

No. 25-6623

IN THE
Supreme Court of the United States

HAMED KIAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

**BRIEF OF *AMICUS CURIAE* PROFESSOR
RENÉE LETTOW LERNER IN SUPPORT OF
RESPONDENT**

RENÉE LETTOW LERNER
Counsel of Record
THE GEORGE WASHINGTON
UNIVERSITY LAW SCHOOL
2000 H Street NW
Washington, DC 20052
(202) 994-5776
rlerner@law.gwu.edu

October 2, 2026

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	3
I. The late eighteenth-century legal systems in England and America had rules and practices, no longer in effect, that were designed to encourage efficient deliberations.....	3
A. Judges regularly commented on evidence to the jury.....	3
B. Jurors were often experienced, especially foremen.	10
C. Jurors were subject to systematic deprivation and sequestration.....	13
II. Jury selection was swift, with limited or no voir dire, which allowed rapid empanelment of twelve jurors and efficient jury trial.	19
III. Mandating rigid rules for jury trials can result in more plea bargains, often meaning no adjudication of any kind.	22
CONCLUSION	23

TABLE OF AUTHORITIES

Cases

<i>Capitol Traction Co. v. Hof</i> , 174 U.S. 1 (1899)	8
<i>Commonwealth v. Child</i> , 27 Mass. 252 (1830)	9
<i>Commonwealth v. Clue</i> , 3 Rawle 498 (Pa. 1831)	18
<i>Commonwealth v. M'Caul</i> , 3 Va. 271 (1812)	18
<i>Commonwealth v. Purchase</i> , 19 Mass. 521 (1824)	18, 19
<i>Crippen v. People</i> , 8 Mich. 117 (1860)	21
<i>Duncan v. Louisiana</i> , 391 U.S. 145 (1968)	22
<i>Hare v. State</i> , 5 Miss. 187 (1839)	18
<i>Howard v. Cobb</i> , 12 F. Cas. 636 (C.C.D. Conn. 1809) (No. 6,755)	17
<i>Johnson v. Root</i> , 13 F. Cas. 798 (C.C.D. Mass. 1862) (No. 7,409)	19
<i>King v. Kinnear</i> , 106 Eng. Rep. 434 (K.B. 1819)	18
<i>King v. State</i> , 6 Miss. 730 (1841)	21
<i>Lester v. Stanley</i> , 15 F. Cas. 396 (C.C.D. Conn. 1808) (No. 8,277)	17
<i>McClain v. State</i> , 18 Tenn. 241 (1837)	18
<i>Patton v. United States</i> , 281 U.S. 276 (1930)	8
<i>St. John v. Abbot</i> , 94 Eng. Rep. 994 (C.P. 1735)	15
<i>State v. Baldwin</i> , 1 Tread. 289 (S.C. 1813)	20, 21
<i>State v. Creasman</i> , 32 N.C. 395 (1849)	21

<i>State v. Flower</i> , 1 Miss. 318 (1829).....	21
<i>The Trial of Peter Cook</i> , Y.B. 8 Will. 3 (1696), reprinted in 13 How. St. Tr. 311 (1812)	20
<i>United States v. Burr</i> , 25 F. Cas. 49 (C.C.D. Va. 1807) (No. 14,692g).....	21
<i>United States v. Callender</i> , 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709).....	21
<i>United States v. Philadelphia & Reading R.R.</i> Co., 123 U.S. 113 (1887).....	8
<i>Vicksburg & Meridian R.R. Co. v. Putnam</i> , 118 U.S. 545 (1886).....	8

Constitutional Provisions

U.S. Const. amend. VI.....	2, 22
U.S. Const. amend. XIV	22

Statutes

Conn. Gen. Stat., tit. 6, c. 1, § 11 (1702).....	16, 17
Act 37, 14 Car. 2 (1662) (Va.).....	16
Act 10, 20 Car. 1 (1645) (Va.).....	16
Criminal Justice Act 1972, c. 71 (U.K.).....	10
Act of 1870, 33 & 34 Vict. c. 77 (Eng.)	19
Jury Act of 1730, 3 Geo. 2, c. 25 (Eng.).....	10, 11
4 W. & M., c. 24 (1692) (Eng.).....	10

