

28 UCCLR 1169
(Cite as: 28 U.C. Davis L. Rev. 1169)

U.C. Davis Law Review
Summer 1995

Edward L. Barrett, Jr. Lecture on Constitutional Law

***1169 REINVENTING JURIES: TEN SUGGESTED REFORMS**

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No idea was more central to our Bill of Rights -- indeed, to America's distinctive regime of government of the people, by the people, and for the people -- than the idea of the jury. Yet no idea today has suffered more abuse -- from benign neglect to malignant hostility to cynical manipulation and strategic perversion -- than the idea of the jury. The groups I blame for this sad betrayal -- lawyers, judges, law professors, and to a lesser extent, citizens -- are well represented in this room this evening.

I.

Well, now that (I hope) I've got your attention, let me explain. My first claim -- the centrality of the jury to the Founders -- is a huge one but, I think, easy to prove. [\[FN1\]](#) The only right secured in all state constitutions penned between 1776 and 1787 was the right of jury trial in criminal cases. The criminal jury was one of only a handful of rights explicitly affirmed in the Philadelphia Convention (in Article III); and the Convention's only discussion of whether to add a more elaborate Bill of Rights took place in response to concerns about protecting civil juries. When the Convention imprudently omitted such a Bill, Anti-Federalists pounced on the omission during the ratification debates; and jury-protection clauses topped their wish lists. Of *1170 the six state ratifying conventions that floated amendment ideas, five put forth two or more explicit jury proposals.

A close look at our Bill of Rights confirms all this. Three amendments explicitly protect the jury: the Fifth Amendment safeguards criminal grand juries, the Sixth further protects criminal petit juries, and the Seventh preserves civil juries. These three clauses are only the most visible tip of the jury iceberg. Let's start with the First Amendment, and its ringing defense of freedom of speech and of the press. As the 1730s Zenger trial had made clear and the 1790s imbroglio over the Alien and Sedition Acts would

confirm, freedom of the press was tightly linked to jury trial in the 1780s. Indeed, the "no prior restraint" doctrine that intertwined with freedom of the press had its deepest roots in jury trial ideas. A prior restraint could issue from a judge via an injunction, and have bite in contempt proceedings that excluded a jury; nonprior restraints, like libel judgments, could have bite only if the government could persuade a jury of the publisher's peers to rule against him.

Now consider the Second Amendment. Like the jury idea, the Second Amendment tried to empower ordinary citizens -- "the people." Indeed, the "militia" and the "jury" were cousins. Both were local bodies, composed of ordinary citizens. Both were collective, republican institutions. Militia service and jury service were twin duties of good citizenship; and roughly speaking, those adult male citizens eligible to serve on one were also eligible to serve on the other. Both the militia and the jury reflected suspicion of paid, professional central officialdom -- a central standing army on the one hand, and judges, prosecutors, and bureaucrats on the other. (And the Third Amendment, of course, simply continued this suspicion of a paid, professional standing army.)

The civil jury was at the heart of the Fourth Amendment. [\[FN2\]](#) Modern case law has turned this Amendment upside down. At the Founding, warrants were not required; they were disfavored: "No warrant shall issue but upon" And they were disfavored precisely because (like a prior restraint) they issued from paid government bureaucrats and cut the jury out of the *1171 loop: the whole purpose of a warrant was to cut off the citizen target's ability to sue the searcher or seizer in a civil jury trespass action. In short, the Fourth and Seventh Amendments were tightly linked: the preferred vehicle for litigating the Fourth Amendment was a tort suit brought by a citizen and tried before a Seventh Amendment jury of fellow citizens. And in this tort suit, the key Fourth Amendment issue would be whether the government's search or seizure had been "reasonable" -- a standard tort question (like negligence) to be shaped over the long run by juries in tandem with judges.

We have already noted the Fifth Amendment's explicit grand jury clause; but let us now note two more Fifth Amendment jury ideas. First, see how the Double Jeopardy Clause snugly safeguards the role of the criminal jury. Article III and the Sixth Amendment require that a criminal case be tried by a jury; and the Double Jeopardy Clause generally prevents appellate judges from reversing that jury's verdict of acquittal. In effect, the Double Jeopardy Clause operates much like the second clause of the Seventh Amendment, which generally prevents appellate judges from overturning a civil jury's verdict. (This connection was well understood by the Framers.) [\[FN3\]](#) Next, consider the majestic Fifth Amendment phrase, "due process of law." This grand phrase traces back to Lord Coke, who defined it, in words well known to all eighteenth century lawyers, as "indictment or presentment of good and lawful men" -- that is, a grand jury. [\[FN4\]](#)

Passing over the Sixth and Seventh Amendments -- the tip of our iceberg -- we come to the Eighth, addressing bail and punishments. How, you may well ask, is the jury relevant here? Aren't bail hearings and sentencing hearings often held by judges sitting alone, without juries? Exactly so -- but from another perspective, this proves my point. Precisely because judges acting *1172 without juries were suspect, the Bill of Rights had to put special limits on them, limits in the Eighth Amendment. (So too in the Fourth Amendment Warrant Clause, and in the First Amendment rule against prior restraints.)

Well trained modern lawyers have been taught that the Ninth Amendment is about -- if it is about anything -- individual rights like privacy; and that the Tenth Amendment means -- if it means much at all -- states' rights and federalism. Here, as elsewhere, well trained lawyers would do well to read the text. Both amendments explicitly speak of "the people" -- of Ninth Amendment "rights . . . retained by the people" and Tenth Amendment "powers . . . reserved . . . to the people." The Preamble, of course, triumphantly trumpets the right and power of "We the People" to collective self-governance; and no phrase appears in more of our first ten Amendments than the phrase "the people." The core idea conjured up by this phrase is not privacy, not federalism, but popular sovereignty -- the idea of the people's control over their mere agents in government. [\[FN5\]](#) And this idea, in large measure, underlies the American idea of jury trial, "trial() by the people themselves" as Thomas Jefferson exuberantly put the point in 1789. [\[FN6\]](#)

Well, that concludes my five-minute tour of the Founders' Constitution and the Bill of Rights. I plead guilty to selective emphasis -- but the full texts are long, and time is short. I hope then, that, at least for now, I have said enough to win your provisional assent to my first huge claim: that the jury idea was absolutely central to the Founders' Bill of Rights, and their distinctive constitutional idea of popular self-government. Let me now move to my second huge claim: that the current state of affairs betrays the jury and the people, and that lawyers, judges, and law professors must bear much of the blame.

