Preserved Where, Preserved How, Preserved Why?

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It is a delight to be here to discuss the civil jury. Thanks to this project, the subject will get the attention it deserves.

And it is a special pleasure to be here with Akhil Amar, my mentor from Yale Law School. As you’ll see, we have different views on the subject, but Akhil’s creativity, his moral passion, and his love for this country are qualities that all his students admire and try to emulate. Alas, we can’t copy his brilliance.

I was invited to be the skunk at the picnic. I appreciate the openness of Sam Issacharoff, Cathy Sharkey, and Steve Susman.

It says something about the seriousness of this conference, and the project as a whole, that not only was a skunk invited, but the skunk is going first. I hope it doesn’t get so smelly that you all clear out immediately.

The Seventh Amendment to the U.S. Constitution, as you know, declares: “In suits at common law . . . the right of trial by jury shall be preserved.”

Almost every state also has a guaranty of civil jury trial in its constitution. The only exceptions are Louisiana and Colorado. Many of these state constitutions declare that “the right of trial by jury shall remain inviolate.”

And yet, jury trials constitute less than 1% of civil dispositions in federal and state courts.

Despite constitutional provisions, civil jury trial has hardly been preserved, nor has it remained inviolate.

This fact becomes less surprising when you consider the fate of civil jury trial around the world. The U.S. is just about the only country left that even claims to hold civil jury trials.

Civil jury trial either never existed or has virtually been abolished in every other country. Even England—the birthplace of the civil jury—and its former colonies of Australia, New Zealand, and Canada have abolished the jury for almost all civil cases. There’s a reason for that.

We in America have a myth about the jury. The myth goes like this: At the founding of this country, the American people and the founders wanted liberty and democracy. They wanted to protect the traditional rights of Englishmen, and especially jury trial. Jury trial decided all important civil disputes. This gave the people a voice in the government.

There’s something to this myth. It’s not all wrong. And one of the greatest experts on the American jury at the time of the revolution and the founding is sitting right here: Akhil Amar.

What I want to do is to put the civil jury in a larger historical perspective. That is, I’m going to talk about the civil jury well before and after the American founding. And what you’ll see is that the fervor for the civil jury in the late 18th century was highly unusual.

Civil jury trial, by its nature, has major drawbacks as a means of adjudication. This was always recognized, from the very beginning of civil jury trial in medieval England.

The Norman King Henry II and his advisors created civil jury trial in 1166. Contrary to Thomas Jefferson and other Romantics, the institution did not come from the Anglo-Saxons. Henry and his court were trying to solve a problem. Because of a recent civil war, many landowners had been ousted from their lands by force. How to decide who should possess a piece of land? Henry and his advisors hit on the idea of gathering twelve laypersons together, putting them on oath, and having them say who should possess the land.

This system had considerable advantages. For one thing, it was more accurate than the traditional Norman method of adjudication, which was trial by battle. (Although I bet Steve would be pretty good at that, too.) The system of judicial decision-making, which first developed in the Church on the Continent of Europe and then spread to the secular governments there, was not yet known in England in 1166. This is an extremely important fact. Henry didn’t have available to him this other way of deciding cases when he had to clean up the civil justice system.

The second big advantage to the government of civil jury trial was that it was cheap. You hauled twelve untrained laypersons together—whom you didn’t pay—and you made them tell you who should win. This was a lot cheaper than maintaining professional judges and having them do the work of fact investigation and adjudication. In effect, Henry transferred this cost to jurors and the parties.

Judges have to explain their decisions in writing, and their decisions can be appealed thoroughly on the merits. With juries, you don’t have to worry about any of that.

The system had advantages but it also had disadvantages. No one expected a group of twelve laypersons to be able to decide disputes involving complicated facts, multiple parties, multiple claims, or complex remedies. To enable decision-making by a jury, the system worked hard to radically simplify disputes.

The English common law developed various ways to try to cope with these shortcomings. Pleading rules and the writ system limited the number of parties that could appear in a single jury case, the number of claims a party could make, how complicated a claim could be, and what remedy was available.

Cases that went to a jury generally concerned only two parties, one claim for money damages, and one or at most a few simple questions of fact. A judge could comment on the evidence in a case, to help the jury understand. At common law, almost the only remedy for a jury making a mistake was to order a new trial. A new trial was time-consuming and expensive, because the case had to be tried all over again to a different jury, but at least it was some way to correct jury error.

Obviously many disputes were more complicated and could not adequately be resolved this way. English judges developed entire separate systems to handle more complicated disputes, with decisions not by juries but by judges. The main alternative system was Equity.

The system of equity decided many important cases, including questions of mortgages, bankruptcy, fraud, trusts, and business associations. Equity was able to administer more complicated remedies like injunctions, besides giving money damages. By the eighteenth century, judges in equity had to give written reasons for their decisions, and those decisions could be appealed.

