the power to nullify—that is, the power to acquit or to convict on reduced charges despite overwhelming evidence against the defendant. It has been argued that our system authorizes jury nullification, in other words, that the jury has de jure authority to acquit against the law. Anne Bowen Poulin, The Jury: The Criminal Justice System's Different Voice, 62 U. CIN. L. REV. 1377, 1399 (1994).}
and issues of law is a tenuous one at best. The distinction certainly was not rigorously observed in early American jury trials. As noted above, juries often possessed the power to determine issues of law as well as issues of fact. This power of the jury to determine issues of law was gradually eroded during the nineteenth century. Placing the power to determine issues of law within the purview of the judiciary, rather than an ever-changing group of laypersons, served to increase the certainty of legal rules while eroding the power of the jury to function as a channel for the expression of popular sovereignty. As Blackstone stated in his Commentaries, "[i]f the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts." Blackstone reasoned that determination of issues of law should be left to judges because "the law is well known,"

510. See Fleming James, Jr., Functions of Judge and Jury in Negligence Cases, 58 Yale L.J. 667, 668 n.4 (1949); see also MANN, supra note 170, at 73 ("The hoary distinction between fact and law is, at bottom, artificial, although often invoked."). One commonly-cited example of a question that is difficult to characterize is that of negligence. See OLIVER WENDELL HOLMES, JR., The Common Law 126-27 (Dover Publications 1991) (1881) (arguing that the determination of negligence is a question of law); Henderson, supra note 15, at 299 (stating that negligence is an example "of what used to be called 'mixed questions of law and fact'"); Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1181 (1989) (arguing that reasonable care is a question of fact when "legal rules have been exhausted and have yielded no answer").

511. See supra notes 298-333 and accompanying text.

512. Professor Nelson attributes the removal of the power to decide issues of law from the juror to an increasing concern with certainty in the law necessitated by an increasingly industrialized society. According to Professor Nelson:

[A] jury system in which juries have power to find law can function only in a society with substantial ethical unity and economic and social stability. As unity and stability broke down near the turn of the century, the jury system began to function less efficiently and with less certainty and predictability. Certainty and predictability, however, were the very qualities that business entrepreneurs needed most in order to rationally allocate resources for economic growth, and they accordingly began to complain about the jury system's inefficiencies. As a result juries lost their power to find law. By 1830 law was stated to juries by the court, and their verdicts were set aside if they failed to follow the court's instructions. Although judges themselves made much law, they looked whenever possible to the legislature as the ultimate lawmaker, and interest groups freely competed to gain control of the legislature so that law would be framed in their own interest.

NELSON, supra note 170, at 8.

513. See Murphy, supra note 1, at 736 ("[J]udicial application of legal rules is a check on excesses of the popular will—for example, community sentiments might favor finding an unsympathetic defendant liable, regardless of the legal rules. In this sense, the judge is more likely to be an impartial decisionmaker."). The author further notes that "[f]acilitating only in the single case before it, the jury is unable to achieve consistency in law declaration." Id. at 739.

514. 3 BLACKSTONE, supra note 7, at *379-80.
and is "not accommodated to times or to men."\(^{515}\) Similarly, Thomas Jefferson argued that juries "are not qualified to judge questions of law."\(^{516}\) However, the fact that juries could still enter a general verdict ensured, to some extent, that juries would always retain some power to determine issues of law.\(^{517}\)

Similarly, not every issue of fact was left to the jury. As Professor Thayer noted before the turn of the century, "the allotment of fact to the jury, even in the strict sense of fact, is not exact. The judges have always answered a multitude of questions of ultimate fact involved in the issue. It is true that this has often been disguised by calling them questions of law."\(^{518}\) Thus, some issues that could be characterized as factual were left to the judge, while some issues that could be characterized as legal were left to the jury.

Some modern commentators argue that juries should be vested with the authority to determine issues of law as well as issues of fact.\(^{519}\) The

---

515. Id. at 380.
516. Arnoux Letter, supra note 299, at 283.
517. As Jefferson noted:

> It is left . . . to the juries, if they think the permanent judges are under any bias[] whatever in any cause, to take upon themselves to judge the law as well as the fact. They never exercise this power but when they suspect partiality in the judges, and by the exercise of this power they have been the firmest bulwarks of English liberty.

518. Thayer, supra note 138, at 159. According to Thayer, the reason that certain questions of fact were assigned to judges rather than to juries was out of concern for the greater certainty that would be accorded through judicial determination.