First, a few words of clarification. No, I am not arguing that we can, or should want to, go back to everything that was said and done in 1789. Much of our Constitution has changed. ***1173** Amen! Or perhaps I should say "Amend!," for the most distinctive changes have occurred through constitutional amendments redefining "We the self-governing people" to include blacks, women, the poor, and the young. But nothing in these glorious Amendments -- the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth, for those of you who are counting -- moots the jury idea. Rather, as we shall see, these new amendments reaffirm popular self-government and demand only that all the people should count, and vote -- count and vote, I shall argue, in juries, too.

Nor am I ignoring larger forces at work over the last two centuries -- nationalism, bureaucratization, technological complexity, and increasing specialization of labor. The jury idea must make its peace with these forces, but a just peace calls for creative accommodation rather than unconditional surrender of the jury idea. Take nationalization, for example. At the Founding, the jury -- like much of the Bill of Rights -- reflected localist suspicion of central authority. The American Revolution, born in local rebellion against imperial oppression, cast a long localist shadow. But in the Civil War era, the national government emerged as liberty's last best hope, and a new banner unfurled: "Freedom National!" A new Bill of Rights arose -- the Thirteenth, Fourteenth, and Fifteenth Amendments -- exemplifying this new nationalism. But in many ways this new nationalism only strengthened the old jury idea. The Fourteenth Amendment was drafted to reverse *Barron v. Baltimore* [\[FN7\]](#) and apply the principles of the Bill of Rights -- including many of its jury ideas -- against the states; [\[FN8\]](#) and as I noted in passing, the Fifteenth Amendment created a national guarantee that states allow blacks to vote, in juries and elsewhere. Similar adaptations of the jury idea will be needed to accommodate bureaucratization and specialization of labor, as we shall see. But here too, the core populist idea of the jury trial must be retooled, [\[FN9\]](#) not retired.

***1174** Finally, in placing much of the blame on lawyers, judges, and law professors, I admit the importance of both materialism and idealism. Material incentives matter, and so do ideas. Over two centuries, lawyers -- both prosecutors and defense attorneys -- have had strong incentives to aggrandize their own roles in litigation at the expense of the jury. But their motives have been partial and partisan; the parties have wrested control from the whole people, embodied in the jury idea. The deepest constitutional function of the jury is to serve the people, not the parties -- to serve them by involving them in the administration of justice and the grand project of democratic self-government. Alas, over the years, short-term convenience of litigants has won out against the long-run values of public education and participation. Judges, of course, are charged with protecting these enduring constitutional values; but they too have perverse and partisan incentives here. The jury was to check the judge -- much as the legislature was to check the executive, the House to check the Senate, and the states to check the national government. On this materialist account, prosecutors, defense attorneys, and judges have, over the centuries, contrived to carve up amongst themselves things that rightfully belong to the jury -- to all of us, as citizens.

And why have we failed -- as jurors, as citizens -- to fight off these creeping assaults? Here, too, a material incentive analysis is helpful. Prosecutors and judges are professional repeat players; defense attorneys are paid; whereas the people at large lack tight organization. The benefits of jury service are widely dispersed -- they redound to fellow citizens as well as the individual jurors. But the individual juror bears all of the cost -- the hassle, the inconvenience, the foregone wages -- of jury service. Jury service is not just a right, but a duty; predictably few of us have militantly insisted that we perform this duty, just as few of us insisted in the Reagan years that we pay our fair share of the intergenerational tax burden. [\[FN10\]](#)

Here is where law professors come in. For one socially useful role of the not-for-hire academic should be to articulate long-run systematic values that the partisans and the temporary, self-***1175** interested agents will predictably slight. We have, for example, a rich academic law and economics literature decrying special interest rent-seeking -- the honey subsidies, the grazing fee giveaways, and so on -- but we lack an equally vigorous literature championing the common good over the special interests in jury law. Law professors have, in general, been better capitalists than democrats.

In the classroom, the big idea of the jury is carved up into a few trivial ideas scattered across the curriculum. Civil Procedure devotes a week or so to the Seventh Amendment; but this hardly shows the jury in its best light. Fundamentally, the jury is, in Tocqueville's phrase, a political institution not a procedural one. [\[FN11\]](#) It exists to promote democracy for the jurors, not efficient adjudication for the parties. Criminal Procedure professors typically discuss a defendant's right to a criminal jury; but what about the people's right -- and duty -- to serve and vote on a jury? In Criminal Procedure, anti-jury warrants typically become the heroes of the Fourth Amendment story; celebration of judge-fashioned exclusionary rules drowns out serious discussion of the jury-driven tort suit at the Amendment's core; and the only thing said about the grand jury (typically) is that a clever prosecutor can get it to indict a ham sandwich. And what about classes in Constitutional Law proper? The jury goes almost unmentioned. Prior restraint is taught as a press rule; the "judicial department" means judges; and "democracy" means legislatures. Federalism, legislative bicameralism, presentment, -- all this and much more are studied, but the big idea of the jury almost never is. One is reminded of Humphrey Bogart's

unforgettable line in Casablanca [\[FN12\]](#) when asked by Peter Lorre whether he (Bogart) despises Lorre: "I probably would, if I gave you any thought."

Outside the classroom, there is still more cause for shame. When academics have publicly weighed in on jury debates in this century, it has too often been on the wrong side -- trivializing the jury, mocking it, coming up with new theories for whittling away its power. As a Yale man, I am happy to say that the worst offenders here have been prominent men from Harvard -- *1176 Felix Frankfurter, Erwin Griswold, and Charles Fairman, to name a few [\[FN13\]](#) -- but other schools have not lagged far behind.

Now, I have painted with an extremely broad brush in sketching out this scathing indictment of lawyers, judges, and law professors. I would be remiss if I left you all thinking that no one stood up against this constitutional betrayal. Some did -- but too few. My own hero is the great Hugo Black, who had an abiding faith in the Constitution, the jury, and the people. (And for all this, he was mocked by sophisticated cynics in the academy -- wise fools!) Unlike most of his fellow Justices, Black had practiced as a trial lawyer; it is perhaps unfortunate that the one Court which has the most power to save or kill the jury has so little familiarity with the institution, now that circuit riding is ancient history.

II.

In the time I have left, I shall try to offer ten admittedly broad and tentative suggestions for reinventing juries today -- preserving the Founders' big idea in our modern world. Ten is an arbitrary number to be sure, but who am I to quarrel with God and Moses on Sinai, the ratifiers of the federal Bill of Rights in 1791, or David Letterman, for that matter? Because my individual proposals are linked by a single vision, it is best, I think, to set out up front some of the basic features of that vision.