Rules

Fed. R. Crim. P. 11(b)(3)	23
---------------------------------	----

Other Authorities

3 John Adams, <i>The Legal Papers of John Adams</i> (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).....	17
April J. Anderson, <i>Peremptory Challenges at the Turn of the Nineteenth Century</i> , 16 Stan. J.C.R. & C.L. 1 (2020)	20
J.H. Baker, <i>Introduction</i> , in <i>The Reports of Sir John Spelman Part II</i> , 94 Selden Society 83 (1978).....	14, 15
John M. Beattie, <i>Crime and the Courts in England, 1660-1800</i> (1986).....	11, 12
3 William Blackstone, <i>Commentaries</i>	6, 14, 15
James S. Cockburn, <i>Twelve Silly Men? The Trial Jury at Assizes, 1560-1670</i> , in <i>Twelve Good Men and True</i> 158 (James S. Cockburn & Thomas A. Green eds., 1988)	11, 12
Edward Coke, <i>The First Part of the Institutes of the Laws of England</i> (1628)	14
Edward Coke, <i>The Third Part of the Institutes of the Laws of England</i> (1680)	14
5 John Comyns & Stewart Kyd, <i>A Digest of the Laws of England</i> (4th ed. 1793).....	16
Charles Clay Doyle & Clement Charles Doyle, “ <i>Wretches Hang That Jury-men May Dine</i> ,” 28 Just. Sys. J. 219 (2007)	16

1 Giles Duncomb, <i>Trials per Pais</i> (8th ed. 1766)	16
“Fabius” (John Dickinson), <i>Letter IV: Observations on the Constitution</i> (Apr. 19, 1788), reprinted in 17 <i>The Documentary History of the Ratification of the Constitution</i> 180 (John P. Kaminski & Gaspare J. Saladino eds., 1995)	18
Fleta, <i>Of the Verdict of the Jurors, in Book III and Book IV</i> , 89 Selden Society 66 (H.G. Richardson & G.O. Sayles trans., 1972).....	14
Thomas A. Green, <i>A Retrospective on the Criminal Trial Jury, 1200-1800, in Twelve Good Men and True</i> 358 (James S. Cockburn & Thomas A. Green eds., 1988)	12
Thomas A. Green, <i>Verdict According to Conscience</i> (1985)	5
2 Matthew Hale, <i>History of the Pleas of the Crown</i> (1736)	14, 15
Matthew Hale, <i>The History of the Common Law of England</i> (Charles M. Gray ed., 1971) (1713)	5, 16
Douglas Hay, <i>The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century, in Twelve Good Men and True</i> 305 (James S. Cockburn & Thomas A. Green eds., 1988)	11
William Waller Hening, <i>The Statutes at Large: Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619</i> (1823).....	16

Peter Charles Hoffer, <i>The Treason Trials of Aaron Burr: Landmark Law Cases and American Society</i> (2008).....	21
Wythe Holt & Brent Tarter, <i>The Apparent Political Selection of Federal Grand Juries in Virginia, 1789-1809</i> , 49 Am. J. Legal Hist. 257 (2007).....	12, 13
P.J.R. King, “Illiterate Plebeians, Easily Misled”: Jury Composition, Experience, and Behavior in Essex, 1735-1815, in <i>Twelve Good Men and True</i> 254 (James S. Cockburn & Thomas A. Green eds., 1988)	11
John H. Langbein, <i>Blackstone on Judging</i> , in <i>Blackstone and His Commentaries: Biography, Law, History</i> 65 (Wilfrid Prest ed., 2009)	6
John H. Langbein, Renée Lettow Lerner & Bruce P. Smith, <i>History of the Common Law: The Development of Anglo-American Legal Institutions</i> (2009).....	16, 20
John H. Langbein, <i>The Criminal Trial Before the Lawyers</i> , 45 U. Chi. L. Rev. 263 (1978) 7, 11, 20	
John H. Langbein, <i>The Origins of Adversary Criminal Trial</i> (2003)	7
Renée Lettow Lerner, <i>How the Creation of Appellate Courts in England and the United States Limited Judicial Comment on Evidence to the Jury</i> , 40 J. Legal Prof. 215 (2016).....	7, 10