Such things, so important, so long enduring, should have a fixed meaning; should not be subject to varying interpretations; should be interpreted by whatever tribunal is most permanent, best instructed, most likely to adhere to precedents.

It is on this ground of policy, or on like legislative considerations, and above all, for fear the jury should decide some question of law that was complicated with the fact,—that many other questions of fact have at one time or another been taken possession of by the judges.

519. See, e.g., Alan Scheflin & Jon Van Dyke, Jury Nullification: The Contours of a Controversy, 43 LAW & CONTEMP. PROBS. 51, 52-54 (1980) (noting that in recent years, many defense lawyers and scholars have tried to maintain a portion of the tradition of the seventeenth,
reason for relaxing this barrier is that such a move would increase the jury's ability to function as an organ of popular sovereignty and contribute to the legitimacy of court decisions. The common objection to increasing the power of the modern jury in this fashion is that it is fundamentally antidemocratic and countermajoritarian. However, the jury, like the legislature, is an organ of representative democracy. It is merely selected in a different fashion.

2. Juror Questioning of Witnesses
Several commentators have advocated allowing the jury to question witnesses, much as the judge might. Commentators have argued that allowing jurors to question witnesses would result in greater clarification.

eighteenth, and nineteenth centuries, when jurors were "told frequently that they had the right and power to reject the judge's view of the law"; Jack B. Weinstein, Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice, 30 AM. CRIM. L. REV. 239, 240 (1993) ("Nullification is but one legitimate result in an appropriate constitutional process safeguarded by judges and the judicial system."); Weinberg-Brodt, supra note 509, at 827-28 (proposing that jury nullification be analyzed under a "defendant-centered" framework, focusing on the "defendant's right to be tried before an independent jury" and viewing jury control procedures "from the standpoint of their impact on the defendant's sixth amendment right").

However, there is the potential danger in a heterogeneous society that jury decisions may lose some of their legitimacy due to inconsistency depending upon the composition of the jury. See Nelson, supra note 170, at 8 ("[A] jury system in which juries have power to find law can function only in a society with substantial ethical unity and economic and social stability.").

As one commentator has stated:

[T]here is tension between the function of the jury and the function of the legislature. As the jury's power is increased to encompass a greater degree of policymaking, essentially a legislative function, the tension increases and raises questions about our fundamental notions of the allocation of power in a democracy. The reasons for this are obvious. A legislature's popular election clothes its decisions with legitimacy. A jury is not elected and may well return decisions that do not reflect the popular will. Although such decisionmaking is tolerated because of popular respect for the jury as an institution and because juries have traditionally had this power, the conflict raises a number of conceptual problems.

Kotler, supra note 317, at 134.

See AMERICAN JUDICATURE SOCIETY, supra note 8; AUSTIN, supra note 8, at 102-03; Guntner, supra note 8, at 68-69; Kassin & Wrightman, supra note 8, at 129-31; Amar, supra note 187, at 118; Dann, supra note 419, at 1253 ("Studies verify that the advantages to jurors and the trial as a whole outweigh the feared risks, and that questioning by jurors is an important device for permitting more . . . juror participation in the factfinding process."); Mark A. Frankel, A Trial Judge's Perspective on Providing Tools for Rational Jury Decisionmaking, 85 NW. U. L. REV. 221, 222-23 (1990); Larry Heuer & Steven Penrod, Increasing Jurors' Participation in Trials: A Field Experiment with Jury Note-taking and Question Asking, 12 LAW & HUM. BEHAV. 231, 251-57 (1988); William W. Schwarzer, Reforming Jury Trials, 1990 U. Chi. Legal F. 119, 139-42; see also Friedland, supra note 4, at 204-05; Harms, supra note 355, at 128 ("Because both judge and jury are charged with finding the truth and reaching a just decision, jury questioning, like judge interrogation, should be allowed.").
of evidence and would elicit necessary information that might not be
delivered were the jury to remain silent. These commentators have
concluded that the absence of questioning by jurors hinders their ability
to function as factfinders.

Similarly, several courts have acknowledged the potential benefits
of juror questioning of witnesses. For example, the Fifth Circuit in
United States v. Callahan stated:

There is nothing improper about the practice of allowing
occasional questions from jurors to be asked of witnesses. If a juror is
unclear as to a point in the proof, it makes good common sense to
allow a question to be asked about it. If nothing else, the question
should alert trial counsel that a particular factual issue may need more
extensive development. Trials exist to develop truth. It may sometimes
be that counsel are so familiar with a case that they fail to see
problems that would naturally bother a juror who is presented with the
facts for the first time.