First, we must see the big idea of the jury generally, above and beyond the Fifth, Sixth, and Seventh Amendments, respectively. Grand juries, petit juries, and civil juries do differ from each other, but they are all juries of sorts. Adjectives should not obscure nouns. Also, we must see how this big idea connects up to other constitutional ideas. In particular, three closely related constitutional analogies strike me as especially fruitful: the legislative analogy, the bicameral analogy, and the voting analogy.

*1177 At the Founding, analogies between legislatures and juries abounded. In the words of a leading Anti-Federalist pamphleteer:

It is essential in every free country, that common people should have a part and share of influence, in the judicial as well as in the legislative department. . . .

The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature . . . have procured for them, in this country, their true proportion of influence. . . . [\[FN14\]](#)

Closely related was the idea of bicameralism: just as the legislature featured two equal branches, one upper and one lower, so too with the judiciary. The judges constituted the upper branch of the judicial department; the juries, the bicameral lower branch. [\[FN15\]](#) If we take these analogies seriously, certain jury issues will appear in a new light.

Most important is the light cast by the voting analogy. Jurors vote in juries, and ordinary voters have in America typically been eligible to serve as jurors. As Tocqueville put the point:

The jury system as understood in America seems to me as direct and extreme a consequence of the . . . sovereignty of the people as universal suffrage. They are both equally powerful means of making the majority prevail. . . . (T)he jury is above all a political institution (and) should be made to harmonize with the other laws establishing the sovereignty. . . . (F)or society to be governed in a settled and uniform manner, it is essential that the jury lists should expand or shrink with the lists of voters. . . .

(In general) (i)n America all citizens who are electors have the right to be jurors. [\[FN16\]](#)

In recent opinions, the Supreme Court has begun to reaffirm this Tocquevillian vision, analogizing voting and jury service. [\[FN17\]](#) The analogy has broad implications, shifting analysis from a litigant's right to be tried by a jury to a citizen's right to serve and vote on a jury. As a result of this shift, a defendant's racially-*1178 based peremptory challenges do not protect his own legitimate right to be tried by a jury he deems to be fair; rather, they threaten the people's right to serve and vote on juries free from racial discrimination. Race-based peremptory challenges, even in the hands of a defendant, violate the Fifteenth Amendment; and gender-based challenges violate the Nineteenth. The jury/voting analogy has been analyzed -- quite powerfully, I think -- in a recent article by a member of the U.C. Davis faculty, and so I shall say no more here, lest I steal his thunder. [\[FN18\]](#) (Indeed, I must be specially careful here, for he also happens to be my brother, and he has been accusing me of stealing his stuff ever since he turned two years old.)

With these general remarks framing the issue, let us now turn to my top ten list (in no particular order) of suggested jury reforms.

1. No Excuses

Citizens should not easily escape the duty, and "repeat-player regulars" (lawyers and judges) should not easily deny citizens the right, to serve on juries. Consider first citizen efforts to shirk jury duty. In part, the shirking problem arises because those who do serve are too often treated shabbily in a process run by -- and for the convenience of -- repeat-player regulars. Reforms on this front, which I shall outline in a moment, should solve part of the problem. But not all of it. Specialization of labor here is another culprit: specialization breeds inequality of citizens, and the jury idea is rooted in equality. Less abstractly, specialization means that many citizens may not want to give up a week of their careers -- and the big bucks they can make in that week -- to shoulder their equal share of duties of citizenship.

A sensible system, I suggest, would require each citizen to devote, say, one week a year to jury service -- note the analogy to the modern Swiss militia. Each citizen could "time shift" -- declare well in advance which week is most convenient -- but except for genuine emergencies, citizens should be obliged to *1179 serve when their week comes up. [\[FN19\]](#) We should turn specialization of labor to the service of democracy by, for example, providing professional specialized day care (or day care vouchers) to enable homemakers -- mainly women, today -- to take their turns in the project of collective self-governance.

And how should this obligation be enforced? Stiff fines are one option. If you shirk your week, you must pay two weeks' salary. (Flat fines, by contrast, would be functionally regressive, and create incentives to shirk for high- salary citizens.) More radically (and problematically), we could re-link jury service and voting: If you want to opt out of the responsibilities of collective self-government, fine -- but you may not then exercise any of its rights. You have two choices: to be a citizen, with democratic rights and duties, or a subject, ruled by others. On this view, you are not entitled to vote outside juries if you are unwilling to serve and vote inside juries. If you are not willing to engage in regular focused deliberation with a random cross section of fellow voters, you should not be governing the polity, just as you may not vote in the Iowa caucuses unless you attend and hear the arguments. Citizens not only have freedom to speak to fellow citizens on issues of public concern: they have duties to listen. As a practical matter these duties are generally unenforceable; but the jury provides a forum to force citizens who might never engage each other -- they live in different neighborhoods, work in different worlds, attend different schools, worship in different churches -- to listen to each other, and deliberate collectively.

Two obvious objections arise. First, isn't the no-serve, no-vote rule a type of in-kind poll tax, outlawed by the Twenty-Fourth Amendment? [\[FN20\]](#) Perhaps, but note that unlike a flat fee, a personal service poll tax bites the wealthy as much as the poor, and *1180 thus avoids class discrimination -- the real mischief that the Twenty-Fourth Amendment was designed to redress. If requiring Iowa's citizens to listen before they vote in caucuses does not violate the Amendment, requiring them to serve on juries may not be so different.

A second objection runs like this: "If jury service is ultimately designed to reconnect the citizens with each other and the polity, we must remember that voting also reconnects. We should be encouraging voting, not discouraging it, and so the no-serve, no-vote rule undermines its long-run goal." For me, this is a weighty, and perhaps dispositive, objection; but I also fear that too many citizens see voting as private and not public: "I'm entitled to vote on any basis I see fit, and don't have to explain or justify myself to fellow citizens. Voting is private and self-regarding -- what I do in the ballot booth is like what I do in the bedroom -- it's nobody else's business." I think this view is deeply wrong. We have secret ballot rules to cure second-best problems of force and fraud that would occur if thugs could monitor your vote, [\[FN21\]](#) not because voting is inherently private or self-regarding. Perhaps too many people today are voting for the wrong reasons -- and relinking voting to jury service may help remind them of the true, public-regarding nature of these rights.

Once we solve the shirking problem and enforce the duty to serve, we must deal with the flip-side of the coin: the efforts of repeat-player regulars to deny the citizen her right to serve. Excuses for cause should be extremely limited: If you are the brother-in-law of the plaintiff, you may be excused; but you may not be excused merely because you happen to have ideas -- what self-governing citizen shouldn't have ideas? Put simply, a juror should have an open mind but not an empty mind. It is sad that in order to try Oliver North, you couldn't know who he *1181 was. [\[FN22\]](#) Too often, juries come up with stupid results because we let the parties pick stupid jurors in stupid ways.

