

ON THE MYTH OF WRITTEN CONSTITUTIONS: THE DISAPPEARANCE OF CRIMINAL JURY TRIAL

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We are accustomed to viewing the Bill of Rights as a success story. With it, the American constitution-makers opened a new epoch in the centuries-old struggle to place effective limits on the abuse of state power. Not all of the Bill of Rights is a success story, however. While we are celebrating the Bill of Rights, we would do well to take note of that chapter of the Bill of Rights that has been a spectacular failure: the Framers' effort to embed jury trial as the exclusive mode of proceeding in cases of serious crime.

I. THE CONSTITUTIONALIZATION OF JURY TRIAL

The Sixth Amendment says: "In *all* criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed" ¹ "All" is not a word that constitution-makers use lightly. The drafters of the Sixth Amendment used it and meant it. Indeed, the Framers of the Constitution had already used the same word for the same end when speaking to the same subject two years earlier. Article III of the Constitution insists: "The Trial of *all* Crimes, except in Cases of Impeachment, shall be by Jury" ²

Two hundred years later, this Constitution and its Bill of Rights continue to govern our criminal justice system. Indeed, because the Sixth Amendment has been treated as incorporated by the Fourteenth Amendment, the federal jury guarantee now governs not only in the federal courts that the Framers had in mind, but also in the state systems where we process the bulk of our criminal caseloads. ³

Although the texts mandate jury trial for "all" criminal cases,

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1. U.S. CONST. amend. VI (emphasis added).

2. *Id.* art. III, § 2 (emphasis added).

3. See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). State constitutions contain similar guarantees.

the reality is far different. In place of "all," a more accurate term to describe the use of jury trial in the discharge of our criminal caseload would be "virtually none." Like those magnificent guarantees of human rights that grace the pretended constitutions of totalitarian states, our guarantee of routine criminal jury trial is a fraud.

This article discusses the astonishing discrepancy between what the constitutional texts promise and what the criminal justice system delivers.

II. NON-TRIAL PROCEDURE

Why did the Framers call for jury trial in "all" criminal cases? They prescribed "all" because they experienced "all." In the world in which they lived, on both sides of the Atlantic, cases of serious crime systematically went to full jury trial. Jury trial was the routine dispositive proceeding of Eighteenth-Century Anglo-American law. We have historical records from the English sources of a few Eighteenth-Century cases in which some pathetic accused, caught in the act or otherwise sensing the hopelessness of his case, attempted to plead guilty. In these cases, the trial judge resisted accepting the guilty plea. Time and again the judge urged the accused to plead "not guilty" and to take his case to the jury.⁴ The great historian of English criminal law, John Beattie of Toronto, has studied this question closely in the surviving Eighteenth-Century records of the county of Surrey, south of London. He reports: "Virtually every prisoner charged with a felony insisted on taking his trial, with the obvious support and encouragement of the court. There was no plea bargaining in felony cases in the eighteenth century."⁵

Return now from the Framers' world of routine jury trial to the practice of our own day. The Constitution has not changed, the Bill of Rights remains in force, and jury trial lives on in the law books as our prototypical mode of discharging cases of serious crime. Furthermore, were you to form your impression of modern American criminal procedure from our popular culture, as nonlawyers and foreigners tend to do, you would

4. See John H. Langbein, *The Criminal Trial before the Lawyers*, 45 U. CHI. L. REV. 263, 278-79 (1978) (reporting cases).

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

scarcely have occasion to notice that anything has changed. Television is busy broadcasting courtroom dramas that culminate in the verdict of a criminal jury trial.

Those who understand our criminal justice system know better. Criminal jury trial has all but disappeared in the United States. Can you find it? Of course, you can find it. You can find it in the show trials of the day, Oliver North, General Noriega, or whatever. But jury trial no longer typifies our system. Can you find a hippopotamus in the Bronx? Yes, there's one in the Bronx Zoo, but it has nothing to do with life in the Bronx. It's a goner. And so, too, stunningly, is criminal jury trial, which has ceased to typify American criminal justice. The criminal justice system now disposes of virtually all cases of serious crime without jury trial, through the plea bargaining system. This non-trial procedure has become the ordinary dispositive procedure of American criminal justice.⁶

The plea bargaining system operates by threat. The authorities who administer our non-jury and non-trial procedure tell the accused in effect: "So you want your constitutional right to jury trial? By all means, be our guest. But beware. If you claim this right and are convicted, we will punish you twice, once for the offense, and once again for having displayed the temerity to exercise your constitutional right to jury trial." Our authorities are, of course, more circumspect in their discourse. They do not need to convey this threat in the bald fashion that I have just expressed it. There is no doubt, however, that plea bargaining works precisely in this way. Whether plea bargaining takes the form of charge bargaining (a lesser offense in exchange for a guilty plea) or sentence bargaining (a reduced sanction in exchange for a guilty plea), the object is to coerce the accused to surrender his right to jury trial by threatening him with a materially greater sanction if he exercises that right.