The Seventh Amendment is based on the distinction between common law and equity. The Amendment states that its requirements concerning jury trial apply in “suits at common law,” not equity. So right away there was a large group of important civil cases that was not subject to jury trial.

Americans at the time of declaring independence valued the civil jury mainly for a political reason. After the Revolution, that political reason became much weaker.

Colonial and revolutionary Americans praised the civil jury for its ability to nullify hated British laws—especially laws about taxes, in suits against government officials. While Americans were under British rule, juries were a way for Americans to govern themselves.

After independence, the American people formed the federal and state republics and governed themselves through elected officials in legislatures and the executive. The representative function of the jury therefore became less important. Jury nullification turned out to be deeply problematic in a self-governing republic. In the American republics, the people elected representatives to make and enforce the laws. Not only that, but the laws were made according to carefully designed mechanisms specified in constitutions, themselves ratified by the people or their representatives. Why should twelve persons have the right to nullify laws made in this manner?

And yet, nullify they did. In the new republic, state juries were well-known for sympathy toward debtors, and verdicts against creditors. In effect, they nullified the laws of contract. James Madison was alarmed, and worried that these verdicts would discourage the investment that the new republic so badly needed.

In the Virginia ratifying convention, Madison argued against the need for a federal right to civil jury trial. Alexander Hamilton did also, in the Federalist No. 83. There was a great difference of opinion among the Founders about the civil jury. In contrast, everyone agreed there should be a right to a jury in criminal cases, and that right is in the body of the Constitution (Art. III, sec. 2) as well as in the 6th Amendment.

As soon as the founding era was over, judges and legislators began limiting civil jury trial. At the founding, the jury had been, as Tocqueville famously described it, a political institution. In the 19th century, however, many Americans in all areas wanted to encourage commercial development through predictable, uniform legal rules. Use of civil juries could lead to unlawful, unpredictable results that undermined the authority of legislatures and courts, and thwarted the ability to plan and carry out actions.

By 1848, the Chief Justice of Georgia, Joseph Lumpkin, explained in an opinion about the right to civil jury trial that “it is notorious, that modern law reform, both in England, and in this country, seeks to dispense, as much as possible with juries.” [Flint River Steamboat Co. v. Foster, 5 Ga. 194, 207 (1848).]

Lumpkin and many other judges, together with legislators, approved wholeheartedly of this program. They increased the use of juryless proceedings and courts, allowed parties to waive civil jury trial, approved increases in jury fees, expanded the use of directed verdict, and permitted judgment notwithstanding the verdict.

Meanwhile, American lawyers, in the adversarial system run amok, had slowed down jury trial tremendously. Changes included: extensive procedures for selecting jurors (especially voir dire); elaborate rules of evidence; dueling expert witnesses; exhaustive cross-examination; and long, complicated instructions to the jury on law. Representatives complained bitterly about the burden of jury service to the jurors themselves, their families, and their work.

There are suggestions to improve these aspects of jury trial. I’m sure we’ll hear more about those today. But even if you speeded up jury trial, great problems still remain.

The final blow to the civil jury was the merger of the systems of common law and equity. This began in the mid-19th century and continued into the 20th. I don’t hear anybody proposing to undo that. It clearly makes sense to have a unified system of procedure, rather than two separate legal systems.

This is what happened: equity conquered the common law. That had to be true, because only equity could handle complex cases.

The result has been the virtual end of civil jury trial.

The old common-law restrictions on cases going to a jury are gone. Now, juries can hear cases involving many parties, many claims, and complicated issues. Few litigants want to take their chances with a jury in such a case.

At common law, there were not many ways for a party to get information about the case before trial. Trial was needed to find out what happened; surprise was a major problem.

After the merger of common law and equity, parties have many ways to get information before trial—all taken from equity: depositions, document discovery, electronic discovery, interrogatories. We call these methods “pretrial discovery.” This information helps parties to settle and makes trial seem unnecessary.

Pretrial discovery is often a huge component of litigation expense and needs to be controlled by judges familiar with the case to be effective.

So here we are, with virtually no litigants wanting to go to jury trial. What is wrong with settlement “in the shadow of the jury,” based on the expectation of what a jury would do?

There is often a significant degree of uncertainty about what a jury might do, including about the likelihood of different outcomes. In some types of cases, systematic juror bias affects settlements. The risk aversion of particular parties, and sometimes even their ability to understand the risks, can play a large role in settlement negotiations. The costs of litigation and the lack of a fee-shifting rule in most cases create enormous pressure to settle. Thanks to the American Rule, in general the losing party does not pay the winner’s litigation costs. Even a party with a good chance of success, therefore, has great incentive to settle to avoid the costs of discovery and jury trial. In short, to put it mildly, a settlement often does not reasonably reflect the merits of a case.

What do we do now? The constitutional provisions concerning jury trial block the proper development of adjudication by judges. The cleanest and best thing would be to repeal them.