The bicameralism analogy is quite helpful here: the same standard for recusal should apply to judge and juror. Indeed, if anything, juror bias is less problematic, because the juror is only one of twelve, and must openly articulate reasons to persuade her peers, [\[FN23\]](#) whereas a biased judge can

single-handedly manipulate the proceedings in ways hard to detect and reverse. (And our juror will sit one week a year; our judge, fifty.)

At the federal level, repeat-player regulars should not be able to conspire to excuse criminal jurors en masse by agreeing to a bench trial. Article III demands that the trial for "all crimes shall be by jury" and "shall" and "all" meant just that to the Framers. So said unanimous Supreme Courts in the nineteenth century, but since the New Deal, the Court has wrongly allowed defendants who plead not guilty to be tried by judges alone. [\[FN24\]](#) The bicameralism analogy here has bite: an Article III judge sitting without a criminal jury is not a criminal court with jurisdiction, just as the Senate sitting without the House is not a legislature. (Whether this Article III mandate should be imposed on state criminal proceedings is, of course, a different question.) [\[FN25\]](#)

*1182 2. Preempting Peremptories

By and large, the first twelve persons picked by lottery should form the jury. The jury -- and not just the venire -- should be as cross-sectional of the entire community of the whole people as possible. Peremptory challenges should be eliminated: they allow repeat-player regulars -- prosecutors and defense attorneys -- to manipulate demographics and chisel an unrepresentative panel out of a cross-sectional venire. [\[FN26\]](#)

The suggestion here closely builds on my first one. Juries should represent the people, not the parties. Democracy is well served if juries force together into common dialogue a fair cross section of citizens who might never deliberate together anywhere else.

All the broad principles outlined earlier -- the big idea of the jury generally, the legislative analogy, the bicameral analogy, the voting analogy -- cut against peremptories. We do not let a defendant handpick a personalized designer legislature to fashion the norms governing his conduct; or the prosecutor who pursues him; or the grand jury that indicts him; or the judge who tries him; or the appellate court that reviews his case. We do not try -- and I'll resist the temptation to wisecrack here -- to pick the most stupid persons imaginable to serve in our legislatures, or on our judiciary. When ordinary citizens vote, they have never been subject to a reverse literacy test reflected in the following joke: "Knock knock . . . Who's there? . . . O.J. . . . O.J. who? . . . Congratulations, you're on the jury!" And in voting, we are especially uneasy about depriving citizens of the right to vote on the basis of discretionary and low-visibility judgments that may mask racial or sexual prejudice and stereotyping.

Three big arguments support peremptories. First is the idea of legitimacy: the parties will better respect a decision reached by a body they helped to select. But what about the legitimacy of the verdict for the rest of society -- We the People who see weird juries, chosen in weird and expensive ways, generate weird outcomes? And the trial judge, appellate court, legislature, and grand jury are legitimate even though the defendant didn't *1183 handpick any of them or have any peremptory challenges. And so here we have a good example of repeat-player regulars dressing up their power grab against the jury in the name of principle.

Next is the prophylactic argument from voir dire: we must allow a defense counsel to probe jurors with incisive questions at voir dire; and counsel needs peremptories to vigorously exercise this right, lest counsel offend a juror for whom no provable grounds exist for a "for cause" dismissal. But since I propose getting rid of almost all "for cause" dismissals and thus most voir dire, the prophylactic argument collapses.

Finally, there is the argument from the long history of peremptories. But the Supreme Court has repeatedly made clear that no constitutional right to peremptories exists: [\[FN27\]](#) they are as much a relic of an imperfectly democratic past as the now dead (or at least dying) "key man" system for generating venires. Peremptories at the Founding, I suspect, were typically exercised as a polite way of dismissing folks with personal knowledge of the parties. In a largely homogeneous community, peremptory challenges would rarely skew the demographics of the eventual jury. [\[FN28\]](#) But after the Fifteenth and Nineteenth Amendments, we must be vigilant to prevent racial and gender discrimination wrapped in the inscrutable cloak of the peremptory challenge. To take the voting analogy and Reconstruction seriously, we should choose to vindicate the more modern constitutional right to vote free from discrimination over the more ancient nonconstitutional right to exclude jurors on the basis of unarticulated prejudice.

***1184** 3. Regularizing Juries

If you're still on board -- and I suspect some of you may have jumped off the freight train a while back -- my next suggestion should follow naturally. We should try to regularize juries -- empower them in ways that make them less vulnerable to encroachments of the repeat-player regulars, without turning them into professionals themselves. First, a single jury, once constituted, should be able to try several cases in a row. If you can hear four quick cases in your week a year, great! The grand jury hears more than one indictment; the judge sits on more than one case; and the legislature may decide more than one issue in a session (though the 1994 session of Congress made me wonder). In England, at least, a typical seventeenth or eighteenth century jury did sit for several cases seriatim. [\[FN29\]](#) Deliberation among fellow citizens will be enhanced; the burden of jury service will be more evenly distributed -- one week for everyone; and more trials can take place if we get rid of all the wasteful preliminaries like elaborate voir dire and peremptories. Remembering the big idea of juries generally, perhaps we should have a single jury hear both civil and criminal cases in its week. Note finally, that though we are regularizing the jury, we have not professionalized it: one week a year will not turn citizens into government bureaucrats, though it will give citizens regular practice in the art of deliberation and self-government.

We should also pay jurors for their time. Again, one week a year will not turn them into professionals, but payment at a fair flat rate will enable a broad cross-section to serve. The legislative and bicameral analogies suggest payment; judges and legislators are paid for their time. At first the voting analogy seems to cut the other way: we do not pay voters to vote. But the time spent going to polls and voting -- one hour perhaps -- is much less than the week a year involved in jury service. To decline to compensate citizens for their sacrifice -- or to pay them \$5 per day as is done in many California courts -- is in effect to impose a functionally regressive poll tax that penalizes the working poor who want to serve and vote on juries, but who cannot ***1185** afford the loss of a week's pay. Payment should come from the government, not private employers. All jurors are equal as jurors, and should be paid equally. One

person, one vote, one paycheck.