In observing that the Framers spoke of jury trial in "all" cases of serious crime—that jury trial was their norm—I do not mean to say that they mandated jury trial. Jury trial was indeed waivable. Then as now, the defendant had the option to plead

6. In the state courts that handle most of the criminal caseload, 95% of felony convictions occur without jury trial; 91% are plea bargained; 4% occur at bench trial. See UNITED STATES DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS: 1988, at 1 (1990). Bench trial is a latter-day American novelty. See Susan C. Towne, *The Historical Origins of Bench Trial for Serious Crime*, 26 AM. J. LEG. HIST. 123 (1982).

guilty. What he lacked was the inducement. Because prosecutorial authorities were not yet in the business of pressuring people to decline trial, the Framers did not forbid practices that they had no reason to foresee.

III. THE DISAPPEARANCE OF JURY TRIAL

How did criminal jury trial disappear? There is much we do not know, but the historical outline seems tolerably clear.⁷ The starting point is to understand that criminal jury trial as the Framers observed it on both sides of the Atlantic in the second half of the Eighteenth Century was a summary proceeding.

The trial that the Framers thought they were constitutionalizing was, by our standards, shockingly brusque and deficient in safeguard. In the Old Bailey in London, the principal court for the trial of serious crime in the Anglo-American world, a dozen or more cases of felony jury trial went forward in a single courtroom in a single day.⁸ The procedures were crude. Lawyers were infrequently involved for prosecution or defense.⁹ There was almost no law of evidence. The "beyond-reasonable-doubt" standard of proof was neither precisely formulated nor routinely announced.¹⁰ There was no *voir dire* of jurors; challenge rights were virtually never exercised. Jurors sat on many trials during a single session, and many of them were experienced veterans who had sat at previous sessions. They received little judicial guidance and may not have needed much.¹¹ The accused conducted his own defense, usually without aid of counsel, and without being allowed to testify under oath. There was virtually no appellate review of trials. Indeed, capital convicts were usually executed within days of trial, unless the trial judge took the special step of reprieving the convict in order to allow post-verdict proceedings. Because the system effectively lacked appellate redress, there was no occa-

7. See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979); see also LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870-1910* (1981); John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261 (1979); Mary E. Vogel, *Courts of Trade: Social Conflict and the Emergence of Plea Bargaining in Boston, Massachusetts, 1830-1890* (1988) (unpublished Ph.D. dissertation, Harvard University, Univ. Microfilms No. 8901664).

8. See Langbein, *supra* note 4, at 277.

9. See *id.* at 282-83.

10. See *id.* at 284.

11. See *id.* at 276, 284.

sion for those features of modern trial practice that are associated with the enterprise of provoking and preserving error for appeal.¹²

We understand that a criminal procedural system so brusque could not have endured. The procedural system that the Framers presupposed when they constitutionalized jury trial was grievously deficient. No one can yearn for the good old days when an Old Bailey judge could try a dozen felons a day. The movement for greater safeguard in criminal procedure that intensified in the later Eighteenth Century and across the Nineteenth and Twentieth Centuries was benign in spirit, and it was in a deep sense inevitable. But there are many ways to increase the level of safeguard and, in the light of hindsight, one can see that the path taken in Anglo-American law was catastrophic. Whereas the Europeans of this period were refining the techniques of an increasingly trustworthy, officialized system of impartial evidence-gathering and prosecuting, the Anglo-American systems turned for safeguard down the path of partisan lawyerization. We came to experience the capture of the criminal trial by lawyers—lawyers for the defense and for the prosecution. The rise of the adversarial system led to the loss of the accused as a testimonial resource, and to the vast elaboration of the law of evidence and of trial procedure that was undertaken in a forlorn effort to regulate adversary combat. Jury trial was redefined as adversary jury trial. The explosive combination of adversary procedure and criminal jury trial produced a system so clumsy, so time-consuming, and so costly that, in the end, Americans found it intolerable to honor the Framers' promise to use jury trial in "all" criminal cases. As a result, the pressure to subvert adversary jury trial has grown ever more intense across the last century.

IV. EVILS OF NON-TRIAL PROCEDURE

What is so bad about plea bargaining? A good way to approach that question is to ask why the Framers so valued jury trial. Plea bargaining suppresses both the jury and the trial. There are important virtues to each. The jury disperses power away from the officers of the state. Because the sanctions ap-

12. See generally BEATTIE, *supra* note 5, at 348-50 (describing the "old" form of trial); LANGBEIN, *supra*, note 4, at 263.

plied in the criminal justice system are so ominous, the danger of abuse of state power in criminal procedure is serious. Plea bargaining achieves just what the Framers expected the jury to prevent, the aggrandizement of state power. Plea bargaining transfers the power of condemnation to a low-visibility decisionmaker, the prosecutor. Because negotiation replaces trial, plea bargaining substitutes an essentially concealed procedure for the salutary openness of public jury trial. The prosecutor who operates the negotiated plea system exercises awesome powers, powers that were meant to be shared with judges and jurors. As a practical matter, plea bargaining concentrates both the power to adjudicate and the power to sentence in the hands of the prosecutor.