Such a practice may be authorized under Federal Rule of Evidence
614(b), which empowers the court to call and interrogate witnesses.
Thus, at the federal level, there appears to be no rigid legal barrier to
allowing jurors to question witnesses during trial. Furthermore, jurors
have been allowed to question witnesses during different periods in the
history of both the English and American juries. Although ques-

523. See Harms, supra note 335, at 148-49.
524. See Edward W. Cleary, Evidence as a Problem in Communicating, 5 VAND. L. REV. 277, 289 (1952). The problem may be summarized as follows:
   It is old hat in experimental psychology that people display different cognitive needs;
   they try to reach knowledge and understanding along different paths. It therefore stands
to reason that decisionmakers may sometimes require a different method of presentation
than that of the clash of two one-sided versions, and that, at a psychologically crucial
point, they would sometimes like to ask a specific question of a witness, which in their
passivity they cannot do.
Mijan Damaška, Presentation of Evidence and Factfinding Precision, 123 U. PA. L. REV. 1083, 1094-95 (1975); see also Robert F. Forston, Sense and Non-Sense: Jury Trial Communication, 1975 B.Y.U. L. REV. 601, 606 (stating that the jury cannot be expected to perform its function
competently if jurors are “unsure about the evidence, unclear on the meaning of the law, confused
by legal jargon, bewildered by trial procedure, or uncertain of the role they are to play”).
526. 588 F.2d 1078 (5th Cir. 1979).
527. Id. at 1086.
528. See, e.g., DeBenedetto, 754 F.2d at 515 (noting that the Federal Rules of Evidence is silent
on the issue).
529. See supra notes 155-56, 503 and accompanying text.
tioning of witnesses by jurors may already be allowed in most jurisdictions, it is often discouraged.530 This is somewhat surprising since empirical studies indicate that judges remain open to the idea of juror-questioning of witnesses.531 As with many of the reforms advocated in this Article, the lack of reform efforts may be due to professional inertia.

3. Juror Questioning of the Judge

Some courts have allowed jurors to question the judge concerning the law and legal instructions that they are to apply to the facts of the case.532 Like the practice of allowing judicial commentary on the evidence, allowing jurors to question the judge concerning the applicable legal principles in a case would facilitate communication between the judge and jury, and arguably result in more accurate outcomes. Furthermore, as noted in the context of the judicial comment power, historically, communications between judge and jury were much more informal.533 Thus, relaxation of rigid procedural formalism in this area would be consistent with historical practices.

4. Communication Among the Jurors

Jurors have been forbidden to communicate with each other prior to deliberations out of a fear that jurors might prematurely make up their minds if allowed to communicate amongst themselves.534 However, commentators have argued that the restraints placed upon juror communication with each other prior to deliberation are unwarranted.535 These

530. See Harms, supra note 335, at 132; Michael A. McLaughlin, Note, Questions to Witnesses and Notetaking by the Jury as Aids in Understanding Complex Litigation, 18 New Eng. L. Rev. 687, 699 (1983).
532. See Dann, supra note 419, at 1261 (concluding that "[c]ase law allows trial judges discretion to decide how to respond to questions from a deliberating jury"); David U. Strawn & G. Thomas Munsterman, Helping Juries Handle Complex Cases, 65 Judicature 444, 447 (1982).
533. See supra notes 106-16, 271-81 and accompanying text.
534. See Dann, supra note 419, at 1262.
535. Several commentators have come to the same conclusion. See, e.g., Austin, supra note 8, at 103 ("The restriction on intragroup discussion should be terminated so that jurors can discuss the details of the trial as it unfolds. Group discussion is a logical adjunct to note-taking and two-way communication."); Dann, supra note 419, at 1262-64; Friedland, supra note 4, at 199; Schwarzer, supra note 522, at 142 (stating that in long or complex trials "it defies reason to expect jurors, who may be confused, troubled, and perhaps overwhelmed by the unaccustomed responsibility, not to share their concerns and look to their colleagues for help and mutual support"). William Schwarzer, Director of the Federal Judicial Center, enumerated the following advantages of allowing jurors to communicate with each other prior to deliberations:
commentators argue that overall juror comprehension of the evidence may be enhanced through group discussion\textsuperscript{536} and that juror discussions prior to deliberation may serve to dispel any prejudgments that certain jurors may have made.\textsuperscript{537}