Most controversially, we should sometimes allow juries to hire support staff, if necessary. In a world of increasing complexity and specialization of labor, few can do an important job well without support. If legislators and judges can have staffs, why not grand juries? [\[FN30\]](#) We trivialize juries when we insist that they -- and only they -- must stay in the eighteenth century world of generalists. Because juries are single-shot entities rather than continuing bodies, they have predictably lost out to ongoing repeat players over two centuries. Perhaps a permanent staff with undivided loyalty to the jury itself -- with mandatory term limits to prevent the staff from entrenching itself and using the jury as a ventriloquist's dummy to advance its own agenda -- should be considered.

4. Respecting Juries

My next proposals are far more modest. (Some of you, I'm sure, have been wondering if I would ever say anything modest.) Some judges do not allow jurors to take notes. This is idiocy. Judges take notes, grand jurors take notes, legislators take notes -- what's going on here? If juries today come up with stupid results sometimes, don't put the blame on them alone. Why shouldn't juries be told at the outset of a case-- in plain English, not legalese -- what the basic elements of the charged offenses are, so they can be thinking of them, and checking them off in their notebooks, as the trial unfolds? If judges are allowed to ask questions from the bench, should not juries at least be allowed to forward questions to the judge to be asked, if not substantively inappropriate? [\[FN31\]](#) More generally, we must try to design the system to welcome jurors. Like Ronald Reagan in that famous *1186 New Hampshire debate (or was it Spencer Tracy in State of the Union? [\[FN32\]](#)) they are the ones paying for these proceedings, and they are entitled to be treated with respect. Instead, all too often, they are treated rudely by court regulars, made to wait in cramped and uncomfortable quarters, treated as if their time had no value, shuttled around without explanation, and so on. We should use juries to reconnect citizens with each other and with their government. After serving on a jury, a citizen should, in general, feel better -- less cynical, more public-regarding -- about our system, but our current regime, run for the convenience of the regulars, too often has exactly the opposite effect. [\[FN33\]](#)

5. Educating the People

Once we start thinking about the jury from the perspective of democracy rather than adjudication -- from the viewpoint of the citizenry rather than the litigants -- other possibilities open up. Let us again hear Tocqueville's words:

To regard the jury simply as a judicial institution would be taking a very narrow view of the matter, for great though its influence on the outcome of lawsuits is, its influences on the fate of society itself is much greater still. The jury is therefore above all a political institution, and it is from that point of view that it must always be judged. . . . (The jury) should be regarded as a free school which is always open and in which each juror learns his rights. . . . I do not know whether a jury is useful to the litigants, but I am sure it is very good for those who have to decide the case. I regard it as one of the most effective means of popular education at society's disposal. [\[FN34\]](#)

***1187** If this is the big idea, why not take advantage of new technology to advance it? Jury deliberations can be videotaped. [\[FN35\]](#) Even if these deliberations can never be introduced to impeach the jury's verdict -- just as *The Brethren* [\[FN36\]](#) is inadmissible evidence to overturn a Supreme Court case -- the videotape can be used (perhaps after some time delay in sensitive cases) as high school teaching materials about democracy in action. For those who find the legislative analogy useful, think of how much C-SPAN broadcasts of legislative debates and hearings have contributed to public education.

Indeed, we might even go a step further. Opponents of the jury often attack it for being a "black box" and for failing to "give reasons." But inscrutability and muteness are not the essence of juries -- one of the historic functions of grand juries, for example, was to issue reports and presentments, as we shall see. If a criminal petit jury or civil jury would like to explain its reasons beyond a terse "guilty" or "judgment for plaintiff," perhaps we should allow the jury to employ a "jury clerk" -- akin to today's judicial clerk -- to help compose a statement of reasons that will enhance public understanding and education. [\[FN37\]](#)

6. Safety in Numbers

For the Framers, a criminal jury meant "twelve men, good and true." Today, in light of the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, we must update all this: "men" must include women, too, and "good and true" jurors ***1188** include the black, the poor, and the young. But twelve should still mean twelve.

Almost no one on the Supreme Court ever thought otherwise until recently. But when the criminal jury right was incorporated against the states, via the Fourteenth Amendment, in 1968, the Court signalled a willingness to water down this clear historical rule to accommodate state traditions of smaller juries. [\[FN38\]](#) Today -- in state courts at least -- criminal juries of less than twelve jurors are permitted. [\[FN39\]](#) And this lax rule has now made its way into the federal courts on the civil side, where six-person juries have been blessed by the Supreme Court as satisfying the Seventh Amendment. [\[FN40\]](#)

The Court has noted that the number twelve does not explicitly appear in the Constitution. [\[FN41\]](#) And there is nothing magic about twelve -- just as there is nothing inherent in a top ten list. But both have a fair amount of history behind them, and once we move off twelve, where shall we stop? If eleven is enough, why not ten? If ten, why not nine? By mathematical induction, we unravel down to one; and clearly something has gone wrong. If the number is at some point arbitrary, why not stick with one that has history clearly on its side?

And here are two more fundamental reasons for twelve over six -- which is where the current Court seems ready to draw the line. [\[FN42\]](#) First, if jury service is a positive good -- a democratic plus -- isn't twelve twice as good as six? More citizens will participate and be educated at Tocqueville's school. Second, if we want individual juries to be cross-sectional, to draw citizens from different backgrounds together in common deliberation, we should want each jury to be of substantial size. A minority perspective is less likely to be represented on a jury of six than on one of twelve. And so the deep inclusionary and cross-sectional spirit of later amendments (Fifteen, Nineteen, Twenty-Four, and

Twenty-Six) confirms our founding vision of safety in large numbers. If anything, if twelve is not sacred, we should consider ***1189** increasing the size of juries. Once again, the big idea of juries generally supports this: grand juries typically have twenty-three members. (The legislative analogy is also helpful here -- most legislatures have more than twelve members.)

7. (Super) Majority Rule?

But all this leads to another controversial -- and I admit highly tentative -- suggestion. Perhaps, even in criminal cases, we should move away from unanimity toward majority or supermajority rule on juries.