Renée Lettow Lerner, <i>The Transformation of the American Civil Trial: The Silent Judge</i> , 42 Wm. & Mary L. Rev. 195 (2000)	9, 10
William E. Nelson, <i>Americanization of the Common Law</i> (1975)	12
William E. Nelson, <i>The Legal Restraint of Power in Pre-Revolutionary America: Massachusetts As a Case Study, 1760-1775</i> , 18 Am. J. Legal Hist. 1 (1974)	12
R. Kent Newmyer, <i>The Treason Trial of Aaron Burr: Law, Politics, and the Character Wars of the New Nation</i> (2012)	21
1 James Oldham, <i>The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century</i> (1992)	6, 7
George Overend, <i>The Preservation and Amendment of Trial by Jury</i> , 23 Law Mag. & L. Rev. Q.J. Juris. 191 (1867)	19
Carl E. Prince, <i>Federalists and the Origins of the U.S. Civil Service</i> (1977)	21
7 <i>The Private Papers of James Boswell from Malahide Castle</i> (G. Scott & F.A. Pottle eds., 1928)	6
John Proffatt, <i>A Treatise on Trial by Jury</i> (1877)	22
Thomas Rowlandson, <i>A Lamentable Case of a Jury-Man</i> (1815) (etching)	16

David J. Seipp, <i>Jurors, Evidences and the Tempest of 1499, in The Dearest Birthright of the People of England: The Jury in the History of the Common Law</i> 75 (John Cairns & Grant McLeod eds., 2002).....	14, 15
James Morton Smith, <i>Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties</i> (1956).....	21
Marcy Strauss, <i>Sequestration</i> , 24 Am. J. Crim. L. 63 (1996).....	18
James B. Thayer, <i>A Preliminary Treatise on Evidence at the Common Law</i> (1898).....	4
<i>The Complete Juryman</i> (1752).....	15, 16
<i>Twelve Good Men and True</i> (James S. Cockburn & Thomas A. Green eds., 1988).....	11, 12
9 John H. Wigmore, <i>A Treatise on the Anglo-American System of Evidence in Trials at Common Law</i> (3d ed. 1940)	5
Hiller B. Zobel, <i>The Boston Massacre</i> (1970)	17

INTEREST OF *AMICUS CURIAE**

Amicus Renée Lettow Lerner is the Donald Phillip Rothschild Research Professor of Law at the George Washington University Law School. She is a legal historian specializing in the history of the jury in England and the United States. Her interest in this case is to assist the Court in understanding the original practice of the jury.

* University affiliation of *amicus curiae* is provided for identification purposes only. Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* monetarily contributed to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

At the time of the ratification of the Sixth Amendment, in the late eighteenth century in England and the United States, jury trial was the exclusive means of resolving felony cases. Plea bargaining and bench trials were unknown. English and American judges understood that jury trial needed to be efficient and that requiring twelve lay jurors to be unanimous presents considerable challenges. Possible difficulties include lengthy trials and deliberations as well as hung juries, with the expensive and time-consuming remedy of trying the case again to a different jury. Because of these problems, in the late eighteenth century the English and American legal systems had rules and practices that were designed to speed jury trial and to further unanimity of twelve jurors in a reasonable time.

These practices included judges commenting on evidence to the jury, use of experienced jurors and foremen, juror deprivation and sequestration, and limited or no voir dire. The procedures were considered important, and in some instances vital, to a functioning jury system. English and American judges understood that without such practices, jury trial would become too lengthy to be workable in many cases. As these practices faded over time, so did jury trial.

Today, the overwhelming majority of criminal cases are resolved not by jury trial but by plea bargain. Without these historical practices, or suitable alternatives, the effect of mandating twelve unanimous jurors would ironically be that fewer jury trials

will be held. Prosecutors will have even stronger incentives to offer plea deals that will be difficult for defendants to refuse. Isolated features of the eighteenth-century trial by jury would be preserved, at the expense of actual criminal jury trials. It is not originalism, but eclecticism, to insist on twelve jurors in criminal cases without the supporting common-law practices that made that number workable.

ARGUMENT

I. The late eighteenth-century legal systems in England and America had rules and practices, no longer in effect, that were designed to encourage efficient deliberations.