There should be no constitutional objections to jurors communicating with each other prior to deliberation. Traditionally, jurors were allowed to communicate relevant knowledge to each other, which might have been known only to certain jurors, since outside knowledge was allowed when jurors acted more as witnesses than as triers of fact\textsuperscript{538}. Therefore, such a procedure seems to be consistent with traditional notions of due process and trial by jury. Despite this historical pedigree, it appears that jurisdictions are divided on the question of whether a judge may permissibly instruct jurors that they may discuss the evidence among themselves prior to deliberations.\textsuperscript{539}

Discussion among jurors may reveal areas of misunderstanding or confusion that jurors could then clarify by questioning the witnesses or the judge. It may also help ease the tension that jurors experience sitting on a long and complicated case. That such discussions may influence the views of some jurors before the trial is over is not objectionable, since any tentative opinion so formed must still stand the test of full debate among the entire jury during the deliberations. In any event, the lonely juror who, unable to talk to the others, remains confused during the trial is not likely to be an effective participant in the verdict deliberations.

Permitting jurors to talk to each other about the case during the trial may have other positive effects. There is evidence that the opinions jurors form early in the trial often become their decisions later. It is possible that a juror may be less prone to form and hold to an early opinion if he or she hears that others view the evidence differently. Discussions with other jurors may suggest to a juror different perspectives and interpretations that will lead to more thoughtful and open-minded consideration of the case. Although the benefits of relaxing the traditional rule are not provable, the rule’s disadvantages seem sufficiently clear to justify jettisoning this unnatural and burdensome restriction.

\textit{Id.} at 142-43 (citation omitted).

- \textsuperscript{536} See \textit{AUSTIN, supra note 8}, at 104.
- \textsuperscript{537} See \textit{id.}
- \textsuperscript{538} See \textsuperscript{supra notes 57-59 and accompanying text.}
- \textsuperscript{539} See \textsuperscript{United States v. Lemus, 542 F.2d 222, 224 (4th Cir. 1976) (upholding instructions); Wilson v. State, 242 A.2d 194, 199-200 (Md. Ct. Spec. App. 1968) (same); \textit{cf. Meggs v. Fair, 621 F.2d 460, 463-64 (1st Cir. 1980) (declining to rule on whether a judge may instruct jurors to discuss evidence prior to deliberation, but effectively upholding such instructions by finding that the judge’s admonition to the jury, requiring that they not commit themselves until all evidence was heard, minimized any danger to the defendant). But see Winebrenner v. United States, 147 F.2d 322, 329 (8th Cir. 1945) (holding instructions to be reversible error); Commonwealth v. Benjamin, 343 N.E.2d 402, 404 (Mass. 1976) (disapproving of instructions); People v. Hunter, 121 N.W.2d 442, 446 (Mich. 1963) (same).
5. Juror Note-Taking

Several commentators have advocated that jurors should be allowed to take notes during the course of trial. Of the reforms discussed in this Article, this is perhaps the most widely supported. For example, in 1960, the Judicial Conference Committee on the Operation of the Jury System made the following recommendation:

Trial jurors should, in the discretion of the trial judge, be permitted to take notes for use in their deliberations regarding the evidence presented to them and to take these notes with them when they retire for their deliberations. When permitted to be taken, they should be treated as confidential between the juror making them and his fellow jurors.

Arguments advanced in favor of juror note-taking include: (1) note-taking aids in juror recollection of the evidence, especially in complex or lengthy trials; (2) note-taking focuses the attention of the juror on the trial proceedings; (3) judges and lawyers are already permitted to take notes; and (4) juror note-taking lessens the time for deliberation by reducing the number of times a jury feels compelled to seek instructions or additional information from the court.

Historically, there appears to have been no barrier to allowing jurors

540. See, e.g., Complex Cases, supra note 8, at 34-37 (recommending the use of multipurpose notebooks for jurors in complex cases); see also AMERICAN JUDICATURE SOCIETY, supra note 8, at 8; GUINThER, supra note 8, at 68-69; KASSIN & WRIGHTSMAN, supra note 8, at 128-29; Amar, supra note 8, at 187, at 1185; Sand & Reiss, supra note 8, at 423; Shrallow, supra note 356, at 214-15. As Kassin and Wrightsman have argued:

There is an element of arrogance and hypocrisy to the notion that jurors would be so adversely affected by taking notes. As Judge Urbom noted, “if there are reasons for note-taking by lawyers and judges during a trial, there are at least the same reasons for note-taking by jurors.” The reasons, we think, are self evident to all of us who kept notebooks in school.