Founding history is relatively clear. A criminal jury had to be unanimous. But like the number twelve, this clear understanding was not explicitly inscribed into the Constitution, and the modern Supreme Court has upheld state rules permitting convictions on 10-2 votes. [\[FN43\]](#)

Beyond this precedent, four main arguments support my suggestion that nonunanimous verdicts should be constitutionally permissible. First, unlike the jury size issue, once we depart from the Framers' clear starting point, we do not slide all the way down a slippery slope. Six was not a stable jury number, but majority rule has unique mathematical properties, and surely no one could think that a defendant could be convicted by a minority vote. Majority rule thus sets a principled lower bound for any reform. Second, at the Founding, unanimity may have drawn its strength from certain metaphysical and religious ideas about Truth that are no longer plausible: some may have thought that all real Truths would command universal -- unanimous -- assent. [\[FN44\]](#) Third, most of our analogies tug toward majority rule -- legislatures generally use it; voters abide by it; appellate benches follow it (even in criminal cases); and grand juries are governed by it [\[FN45\]](#) -- or supermajority rule: in the impeachment context, ***1190** the House, acting as a kind of grand jury, votes by majority rule, but the Senate, acting as a kind of petit jury, must summon a two-thirds vote to convict. [\[FN46\]](#)

Last, and most important, all my other suggested reforms put tremendous pressure on unanimity. Unanimity within a jury at the Founding was nestled in a cluster of other rules that now must fall. Blacks, women, and the poor were excluded from voting and jury service too. Key man systems rounded up the usual suspects -- a set of relatively homogeneous citizens to serve. Peremptory challenges could further trim off outliers on a distributional curve. But if everyone now gets to serve on a jury, and we eliminate all the old undemocratic barriers, preserving unanimity might also be undemocratic, for it would create an extreme minority veto unknown to the Founders. In practice this minority veto could disempower juries by preventing an intolerably large percentage of jury cases from ever reaching a final verdict.

Even at the Founding, perhaps unanimous jury verdicts existed in the shadow of a jury custom of majority rule. Juries would discuss the matter and vote on guilt; and even if the minority were unconvinced about guilt, they would in the end vote to convict after they had been persuaded that the majority had listened to their arguments in good faith. This custom might be hard to institutionalize today, but it bears some resemblance to legislative "unanimous consent" rules. A single lawmaker may often slow down proceedings -- force her colleagues to deliberate more carefully on something that

matters to her -- but in the end she may not prevent the majority from implementing its judgment. Perhaps the same should hold true for juries. Recall *1191 once again Tocqueville: "The jury system (and) universal suffrage . . . are both equally powerful means of making the majority prevail." [\[FN47\]](#)

In allowing juries to depart from unanimity, we must try to preserve the ideal of jury deliberation and self-education -- jurors should talk to and listen to each other seriously and with respect. Friends of unanimity argue that it promotes serious deliberation -- everyone's vote is necessary, so everyone is seriously listened to. But unanimity cannot guarantee mutual tolerance -- what about the eccentric holdout who refuses to listen to, or even try to persuade, others ("you can't make me, so there!"). Conversely, nonunanimous schemes can be devised to promote serious discussion. Jurors should be told that their job is to talk and listen to others with different ideas, views, backgrounds and so on. So too, judges can advise jurors that their early deliberations should focus on the evidence and not their tentative leanings or votes -- and that no straw poll should be taken until each juror has had a chance to talk about the evidence on both sides. Institutionally, perhaps we might try a scheme where on Day 1, a jury must be unanimous to convict; on Day 2, 11-1 will suffice; on Day 3, 10-2, and so on, until we hit our bedrock limit of, say two-thirds (for conviction), or majority rule (for acquittal). To discourage jurors in the (early) majority from freezing out and waiting out the (early) minority, and to encourage the (early) minority to make arguments rather than filibuster, jurors should be told that the whole purpose of our sliding vote scheme is to give a sole holdout on Day 1 a fair chance to pick up a convert by Day 2, and so on.

8. Jury Review

So far, I have focused more on criminal juries than civil. Tocqueville, however, found civil juries even more educational for the citizenry than criminal ones. At the Founding, a key role for all juries was to protect citizens from government abuse -- and the paradigmatic Seventh Amendment case was one brought by an aggrieved citizen against an abusive government official. We should revive this grand tradition, especially in Fourth *1192 Amendment cases. Elsewhere, I have followed in the footsteps of the great Dean for whom this Lecture Series is named, and who is with us here tonight, in voicing serious reservations about the Fourth Amendment exclusionary rule. [\[FN48\]](#) Whether or not you share our concern about letting guilty criminals go free, I hope you see the need to strengthen remedies for the truly innocent citizen wrongly searched. (The exclusionary rule is no help here -- there is no criminal evidence to exclude because our citizen is not a criminal.)

For our purposes tonight, what is especially noteworthy is the part that Seventh Amendment juries should play in helping to define which searches and seizures are "reasonable" within the meaning of the Fourth Amendment. The Constitution comes from the people, and the people should have some role in administering it and saying what it means. [\[FN49\]](#) Often, legislators and judges will properly lay down rules establishing the per se reasonableness or the per se unreasonableness of certain types of searches and seizures, much as they lay down rules establishing per se negligence and per se non-negligence (safe harbors) in tort law. But sometimes reasonableness will call for a contextual, common sense assessment that defies broad categorization, and sometimes a jury will be the best body to make this common sense and democratic assessment. And so here too, the bicameralism analogy is useful. Just as

judges can review actions of government for unconstitutionality -- Marbury-style judicial review [\[FN50\]](#) -- sometimes juries can too, as when assessing the mixed fact and law question of Fourth Amendment reasonableness. [\[FN51\]](#)

*1193 9. Why Not Administrative Grand Juries?

So asks my friend Ron Wright, in a recent issue of the Administrative Law Review. [\[FN52\]](#) Professor Wright's inspiring idea is to find niches in administrative agencies where citizen input, citizen advisory panels, citizen oversight groups, and so on, would be desirable and workable. I shall not go into detail here (it would hard to improve on "the Wright stuff") but I shall simply note how Ron's work is in the best tradition of the creative accommodation I am urging tonight. The Founders knew not the modern administrative state, but they did try to build citizen involvement into every branch of government they did know: a lower legislative branch of rotating citizen-legislators (or so they thought), criminal prosecutions that would involve grand juries, and bicameral judicial trials featuring juries in both civil and criminal cases. Now that a massive administrative branch has arisen, fidelity to deep constitutional structure should lead us to try to find room, here, too, for the people. [\[FN53\]](#)

10. Preserving Presentments

In his celebrated 1790 Lectures on Law, Founder James Wilson described the grand jury as:
 a great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered. All the operations of government, and of its ministers and officers, are within the compass of their view and research. They may suggest publick improvements and the modes of removing publick inconveniences: they may expose to publick inspection, or to publick punishment, publick bad men, and publick bad measures. [\[FN54\]](#)

In exposing corruption and wrongdoing, grand juries used the devices of presentments and reports, bringing to light abuses that the citizenry at large had a right to know about, even if no indictable offense had occurred. In an elegant student note, my sometime co-author Renee Lettow suggests reviving the tradition *1194 of grand jury presentments, giving a cross-sectional deliberative body of citizens a more active and visible role than that of prosecutorial rubber stamp. [\[FN55\]](#) I commend you to her celebration of the efforts of a Rocky Flats, Colorado, grand jury to alert fellow citizens about perceived government malfeasance and self-dealing; and her description of the efforts of repeat-player regulars like the federal judge to muzzle the grand jury. She has stated her case well, and it too, belongs on a short list of potential jury reforms.

