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**What's Wrong With the Modern Jury:  
 How Our System Can Better Fulfill the Framers' Ideals**  
 By **VIKRAM DAVID AMAR**  
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Over the next few months, America will experience a spate of high profile trials, including the criminal cases of Martha Stewart, Kobe Bryant, Michael Jackson and Scott Peterson. As the country readies itself for these courtroom spectacles, the time is ripe to examine the institution situated at the center of each of these cases - the American jury.

The Founders of our nation believed that no idea was more central to the Bill of Rights - indeed, to the idea of government of the people, by the people and for the people - than that of the citizen jury. It was, in short, a cornerstone of a free society.

But today that cornerstone is crumbling: People who have witnessed the parade of notorious trials in recent years have seen the failures of the modern system, and as a result they have come to question the value of the institution.

Today, in Part One of a multiple-part series, I will sketch out the role that our nation's Founders hoped and expected juries to perform, and briefly lay out some of the perceived failures in the way juries operate today. And in future columns I shall discuss ways to recapture the Framers' original vision, and restore the jury to its rightful place.

### **The Founders' Vision: Protecting Defendants and Empowering Citizens**

The Framers of the Constitution felt that juries - because they were composed of ordinary citizens, and because they owed no financial allegiance to the government - were indispensable to thwarting the excesses of powerful and overzealous government officials.

Accordingly, the jury trial was the only right explicitly included in each of the state constitutions penned between 1776 and 1789. And the criminal jury was one of the few rights explicitly mentioned in the original federal Constitution that was proposed by the Philadelphia Convention.

Even with Article III's mention of criminal juries, opponents of the proposed Constitution complained bitterly that it did not go far enough in protecting the institution of the jury. In fact, the failure to adequately empower juries was among the most common complaint that Anti-Federalists voiced against the original Constitution proposed for ratification in 1787.

It is no surprise, then, that the Bill of Rights that was ultimately offered to appease fearful Anti-Federalists featured the jury in three separate amendments. The Fifth Amendment safeguards criminal grand juries; the Sixth Amendment protects criminal petit juries (that is, trial juries); and the Seventh Amendment preserves civil juries.

Column continues below | The need for juries was thought to be especially acute in criminal cases: A grand jury could block any prosecution it deemed unfounded or malicious, and a petit jury could likewise interpose itself on behalf of a defendant charged unfairly.

The famous Zenger case in the 1730s had dramatized, for the Framers, the libertarian advantages of

juries. When New York's royal government sought to stifle its newspaper critics through criminal prosecution, New York grand juries refused to indict, and a petit jury famously refused to convict.

### **Beyond the Parties to the Case: The Jury's Centrality to Majoritarian Self-Government**

But the Founders' vision of the jury went far beyond merely protecting defendants. The jury's more important role was democratic. The jury was an essential democratic institution because it was a means by which citizens could engage in self-government.

Nowhere else - not even in the voting booth - must Americans come together in person to deliberate over fundamental matters of law and policy. Jurors face a solemn obligation to overlook personal differences and prejudices, to fairly administer the law and do justice.

As the great historian of Anti-Federalist thought, Herbert Storing, put it: "The question was not fundamentally whether the lack of adequate provision for jury trial would weaken a traditional bulwark of individual rights (although that was also involved) but whether it would fatally weaken the role of the people in the administration of government."

Given this democratic function of juries, it is not surprising that the Framers often analogized jury service to voting and office-holding - in their view, all were essential parts of a so-called "political rights" package. Indeed, the jury's place in the judicial framework was closely related to the idea of bicameralism: Just as the legislature comprised two equal branches, an upper and a lower, juries and judges constituted the lower and upper branches, respectively, of the judicial department.

### **Recognition of Jury Service as a Political Right Has Continued Over More Modern History**

The Supreme Court has recently reinforced the linkage between jury service and voting as part of a package of political rights. For example, in a case challenging race-based exclusions in jury selection, *Powers v. Ohio*, Justice Anthony Kennedy observed in his majority opinion that "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process . . . . Whether jury service may be deemed a right, a privilege or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise."

The link between jury service and other rights of political participation such as voting was also recognized and embraced by the drafters of the Reconstruction amendments and implementing legislation in the wake of the Civil War, and still later by authors of various Twentieth century voting amendments.

For example, the framers of the Fifteenth Amendment, which prohibited race-based discrimination in voting, understood well that the voting they were protecting included voting on juries. That amendment, drafted and ratified in the 1860s, proved to be a template for later amendments protecting women, the poor, and the young from voting discrimination.

Related to the jury's democratic function was the jury's educational mission. Though the jury, citizens would learn self-government by doing it. In the words of the famous Nineteenth Century political scientist Alexis de Tocqueville, "the jury is both the most effective way of establishing the people's rule and the most effective way of teaching them how to rule."

As Tocqueville understood, this learning would carry over to other political activity as well: "[The jury] should be regarded as a free school which is always open and in which each learns his rights . . . and is given practical lessons in the law. . . . I think the main reason for the political good sense of the Americans is their long experience with juries in civil cases."

### **Modern Perceptions of Jury Makeup and Performance**

Americans today do not universally share the enthusiasm for juries that was expressed by the founding generation. To the contrary, many have become disillusioned with what they have seen of our jury system -- especially as it operates in criminal cases.

Over the past 15 years, millions of observers have seen up close the prosecutions of Oliver North, O.J. Simpson, William Kennedy Smith, the Menendez brothers, and the assailants of Rodney King and Reginald Denny. In the process, these viewers have all become armchair jurors. And sadly, the failings of the modern system have begun to seem obvious to anyone who has a television.

Among the common -- and, to some extent, justified -- perceptions are the following:

- \* In search of "impartial" jurors, the selection process seems stacked against the educated, the perceptive, and the well-informed, in favor of persons more easily manipulated by lawyers and judges. ★
- \* Attorneys exercising their clients' rights to "strike" candidates from the jury pool slyly and cynically seek to exclude jurors on the basis of race, gender and other supposed indicators of bias. ✎
- \* Courts subject citizens to repeated summonses, intrusive personal questioning, cramped waiting rooms, financial hardships and long and inefficient trials. Unsurprisingly, many citizens - perhaps the majority - struggle mightily (and successfully) to avoid jury duty altogether. ✎
- \* In court, the jury is unfairly subjected to rules that presume jurors are incapable of impartial deliberation, and that provide little help in their understanding points of law or evaluating witness testimony.
- \* The scales of justice seem tipped in favor of rich litigants with high-priced counsel.

Even if these perceptions are accurate to some extent, are they inevitable? In my next column, I will begin to evaluate some proposed fixes that reformers have offered to enable juries to live up to their intended, and exalted, roles.

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