KASSIN & WRIGHTSMAN, supra note 8, at 129 (endnote omitted).


542. See Petroff, supra note 155, at 130.

543. See McLaughlin, supra note 530, at 709.

544. See Frankel, supra note 522, at 225; Shrallow, supra note 356, at 215-16.

545. See United States v. Carlisi, 32 F. Supp. 479, 483 (E.D.N.Y. 1940) (“There is no legal reason why . . . notes should not be made by jurors. Judges and lawyers make notes, why not jurors?”); Dudley v. State, 263 N.E.2d 161, 164 (Ind. 1970) (“Judges and lawyers alike . . . consistently take notes during trial proceedings . . . . We see no reason why, normally, a juror should be deprived of this assist or help in arriving at his verdict.”).

546. See Frankel, supra note 522, at 224; see also Sand & Reiss, supra note 8, at 450.
to take notes during trial. Initially, the practice might not have been widespread due to the illiteracy of the general population. This does not mean, however, that it was impermissible. Certainly, once more of the population became literate, the practice of juror note-taking was allowed and became increasingly widespread.

Furthermore, the practice of allowing jurors to take notes is clearly within the scope of permissible procedures acknowledged by a variety of courts. The Supreme Court has never directly ruled on the permissibility of juror note-taking. However, the majority of state and federal courts leave the decision of whether or not to allow note-taking to the discretion of the trial judge. Despite this fact, most judges do not

547. See supra notes 158, 340 and accompanying text.
548. See Agnew v. United States, 165 U.S. 36, 45 (1897) (disposing of the issue on procedural grounds and failing to reach the merits of note-taking).
549. Many federal cases have sanctioned this procedure. See, e.g., United States v. Polowichak, 783 F.2d 410, 413 (4th Cir. 1986); United States v. Rhodes, 631 F.2d 43, 45 (5th Cir. 1980) (emphasizing the need to instruct the jury on the proper use of notes); United States v. Johnson, 584 F.2d 148, 157-58 (6th Cir. 1978); United States v. Maclean, 578 F.2d 64, 65 (3d Cir. 1978) (stating that "the unanimous view of federal appellate courts... [is that w]hether or not to allow note-taking by jurors is a matter committed to the sound discretion of trial judges"); United States v. Anthony, 565 F.2d 533, 536 (8th Cir. 1977); United States v. Riebold, 557 F.2d 697, 705-06 (10th Cir. 1977); United States v. Bertolotti, 529 F.2d 149, 159-60 (2d Cir. 1975); United States v. Braverman, 522 F.2d 218, 224 (7th Cir. 1975); United States v. Marquez, 449 F.2d 89, 93 (2d Cir. 1971); Toles v. United States, 308 F.2d 590, 594 (9th Cir. 1962); Goodloe v. United States, 188 F.2d 621, 621-22 (D.C. Cir. 1950); United States v. Chiarelli, 184 F.2d 903, 907 (2d Cir. 1950) (holding that the trial court's refusal to allow note-taking was not an abuse of discretion); see also United States v. Standard Oil Co., 316 F.2d 884, 897 (7th Cir. 1963) (explaining that compulsory note-taking is permissible under certain circumstances). Similarly, many state courts have sanctioned this procedure. See, e.g., People v. Cline, 35 Cal. Rptr. 420, 422-23 (Ct. App. 1963); Cahill v. Mayor of Baltimore, 98 A. 235, 238 (Md. 1916); Commonwealth v. Tucker, 76 N.E. 127, 142 (Mass. 1905); Watkins v. State, 393 S.W.2d 141, 145-46 (Tenn. 1965) (stating that the general rule in the United States is that allowing note-taking by jurors is within the discretion of the trial judge); see also Denson v. Stanley, 84 So. 770, 771 (Ala. Ct. App. 1918), rev'd on other grounds sub nom. Ex parte Stanley, 84 So. 773 (Ala. 1919) (jury may take notes, but it is not required); Thomas v. State, 16 S.E. 94, 94 (Ga. 1892) (a juror may take notes); Indianapolis & St. Louis R.R. v. Miller, 71 Ind. 463, 472 (1874) (a juror may take notes on own motion but not on motion of counsel); Van Sickle v. Kokomo Water Works Co., 158 N.E.2d 460, 463 (Ind. 1959) (note-taking is not prejudicial); State v. Keen, 118 P. 851, 855 (Kan. 1911) (sketch of homicide scene did not constitute misconduct by juror); Martin v. Atherton, 116 A.2d 629, 632 (Me. 1955) (note-taking is not prohibited); Cowles v. Hayes, 71 N.C. 194, 195 (1874) (note-taking is commendable); State v. Cottrell, 37 A. 947, 947 (R.I. 1886) (juror submitting notes for a newspaper article was not grounds for new trial). But see Corbin v. City of Cleveland, 56 N.E.2d 214, 215 (Ohio 1944) (trial court erred in suggesting that jurors take notes); Thornton v. Weaver, 112 A.2d 344, 347-48 (Pa. 1955) (note-taking generally forbidden); see also Batterson v. State, 63 Ind. 531, 536-37 (1878) (no misbehavior when the trial judge instructed a juror to stop taking notes); Cheek v. State, 35 Ind. 492, 494-95 (1871) (persistent note-taking, after being instructed not to, would entitle the defendant to a new trial); State v. Johnson, 632 S.W.2d 43, 45 (Mo. Ct. App. 1982); Fisher v. Strader, 160 A.2d 203, 204 (Pa. 1960) (notes were not prejudicial
exercise this discretion and allow jurors to take notes during trial. This is surprising considering that under the common law the propriety of note-taking was not problematic. It is also surprising because empirical data indicates that judges remain open to allowing juror note-taking during trial. Once again, professional inertia may be to blame for the lack of reform in this area.