Underlying Lettow's arguments -- and Wright's too, for thatmatter -- is the vision I have tried to conjure up for you tonight: what I have called at times tonight "the big idea of the jury," and at other times, "popular sovereignty." The vision is a demanding one -- and at times, an expensive one, too. Some of my proposed reforms may, in the short run, cost money. Public education is always costly, in the short run. But in the long run -- at least in a government of the people, by the people, and for the people -- public ignorance is always more expensive, as the Founders of this great University and great

Law School, and of our Constitution too, well understood.

[FN^a]. Southmayd Professor, Yale Law School. This Essay derives from the Seventh Edward L. Barrett, Jr. Lecture, delivered on October 25, 1994 at the University of California at Davis School of Law.

[FN1]. For much more elaboration and documentation of my claims over the next few pages, see generally [Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *Yale L.J.* 1131 \(1991\)](#).

[FN2]. In addition to Amar, *supra* note 1, at 1175-81, see generally [Akhil Reed Amar, *Fourth Amendment First Principles*, 107 *Harv. L. Rev.* 757 \(1994\)](#).

[FN3]. In addition to Amar, *supra* note 1, at 1190 & n.261, see [Akhil Reed Amar & Jonathan Marcus, *Double Jeopardy Law After Rodney King*, 95 *Colum. L. Rev.* 1, 57-58 & nn.279-81 \(1995\)](#). This protection of the jury's role is asymmetric; a defendant can appeal a jury verdict of conviction, and a trial judge may overturn a jury conviction via a motion for judgment of acquittal. But the Constitution protects acquittals by juries with more finality than acquittals by judges. See generally Peter Western & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 *Sup. Ct. Rev.* 81, 124-34.

[FN4]. In addition to Amar, *supra* note 1, at 1190 & n.262, see [Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *Yale L.J.* 1193, 1248-50 \(1992\)](#).

[FN5]. In addition to Amar, *supra* note 1, at 1199-1201, see generally [Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *Colum. L. Rev.* 457, 489-94 \(1994\)](#) and Akhil Reed Amar, *Of Sovereignty and Federalism*, [96 *Yale L.J.* 1425, 1429- 51 \(1987\)](#).

[FN6]. Letter from Thomas Jefferson to David Humphreys (Mar. 18, 1789), quoted in Amar, *supra* note 1, at 1195 n.284.

[FN7]. 32 U.S. (7 Pet.) 242 (1833).

[FN8]. For much more documentation and elaboration, see generally Amar, *The Bill of Rights and the Fourteenth Amendment*, *supra* note 4.

[FN9]. Or as Professor Lessig might say, "translated." See generally [Lawrence Lessig, *Fidelity in*](#)

[Translation, 71 Tex. L. Rev. 1165 \(1993\).](#)

[FN10]. This material initiative analysis will be developed at greater length in a manuscript I am currently co-authoring with Professor Ian Ayres.

[FN11]. See infra text accompanying note 16.

[FN12]. (Metro-Goldwyn-Mayer 1943).

[FN13]. See, e.g., Amar, *The Bill of Rights and the Fourteenth Amendment*, supra note 4, at 1266 n.309 and sources cited therein.

[FN14]. *Letters from the Federal Farmer (IV)*, reprinted in 2 *The Complete Anti-Federalist* 249-50 (Herbert Storing ed., 1981).

[FN15]. See Amar, supra note 1, at 1188-89.

[FN16]. Alexis De Tocqueville, *Democracy In America* 273, 728 (Mayer ed., 1969).

[FN17]. See, e.g., [Edmonson v. Leesville Concrete Co., 500 U.S. 614, 625- 26 \(1991\)](#); [Powers v. Ohio, 499 U.S. 400, 406-08 \(1991\)](#).

[FN18]. See [Vikram D. Amar, Jury Service as Political Participation Akin to Voting, 80 Cornell L. Rev. 239 \(1995\)](#).

[FN19]. Long trials lasting more than a week raise distinct problems -- the longer the trial, the greater the difficulty in assembling a truly cross-sectional jury. See infra text accompanying notes 26-28. Not all citizens will be able to serve without huge sacrifice, and when they drop out, the remaining pool can be skewed by self-selection. Note, however, that grand juries do typically sit over extended periods, though they do not always meet full time.

[FN20]. Though the Twenty-Fourth Amendment by its terms applies only to voting in federal elections -- and thus by analogy to federal juries -- its anti-wealth-discrimination principles have been deemed

applicable against states. See [Harper v. Virginia Bd. of Elections, 383 U.S. 663 \(1966\)](#).

[FN21]. See generally John Stuart Mill, Considerations On Representative Government 154-58 (Currin V. Shields ed., 1958)(Chapter X: "Of the Mode of Voting").

[FN22]. Actually, in the North case, there was a seemingly strong reason to excuse jurors who had seen North testify on television, because this testimony was procured under a grant of immunity, and thus strictly inadmissible under the Fifth Amendment. (I am indebted to Betsy Cavendish for this reminder.) But this Fifth Amendment wrinkle does not exist in most other high profile cases, where intelligent and well-informed jurors are dismissed precisely because they are intelligent and well-informed. And if someone is intelligent and well-informed, should we not at least consider using the scalpel of strict instructions -- "you must base your verdict only on the evidence admitted in this trial"--rather than the sledgehammer of exclusion? A judge with comparable knowledge is not disqualified here. Why do we trust judges so much and jurors so little?

For fascinating data on how a multi-layered jury selection process "dummied down" the original jury pool (as measured by percentage of college graduates and knowledge of Watergate) in a high profile case involving political figures, see Hans Zeisel & Shari S. Diamond, The Jury Selection in the Mitchell-Stans Conspiracy Trial, 1976 Am. B. Found. Res. J. 151, 158-61.

[FN23]. It might be feared that a single eccentric juror today might simply sit mute and refuse to engage her peers. For my suggested corrective, see infra text accompanying note 47.

[FN24]. See generally Amar, supra note 1, at 1196-99. This shift cannot be defended on the libertarian ground of giving defendants more constitutional choices, since the Court has not recognized any constitutional right of a defendant to a bench trial over the objection of a prosecutor. See [Singer v. United States, 380 U.S. 24 \(1965\)](#).

[FN25]. See generally Amar, The Bill of Rights and the Fourteenth Amendment, supra note 4, at 1260-72.

