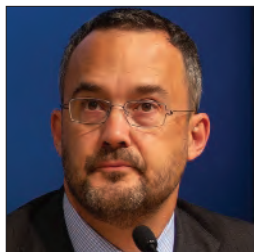
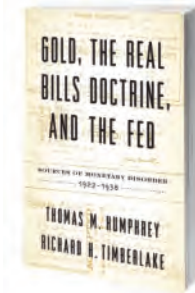


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Cato Policy Report

MAY/JUNE 2019

VOL. XLI NO. 3

Our Broken Justice System

BY CLARK NEILY

Imagine you have omnipotent power over nature but a poor understanding of how it actually works. One day, after being stung during a picnic, you decide to get rid of all honeybees. What would happen? Before long, wide swaths of the terrestrial ecosystem would begin to fall apart. Crops that depend on bees for pollination would fail; various other plants and trees would be unable to reproduce and would start dying off, followed by the countless insects, birds, and mammals that depend on those flora to survive.

This is an apt metaphor for what has happened to America’s criminal justice system over the past century as we have taken the very heart of that system—citizen participation, in the form of jury trials—and ripped it right out. The result has been every bit as disastrous for the criminal justice “ecosystem” as the elimination of bees would be for the natural one. And just as the extinction of bees would produce downstream effects that would be difficult to trace back to their true cause, so too does our criminal justice system feature downstream pathologies not obviously con-

nected to the practical elimination of jury trials. Thus, to achieve fundamental reform of America’s criminal justice system, we must understand how we managed to kill off the criminal jury trial and, even more important, how we can resurrect it.

The jury trial is the only right mentioned in both the unamended original Constitution and the Bill of Rights. Indeed, the Constitution devotes more words to the subject of jury trials than to any other right. The

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PETER GOETTLER, president and CEO of the Cato Institute, addresses attendees at the opening reception for the Institute’s art exhibition, *Freedom: Art as the Messenger*, on display now in the public areas of the Cato building in Washington, DC. About half the 400 attendees said they had never been to a Cato event before. See page 5.

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Founders' intent to put citizen participation at the very heart of our criminal justice system is unmistakable. And yet the criminal jury trial is now all but extinct. More than 95 percent of all criminal convictions today are obtained through plea bargains—that is, supposedly voluntary confessions. One of the most important questions in criminal law and criminal justice reform is why so few people are interested in exercising their right to force the government to prove their guilt beyond a reasonable doubt to the satisfaction of a unanimous jury.

There appear to be two main reasons. First, the plea-bargaining process can be—and often is—extraordinarily coercive. Second, the criminal jury trial itself has been fundamentally transformed over time so that it is much less valuable to criminal defendants now than it was earlier in our nation's history. I will briefly summarize coercive plea bargaining, which gets significant attention, and then discuss in more detail the radical devaluation of the criminal jury trial, which does not receive nearly the attention it merits.

MORE PROSECUTIONS MEANS MORE PLEA BARGAINING

Unknown at the Founding, plea bargaining arose in response to the need to process a rapidly increasing number of criminal defendants through a system that was consciously designed to promote fairness and transparency rather than mere efficiency. The problem became particularly acute during Prohibition, when the government itself became a generator of crime by enforcing widely ignored laws and prompting the creation of a flourishing—but characteristically violent—black market in the production and distribution of alcohol.

Over time, prosecutors found that with the application of enough pressure, nearly any defendant could be induced to confess and thereby spare the government the inconvenience, expense, and risk of a public

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jury trial. That pressure can be generated in many ways: for example, detaining defendants before trial in a hellscape like Rikers Island, providing systematically underfunded and inadequate defense counsel to indigent defendants, increasing a defendant's exposure to punishment through creative charge-stacking, and establishing vastly excessive mandatory minimum sentences to make an example of those who exercise their right to a jury trial and lose. Perhaps not surprisingly, federal prosecutors—who are typically drawn from the most elite law schools and have clerked for top federal judges—have proven particularly adept at applying the levers of coercive plea bargaining. In the federal system, more than 97 percent of all criminal convictions come from plea bargains. Today's federal prosecutors rarely lose a case because they rarely go to trial.

But coercive plea bargaining is only part of the story behind the demise of the criminal jury trial. An equally important but far less appreciated dynamic has been the radical transformation of the American jury and its role in the adjudication of criminal charges.

WHAT IS THE ROLE OF THE JURY?

There are two competing views regarding the proper function of a criminal jury. The one that holds sway today conceives of the jury as a purely fact-finding body. Was the light green or red when the defendant entered the intersection? Did the defendant use this knife to kill that person? Were the representations contained in this company's SEC filings materially misleading, and if so, was the deception intentional? According to the modern understanding, a jury has no other role than to help ensure that the verdict in a criminal case is based upon

empirically correct answers to purely factual questions like these.

But the Founding-era conception of the jury was much different. Consistent with centuries of Anglo-Saxon custom and practice predating the Magna Carta, criminal juries were understood to play both a fact-finding role on the one hand and a government-checking and injustice-preventing role on the other. Jurors fulfilled the latter role by refusing to convict when they believed, for whatever reason, that it would be unjust to do so. Thus, for example, colonial jurors in New York famously acquitted the publisher John Peter Zenger of seditious libel for his criticisms of royal governor William Cosby, even though Zenger had plainly committed that crime. This concept is commonly referred to as “jury nullification,” but a more precise and less pejorative term is “conscientious acquittal”—the refusal to convict a factually guilty defendant if the jury believes it would be unjust to do so.