It is difficult to get twelve persons to agree unanimously on almost anything, much less a serious criminal charge. In the common-law system, courts and legislatures worked together to develop a set of rules that encouraged twelve jurors to reach unanimity in a reasonable time. These rules and practices included external assistance—the judge commenting on evidence to the jury; internal assistance—the presence of an experienced foreman and other experienced jurors; and time pressure—deprivation and sequestration.

A. Judges regularly commented on evidence to the jury.

In the eighteenth-century English and American legal systems, a major contributor to twelve jurors being able to achieve unanimity efficiently was the widespread practice of trial judges summing up and commenting on the evidence. The practice was the

same in criminal and civil cases. Jurors were not left to puzzle over lengthy and nearly incomprehensible instructions on law with no help on the facts, as they so often are today. At common law, in many cases the judge guided the jury on the facts, and the jury usually followed that guidance. In effect, there was a partnership between the judge and the jury in deciding the case, not the rigid formal separation existing today.

When the common-law tradition of judicial comment eroded in the United States during the nineteenth and twentieth centuries, prominent American scholars of evidence such as James Bradley Thayer and John H. Wigmore were deeply concerned. Thayer wrote that it is

impossible to conceive of trial by jury as existing [in England] in a form which would withhold from the jury the assistance of the Court in dealing with the facts. Trial by jury, in such a form as that, is not a trial by jury in any historical sense of the words. It is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern, and much less to be respected.

James B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* 188 n.2 (1898). For Wigmore, “this unfortunate [American] departure from the orthodox common law rule has done more than any other one thing to impair the general efficiency of jury trial as an instrument of justice.” 9 John H. Wigmore,

A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 2551, at 504–505 (3d ed. 1940). Thayer and Wigmore recognized the crucial role of the judge in helping to guide twelve jurors to unanimity.

At common law in England, a judge’s charge to the jury did not separate instructions on law from comments on evidence; the judge folded them together. Thomas A. Green, *Verdict According to Conscience* 139 (1985). The judge endeavored to help the jurors sort out the facts, particularly in cases of conflicting testimony. Matthew Hale (1609-1676), who served as a judge of all three superior common-law courts, including as Chief Justice of the Court of King’s Bench, which decided felony cases, wrote of the “Excellency” of the practice of judges commenting on evidence. The trial judge was not only able to “direct” the jurors on questions of law, but also

in Matters of Fact, to give them a great Light and Assistance by his weighing the Evidence before them, and observing where the Question and Knot of the Business lies, and by showing them his Opinion even in Matter of Fact, which is a great Advantage and Light to Lay Men.

Matthew Hale, *The History of the Common Law of England* 164–165 (Charles M. Gray ed., 1971) (1713) (Hale, *History of the Common Law*).

In the mid-eighteenth century, Blackstone also praised judicial comment on evidence. He described,

at the end of a trial, the judge summing up the evidence for the jury and “observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with the remarks as to the credibility of the witnesses, and how far they have been contradicted or supported by others.” 3 William Blackstone, *Commentaries* *375. Blackstone emphasized the benefits of the practice. “This having the judge’s observation upon the evidence, is a most advantageous usage of the English law. For the jury are usually unpracticed in such matters, and are liable to be misled by the eloquence of counsel, or their own lack of experience.” *Id.*

Judicial comment on evidence continued vigorously on both sides of the Atlantic through the eighteenth century, and juries mostly followed the judges’ lead. In 1773, James Boswell asked Lord Mansfield, the Chief Justice of King’s Bench, whether juries always followed his recommendations. Mansfield replied that juries did, “except in political causes.” 1 James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* 206 n.44 (1992) (Oldham, *Mansfield*) (quoting 7 *The Private Papers of James Boswell from Malahide Castle* 109 (G. Scott & F.A. Pottle eds., 1928)); see also John H. Langbein, *Blackstone on Judging, in Blackstone and His Commentaries: Biography, Law, History* 65, 70–71 & nn.33–35 (Wilfrid Prest ed., 2009) (discussing judges routinely guiding juries in both civil and criminal cases). Sometimes a judge strongly indicated the verdict he favored; sometimes he contented himself with a broad hint. See John H. Langbein, *The*

Criminal Trial Before the Lawyers, 45 U. Chi. L. Rev. 263, 286 (1978) (Langbein, *Criminal Trial*). Juries were not legally obligated to follow a judge's views, but they ordinarily did. Oldham, *Mansfield*, *supra*, at 150.