6. Authority to Determine Sanction in Criminal Cases

In the criminal context, under the Sixth Amendment, it is constitutionally permissible for the jury to have a role in determining the sentence of a criminal defendant. However, the Supreme Court has consistently held that there is no constitutional right to have the jury undertake a role in determining the sentence. The Court stated in Spaziano v. Florida that the “Sixth Amendment never has been thought to guarantee” a right to sentencing by a jury. In holding that there is no constitutional right to have the jury determine sentence as well as guilt, the Court has baldly asserted that historically there was no

if not taken into the jury room and relied on).

550. See Forston, supra note 8, at 633; see also Heuer & Penrod, supra note 531, at 229 (reporting results of a survey of judges indicating the allowance of note-taking in approximately one-third of trials, but that 37% of judges never allowed note-taking).

551. See Petroff, supra note 155, at 127.

552. See Heuer & Penrod, supra note 531, at 226.

553. See Spencer v. Texas, 385 U.S. 554, 560 (1967) (recognizing the wide leeway given to states in dividing responsibility between the judge and jury in criminal cases). In fact, the Supreme Court has acknowledged the value of employing juries in making capital sentencing decisions. See, e.g., McCleskey v. Kemp, 481 U.S. 279, 311 (1987) (remarking that a jury, in determining whether to impose a capital sentence, can make “the difficult and uniquely human judgments that defy codification and that ‘build discretion, equity, and flexibility into a legal system’” (quoting Kalven & Zeisel, supra note 2, at 498)); Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968) (noting the jury’s important function in making capital sentencing decisions).


555. 468 U.S. at 447.

556. Id. at 459.
such right. However, this certainly does not mean that such proce-
duress are not constitutionally permissible. Historically, the particular facts
found by the jury often determined the particular sentence in a case. Thus, the jury had an indirect role in determining the sentence in the case
through its factfinding power.

In most modern criminal cases in the United States, the jury does
not participate in sentencing. However, the exception is the capital
case. The vast majority of states vest the jury with the power to
determine whether or not to impose the death penalty. However, in
seven states, the judge has the power to impose the death penalty. The
Supreme Court has held that the Sixth Amendment does not require
that a jury determine whether or not there are sufficient “aggravating
factors” under these statutes to warrant the imposition of the death
penalty. The Court has stated that “the Sixth Amendment does not
require that the specific findings authorizing the imposition of the
sentence of death be made by the jury.” Even when these statutory
“aggravating factors” relate to the circumstances of the accused’s offense,
the Court has found that it is constitutionally permissible to leave the
determination of sentencing to the judge alone. Therefore, there is