Jurors might consider it unjust to convict a factually guilty defendant for many reasons. They might find the prosecution to be politically motivated, as in Zenger's case. They might consider the prosecution's tactics, such as the use of paid informants or threats against the defendant's friends and family, to be unacceptable. Or they might feel that the process had been corrupted by the criminal acts of law enforcement officials, such as the undercover agents who stole hundreds of thousands of dollars' worth of bitcoin during the Silk Road/Ross Ulbricht investigation. But probably the two most common grounds for conscientious acquittal throughout history are a moral disagreement with the law itself and a belief that the proposed punishment is too harsh for the crime.

Consider the breathtakingly harsh penalties for the cultivation and distribution of marijuana under federal law. A person caught growing 1,000 or more marijuana plants—a modest commercial operation in fully

legalized states like Oregon or Colorado—faces a federal mandatory minimum of 10 years in prison. Even worse, if an 18-year-old who is engaged in a perfectly legal sexual relationship with a 17-year-old takes nude pictures of his or her paramour and stores them in the cloud, that constitutes the production of child pornography under federal law, for which the mandatory minimum sentence is a whopping 15 years.

Prosecutors who bring unduly harsh charges against sympathetic defendants ought to be concerned about how jurors might react, particularly if the government's hands are less than clean. Consider the case of Charles Lynch, a Californian suffering from debilitating migraines who had such a miraculous experience with medical cannabis that he decided to open a dispensary to provide others with the same opportunity. Unsure about the interplay between state and federal laws, Lynch placed four separate calls to the Drug Enforcement Administration (DEA), seeking to determine whether it would be permissible for him to operate the proposed marijuana dispensary under federal law. Instead of giving him a flat (and accurate) “no,” DEA personnel shuffled him around from one staffer to another until finally he ended up speaking with a representative of the “Marijuana Task Force,” who falsely advised him that “it was up to the cities and counties to decide how they wanted to handle the matter.” Lynch then opened his dispensary and had been operating it for nearly a year when the DEA raided his home and business, resulting in a multicount federal indictment that included a five-year mandatory minimum prison sentence.

Given that Lynch is being prosecuted for conduct that a clear majority of Americans now think should be legal, should his lawyer be permitted to inform the jury about the five-year mandatory minimum, and is Lynch entitled to a jury instruction advising jurors that they have no obligation to convict him, even if they believe he is

“The modern criminal jury is a comparatively toothless institution.”

factually guilty? Prosecutors throughout the country are adamant that the answer to both questions is no. And the case law generally supports them. Thus, even though the penalties for many federal crimes are expressly stated in the U.S. Code and are easy to look up, prosecutors will go to extraordinary lengths to ensure that jurors remain ignorant of the punishment the government plans to inflict on the defendant if they convict. And even though the Supreme Court has repeatedly acknowledged that jurors have the unquestioned authority to engage in so-called nullification, judges and prosecutors work together to ensure that jurors remain ignorant of that power as well. These efforts include screening potential jurors during voir dire (jury selection) and misleading those who are empaneled into believing that they would be violating their oaths if they acquitted a defendant whose factual guilt they believed had been proven beyond a reasonable doubt.

Thus, whereas Founding-era jurors generally knew what the punishment would be for the defendant upon conviction, modern jurors rarely do. And whereas Founding-era jurors were likely to be generally familiar with—and supportive of—the historic role of juries in limiting government power and preventing manifest injustices through conscientious acquittal, modern jurors rarely are, both because the practice has fallen into disuse and because the system makes a point of eliminating from the jury pool people who consider conscientious acquittal a legitimate act. As a result, the modern criminal jury is a comparatively toothless institution that plays scant role in constraining the discretion of prosecutors, whose appetite for con-

victions has helped give America the highest incarceration rate in the world.

WHAT CATO IS DOING

Cato's Project on Criminal Justice considers the practical elimination of citizen participation in the administration of criminal justice through coercive plea bargaining and the diminished power of the jury to be among the American criminal justice system's chief pathologies, and we have devised a strategic plan to challenge it. The centerpiece of that plan is an *amicus curiae* (“friend of the court”) brief campaign designed to challenge the government's preference for purely fact-finding juries whose members are neither advised about nor equipped to fulfill the crucial injustice-preventing role that Founding-era Americans considered to be the essential political function of criminal juries. The campaign includes not only challenges to judges' refusal to instruct jurors regarding nullification and sentencing but also First Amendment challenges to the government's policy of criminalizing third parties' communication of such information to jurors. In fact, the government has no compelling interest in preventing people from communicating to jurors publicly available information about the government's own sentencing policies or information designed to challenge the government's self-serving and anachronistic conception of the jury as a purely fact-finding body. Taken together, these steps could help revive the Framers' understanding that juries have an important, legitimate role in preventing injustices and checking the illegitimate use of government power.

Restoring citizen participation in the administration of criminal justice through what we might call “Founding-era informed juries” is a powerful antidote to the twin travesties of coercive plea bargaining and mass incarceration. Our work on that project has only just begun, but we will not rest until the goal has been achieved. There is simply too much at stake. ■