[FN26]. Consider, for example, the data discussed in Zeisel & Diamond, supra note 22.

[FN27]. See, e.g., [Stilson v. United States, 250 U.S. 538, 586 \(1919\)](#); [Swain v. Alabama, 380 U.S. 202, 219 \(1965\)](#); [Batson v. Kentucky, 476 U.S. 79, 91 \(1986\)](#); [Georgia v. McCollum, 112 S. Ct. 2348, 2358 \(1992\)](#).

[FN28]. In conversation, Professor Stan Krauss has expressed some reservations about this point. I look forward to his eventual publication of his historical work on American juries, and may well adjust or abandon my hunch when this work comes out. As my next sentences make clear, my most important historical and structural claims here focus less on the Founding, and more on the Reconstruction and Progressive Era visions.

[FN29]. See John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263, 274-75 (1978).

[FN30]. See Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 Admin. L. Rev. 465, 516 (1992).

[FN31]. Professor Stan Krauss has informed me that American juries were quite active in trials at least through the middle of the nineteenth century. Some juries even caused witnesses to be recalled, and asked witnesses clarifying questions after the cases had been submitted to the jury, and jury deliberation had begun.

[FN32]. (Metro-Goldwyn-Mayer 1948).

[FN33]. For a discussion of the empirical evidence, see [Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 Am. Crim. L. Rev. 1177, 1185-86 \(1995\)](#).

I am heartened here by a recent conversation with Justice Joyce Kennard, who now sits on the California Supreme Court. When she served as a trial judge, she always made a point of thanking jurors and soliciting their observations and suggestions about their jury experience. Indeed, she routinely administered questionnaires to jurors who had completed their service, inviting them to comment on all aspects of their jury experience. This is exactly the sort of thing I am calling for here.

[FN34]. Tocqueville, *supra* note 16, at 272, 275.

[FN35]. At the federal level, this videotaping would require a change in the law. See [18 U.S.C. S 1508 \(1988\)](#) (prohibiting recording or observing jury deliberations).

[FN36]. Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* (1979).

[FN37]. My views of juries and jury secrecy here may well differ from those of my distinguished colleague, Abe Goldstein. See [Abraham S. Goldstein, Jury Secrecy and the Media: The Problem of Postverdict Interview, 1993 U. Ill. L. Rev. 295](#). With due respect, I think Professor Goldstein fails to give enough stress to the jury as a political institution in an open, democratic society. For Goldstein, the "genius" of the jury lies in its "inscrutability." *Id.* at 314. For me -- and, I submit, for the Framers -- the genius of the jury lies in its democratic character.

For a thoughtful and more narrow argument that the public need not be given private information about individual jurors -- their addresses, their questionnaire responses, even their names -- see Nancy J. King, *The Case for More Routine Use of Anonymous Juries in Criminal Trials* (unpublished manuscript, on file with author).

[FN38]. See [Duncan v. Louisiana, 391 U.S. 145, 158 n.30 \(1968\)](#).

[FN39]. See [Williams v. Florida, 399 U.S. 78 \(1970\)](#); [Ballew v. Georgia, 435 U.S. 223 \(1978\)](#).

[FN40]. See [Colgrove v. Battin, 413 U.S. 149 \(1973\)](#).

[FN41]. [Williams, 399 U.S. at 86-100](#).

[FN42]. [Ballew, 435 U.S. 223](#).

[FN43]. See [Apodaca v. Oregon, 406 U.S. 404 \(1972\)](#). Apodaca's current status is hardly clearcut, since it failed to generate a majority opinion. A four Justice plurality upheld Oregon's rule allowing nonunanimous jury verdicts on the theory that the Sixth Amendment does not require unanimity to convict. A fifth Justice concurred, but on the very different theory that the Sixth Amendment does not incorporate jot-for-jot against states. See also [Burch v. Louisiana, 441 U.S. 130 \(1979\)](#).

[FN44]. Thus, we may have an example of what Professor Lessig has termed an "Erie effect" calling for a changed reading. See [Lawrence Lessig, Understanding Changed Readings: Fidelity and Theory, 47 Stan. L. Rev. 395, 426- 38 \(1995\)](#).

[FN45]. The jury in ancient Athens -- the cradle of democracy -- was large and randomly selected, often heard more than a single case, and operated by majority rule. (I am indebted to Shawn Chen for this reminder.) See generally Mogens Herman Hansen, *The Athenian Democracy In the Age of Demosthenes* (J.A. Crook trans., 1991).

[FN46]. Note, however, that a two-thirds vote in defendant's favor is not necessary for an acquittal in impeachment. Civil libertarians may well wonder whether jury unanimity should be necessary to acquit a criminal defendant. If so, the consequence is that the prosecutor needs only one sympathetic juror to hang a jury and inflict another trial on defendant. As the impeachment analogy reminds us, logic does not mandate symmetry (though other reasons for symmetry may exist).

[FN47]. Tocqueville, *supra* note 16, at 273 (emphasis added).

[FN48]. See Amar, *Fourth Amendment First Principles*, *supra* note 2; Edward L. Barrett, Jr., *Personal Rights, Property Rights and the Fourth Amendment*, 1960 *Sup. Ct. Rev.* 46; Edward L. Barrett, Jr., *Exclusion of Evidence Obtained by Illegal Searches--A Comment on People v. Cahan*, 43 *Cal. L. Rev.* 565 (1955).

[FN49]. In ancient Athens, juries could sometimes decide upon the constitutionality of a law under the system of *graphe paranomon*. (Here too, I am indebted to Shawn Chen.) See generally Mogens Herman Hansen, *The Political Power of the People's Court in Fourth Century Athens*, in *The Greek City From Homer To Alexander* 225 (O. Murray & S. Price eds., 1990).

[FN50]. See [Marbury v. Madison](#), 5 U.S. (1 Cranch) 137 (1803).

[FN51]. To give jurors more familiarity and confidence with Fourth Amendment issues, and to create more uniformity across decisions so as to give more guidance to police officers, perhaps it might be sensible to convene a special "Fourth Amendment" jury. Such a jury would sit for several weeks and hear a string of cases alleging "unreasonable" government conduct. This may also be an especially good place to use jury clerks. See *supra* notes 30, 37 and accompanying text.

[FN52]. See *supra* note 30.

[FN53]. Once again, I borrow from Professor Lessig's ideas about "faithful" "translations." See Lessig, *supra* note 9.

[FN54]. 2 *Works of James Wilson* 537 (Robert McCloskey ed., 1967).

[FN55]. See [Renee Lettow, Note, Reviving Grand Jury Presentments](#), 103 *Yale L.J.* 1333 (1994).

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