557. See id.; see also Cabana, 474 U.S. at 385 (stating that “[t]he decision whether a particular
punishment—even the death penalty—is appropriate in any given case is not one that we have ever
required to be made by a jury”).
558. See supra Parts II.D.3, III.D.3.
559. See Kotler, supra note 317, at 139.
560. See Mello, supra note 554, at 284 & n.1.
561. The judge has exclusive authority to impose the death penalty under the following statutes:
ARIZ. REV. STAT. ANN. § 13-703(B) (West 1995); IDAHO CODE § 19-2515(a) (Michie 1996); MONT.
CODE ANN. § 46-18-301 (1994); Neb. REV. STAT. § 29-2520 (1989). Under the following statutes,
the jury may make a sentencing recommendation to the judge, which the judge can then accept or
reject: ALA. CODE § 13A-5-46 (1994); FLA. STAT. ANN. § 921.141(2) (West 1996); IND. CODE § 35-
50-2-9 (West 1986).
564. See id. at 639 (holding that the trial judge could make a determination concerning the
imposition of the death penalty when aggravating factors involved whether “the killing was
committed for pecuniary gain, and the killing was especially heinous, atrocious, and cruel”); see also
Walton, 497 U.S. at 645-46 (holding that a judge may find aggravating circumstances when murder
was committed in an “especially heinous, cruel or depraved manner” or for “pecuniary gain”). But
see id. at 713 (Stevens, J., dissenting) (arguing that the Court had “encroached upon the factfinding
room to expand or contract the role of the jury in sentencing.

V. CONCLUSION

Although some commentators have argued that procedural reform in the United States may be hampered by Supreme Court decisions constitutionalizing or federalizing the rules of procedure, professional inertia among lawyers and judges, and a distrust of centralized authority, the reforms discussed in this Article fall within the scope of traditional understandings of trial by jury and due process in the United States. Therefore, meaningful reform of jury procedures should not run afoul of federal constitutional norms, and should enjoy some degree of success. For example, the Supreme Court has itself gone so far as to state that

[a] criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems. Yet no American State has undertaken to construct such a system.

Furthermore, recent Supreme Court decisions in the area of due process have arguably evidenced a "subtle devolution of political authority from function that has so long been entrusted to the jury").

565. See, e.g., Van Kessel, supra note 6, at 487.

Supreme Court constitutionalizing of the rules of criminal procedure, which began with Warren Court decisions in the 1960s, narrowed the scope of possible reforms at state as well as federal levels. In the name of creating a minimum floor of federal standards to which all states must conform, the Court significantly restricted states in experimenting with different procedural models.

Id. However, one commentator has argued that Supreme Court precedent is not inconsistent with experimentation with the jury system. See Alschuler, supra note 14, at 996-97.

566. See, e.g., Van Kessel, supra note 6, at 487.

Lawyers have a strong interest in maintaining the present system, which allows them to be the central figures in the great drama of the criminal trial. They will not easily yield their power to influence the outcome of trials while often being regarded as heroes in doing so. Furthermore, any interest they may have in expediting the trial process, such that there could be more trials and fewer guilty pleas, is diminished by their strong interest in maintaining the present plea bargaining system. Lawyer dominance over the disposition of cases through the plea bargaining process is even greater than lawyer control of the trial process.

Id. at 501.

567. See id. at 505.

the central government to the states,\textsuperscript{569} which might allow for increased procedural experimentation on the part of the state governments.

The reforms discussed in this Article: (1) allowing the knowledge and experience of potential jurors to be a factor that works for instead of against their being placed on the jury; (2) eliminating or cutting back on peremptory challenges and extensive lawyer-conducted voir dire; (3) retaining the rule of unanimity and the twelve member jury; (4) drafting jury instructions in plain English and preinstructing the jury; (5) requiring the judge to comment on the evidence and the credibility of witnesses; (6) relaxing the rules of evidence to allow hearsay, character, and past conviction evidence to be heard by the jury; (7) giving jurors the right to communicate with each other, ask questions of the witnesses as well as the judge, and take notes during trial; (8) allowing for greater jury participation in the determination of sanctions in criminal cases; and (9) requiring the jury to give reasons for its verdict in a written decision will result in increasing the speed and accuracy of trials in the United States. As the foregoing historical and constitutional analysis demonstrates, these reforms are, for the most part, consistent with traditional notions of trial by jury and due process in the United States. Thus, legal reformers, judges, and lawyers should feel no reservations in experimenting with these jury procedures in order to increase the speed, efficiency, and justice of both criminal and civil trials in the United States.