Assuming that repeal is not going to happen soon, because of interests represented in this room and popular sentiment, there are sensible ways to interpret many of these provisions to give more flexibility. “Suits at common law” originally meant suits between limited parties, for limited numbers and types of claims, for money damages. Let’s go back to that. The legislature can determine the rest.

Then what? Then we should set up a system for proper judicial adjudication. There are many examples of how to do this right from other legal systems. The English, the Germans, and the Australians are not barbaric or anti-democratic because they do not use civil juries.

Moving to judicial adjudication need not mean merely a switch from jury trials to bench trials. It could have a profound effect on all aspects of litigation, including the elimination of “trials” altogether. In the United States, we often fail to recognize the many ways our system has been affected by the limitations of the jury. Removing the jury could allow faster, less expensive, and more accurate resolution of cases.

Other countries are well aware of the main danger of judicial adjudication: the biased or corrupt judge. Blackstone wrote that this could be a problem, and so did Alexander Hamilton. (Hamilton observed that juries also could be biased or corrupt.) Other countries take steps to guard against this danger.

* **Use of a panel of judges in the first instance**

One of the main safeguards against judicial bias in countries that traditionally use judges to resolve cases is having a panel of judges decide a case in the first instance, rather than a single judge. These panels allow colleagues to correct a biased judge. Besides, several heads are often better than one at legal decision-making.

An argument one frequently hears from proponents of juries is that “many heads are better than one.” Precisely, which is why a panel of three or five judges should be used in important cases in the first instance. A single judge is not the only alternative to a jury, as many proponents of juries assume.

* **More efficient courtroom proceedings**

Court hearings would speed up considerably. There would be no need for conducting voir dire and the rest of jury selection, instructing the jury, or administering rules of evidence. The law of evidence is the law of jury control. We fear that lay juries will not be able to handle properly certain kinds of evidence, and so we exclude it. (This is clear in England, which has abolished the hearsay rule in civil cases, because these are now decided by bench trial.)

Judges could come into court having reviewed written evidence from the parties and prepared to ask questions of witnesses that can get directly to the point. No juries means a more active bench. A courtroom proceeding without a jury would resemble an efficient business meeting, rather than an often tedious scripted performance.

* **Sequential proceedings in logical order**

Judges could focus on different points in separate hearings, and address threshold questions first. If a defendant is not liable, there is no need to hear evidence about damages.

Such discontinuous proceedings are not possible with lay juries. It is not fair to ask lay jurors to keep coming back to court at different times. The jury requires trial of all issues at once, with related confusion and waste of time.

* **Focused, effective discovery**

Such sequential proceedings should help judges to control discovery. Judges can order and be more active in guiding discovery on each point as it arises. Parties should no longer be able to inflict or threaten to inflict horrible costs and delays on each other with little gain in knowledge of relevant facts.

* **Reform of expert testimony**

Dueling, and confusing, party-financed and party-controlled experts are a major problem in litigation today. More active, involved judges would allow innovations in expert testimony such as the Australian system of “hot-tubbing,” or concurrent testimony, which mitigate partisan bias. <http://www.fedcourt.gov.au/publications/judges-speeches/justice-rares/rares-j-20131012> In Australia, judges consider this system to be appropriate only for bench trials because it requires an informed and active fact-finder.

* **Keeping cases moving**

One advantage of jury trial is that at least a jury has to make a prompt decision. Deliberations cannot drag on for months.

Some judges will need encouragement to keep cases moving and to make prompt decisions on the merits. These incentives might include time limits and review of performance by judicial peers and superiors.

* **Reasoned decision-making**

One of the most important changes in shifting to judicial adjudication is that decisions on the merits would be accompanied by written opinions explaining facts found and application of law to facts.

Juries do not give official reasons. The requirement that judges explain their reasoning to the parties and to the public, besides being more satisfying to the litigants, acts as a safeguard in several ways. A biased or corrupt judge would have a harder time justifying a bad decision. In addition, the reasoning of the judge or judges in the first instance can be thoroughly reviewed on appeal.

* **Appeal de novo, of fact and law**

A thorough appeal is a vital safeguard in legal systems that rely on judges to make decisions. Appeals in these systems are often de novo, with no presumption of correctness attaching to the decision below, and of fact as well as law. These appeals need not be time-consuming. Appellate courts in other systems often rely on the record developed below, although they may add to it if necessary.

These systems are thorough in guarding against error in decisions on the merits. Our limited appeals are a legacy of the jury system. We try to control inputs, such as what evidence the jury hears or the judge’s instructions on law, but there is little control over outputs, that is, the correctness of the verdict. Judicial decisions leading to settlement, such as a decision in a dispute over discovery or the denial of a motion for summary judgment, are virtually unreviewable. The terms of settlement can almost never be reviewed on appeal.

Timid reforms will not resolve the many problems with the civil litigation system today. It’s time to think boldly.