Plea bargaining is also wrong because it is coercive. A legal system that comes to depend upon coercing people to waive their supposed rights is by definition a failed system. The system can no longer function by adhering to its own stated principles. Plea bargaining puts the accused under ferocious pressure to bear false witness against himself.¹³ As the disparity grows between the sentence offered for confession and the sentence threatened for conviction upon trial, the inducement to confess becomes ever more intense. I do not think that large numbers of innocent people are confessing themselves guilty to crimes committed by strangers. At the margin, however, such cases do indeed arise.¹⁴

The want of trial is also costly in another way. There is an important civic interest in having public inquiry and adjudication take place in cases of serious crime—a positive externality, the economists would say. Plea bargaining prevents the citizenry from learning about the circumstances of the crime and punishment. There is, for example, a lingering distaste among substantial sections of the American people about the way that James Earl Ray was sent off to prison in Tennessee. Without trial, we do not feel adequately informed about whether our institutions have responded fully and fairly to events.

In the end, however, the worst aspect of plea bargaining is simply the dishonesty. Charge bargaining has made our criminal statistics into hash. The person who committed murder is

13. See John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978).

14. See Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 61 (1968) (discussing an example of coercive plea bargaining).

pretended to have committed manslaughter; the person whose real crime was child molesting is convicted of loitering around a schoolyard.¹⁵ Not only has this willful mislabelling turned our criminal statistics into a pack of lies, it has also forced us into the widespread practice of preferring arrest records over conviction records for a host of purposes. Continental observers find our reliance upon bare arrest records in matters of sentencing and employment to be incredible.¹⁶ And looming over the whole of the saga of plea bargaining is the lie that has to be lived to escape the Constitution and the Bill of Rights—the lie that persons accused of serious crime really do not want a jury trial.

V. MARKETS

The Supreme Court's justification for plea bargaining, though wholly unprincipled, possesses the virtue of candor. In *Santobello v. New York*,¹⁷ Chief Justice Burger explained that plea bargaining is to be encouraged because "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."¹⁸ Translation: We cannot afford the Constitution and the Bill of Rights. Sheer expediency is rationale enough for disregarding the constitutional texts.

The most prominent academic effort to justify plea bargaining is Frank Easterbrook's chilling paper, "Criminal Procedure as a Market System."¹⁹ Easterbrook correctly observes that the behavior of actors in the plea bargaining system is market-like. Under the constraints of the system, they behave rationally, maximize their utilities, allocate their resources, and so forth.²⁰ It is indeed quite a glorious Turkish rug market that we have created in lieu of what the Framers designed. Easterbrook's paper assumes away the vital question, which is what purpose the Framers ascribed to jury trial. Did they mean for this entitle-

15. See David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255, 258-59 (1965).

16. See Mirjan Damska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 533 (1973).

17. 404 U.S. 257 (1971).

18. *Id.* at 260.

19. 12 J. LEGAL STUD. 289 (1983).

20. See *id.* at 308-09.

ment to be sold at the Turkish market with the other rugs? I think not. They had public purposes in mind when envisioning that "all" serious criminal cases would go to jury trial. To say that we have constructed a market in criminal procedural rights is a condemnation, not a justification.

VI. THE FRAGILITY OF THE WRITTEN TEXTS

The disappearance of criminal jury trial offers as telling a lesson as one could wish about the myth of written constitutions. Constitutional texts do not enforce themselves. They require the adherence and support both of the social and political order and of the legal system and legal professionals. Plea bargaining has defeated the Constitution and the Bill of Rights because legal professionals—especially judges, prosecutors, and defense attorneys—have preferred the convenience of doing deals to the rigor of trying cases.

I am left to say that much more attention should be given to how we handle criminal adjudication. I believe that concessionary non-trial procedure is wrong. Condemnation without adjudication, which is effectively what we practice in the plea bargaining system, is wrong. On the other hand, we do not want to recover the procedural world that the Framers envisioned, the world of summary jury trial. Nor can we afford the routine adversary jury trial that is the norm of our formal law.

Events that we cannot foresee but whose happening we can predict with serene certainty will one day force us to rethink our failed system of criminal procedure. We will be driven to re-introduce some component of genuine adjudication into our criminal procedure, perhaps on the platform of the existing Rule 11 hearing that is at present mostly a formalism.²¹ When we do, I hope that we might pay attention to the Continental model. More than a century ago, Europeans came to look at Anglo-American criminal justice. They took back with them the notion that lay participation in criminal adjudication is profoundly important, but they also came to the conclusion that systems of mass justice appropriate to urban industrial democracies could not use laypersons in the clumsy, time-consuming, costly fashion of the adversary jury trial. The Europeans devised ways of combining laypersons with professional judges in

21. *See* FED. R. CRIM. P. 11.

streamlined procedures that guarantee significant lay participation in every case of serious crime.²² The result is that they have perpetuated more of our jury tradition than we have. They have a system of routine lay participation in every case of serious crime, whereas we have a system of full-dress adversary jury trial so complex that we must deny it to almost all defendants.

22. See John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195.