Over time, the character of judicial comment changed somewhat, as trials increasingly featured lawyers. By the late eighteenth century in criminal cases, judges more rarely stated their opinions about the outcome plainly. But they continued to comment on evidence and gave more detailed summaries of the evidence, guiding the juries to the important points. See John H. Langbein, *The Origins of Adversary Criminal Trial* 322–323 (2003); Renée Lettow Lerner, *How the Creation of Appellate Courts in England and the United States Limited Judicial Comment on Evidence to the Jury*, 40 J. Legal Prof. 215, 229–230 (2016) (Lerner, *Appellate Courts*). The implication is that the advent of counsel, especially defense counsel, tended to obscure the crucial questions of fact.

Many judges in the United States availed themselves of their common-law powers to comment on evidence. Federal judges, with the security and authority of life tenure, were known for robust comment. In 1886, the U.S. Supreme Court gave a resounding endorsement of the practice:

In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary

to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error.

Vicksburg & Meridian R.R. Co. v. Putnam, 118 U.S. 545, 553 (1886).

In 1887, and in several cases thereafter, the Court defined the constitutional phrase “trial by jury” to mean a trial in which the judge had the power to comment on the evidence. *United States v. Philadelphia & Reading R.R. Co.*, 123 U.S. 113, 114 (1887) (“Trial by jury in the courts of the United States is a trial presided over by a judge, with authority, not only to rule on objections to evidence, and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact”); *see also Capitol Traction Co. v. Hof*, 174 U.S. 1, 13–14 (1899) (same); *Patton v. United States*, 281 U.S. 276, 289 (1930) (same). In 1930, the Court declared that this power, among certain other attributes of a common-law trial, was “beyond the authority of the legislative department to destroy or abridge.” *Patton*, 281 U.S. at 290. This Court made clear that the judge’s power to comment on evidence

was a crucial element of trial by jury under the U.S. Constitution.

State appellate courts also encouraged trial judges to exercise their powers to comment. For example, in 1830 in Massachusetts, Chief Justice Isaac Parker rejected an argument that a trial judge had improperly commented on evidence in a criminal libel case. “We know of no rule requiring the judge to conceal his opinion. He is to comment upon the evidence.” *Commonwealth v. Child*, 27 Mass. 252, 260 (1830) (opinion of Parker, C.J.). He asked rhetorically: “Is he to do it by merely stating that one witness says this thing and another says that? Has he not power to say, this evidence is weak and that evidence is strong?” *Id.* At that time, appellate judges in Massachusetts also sat as trial judges. Chief Justice Parker described his own practice when presiding over trials. When the evidence was nearly balanced, “I endeavor to leave it to the jury to decide which scale preponderates; but if the evidence on one side is strong, compared with that on the other side, I think it my duty to make the jury comprehend that it is so.” *Id.*¹ Such judicial comment encouraged twelve jurors to arrive at a unanimous verdict efficiently.

In the nineteenth century and into the twentieth, state and federal judges’ power to comment on evidence eroded. Judicial elections and the increasing

¹ For additional examples of state judges exercising the power to comment in criminal and civil cases, see cases collected in Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 Wm. & Mary L. Rev. 195, 214 & n.70 (2000).

separation between trial and appellate courts played a role. *See generally* Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 Wm. & Mary L. Rev. 195 (2000) (describing the process of limiting trial judges' power to comment on evidence); Lerner, *Appellate Courts*, *supra* (same). The waning of the traditional common-law power in the United States prompted the troubled comments of Thayer and Wigmore quoted above. Both recognized the importance of judicial comment in guiding the jurors and helping the twelve to agree.

B. Jurors were often experienced, especially foremen.

In addition to the guidance of the judge, late eighteenth-century jurors in England and America often had guidance from other members of the panel who were repeat players. These repeat jurors tended to be familiar with the law and courtroom proceedings, a familiarity that helped them to decide cases quickly. Foremen were often especially experienced and therefore could guide juries effectively in making decisions. This practice helped to persuade twelve jurors to be unanimous in a reasonable time.

In England, the same persons tended to be called for jury service again and again.² Repeat service occurred often enough that some members of

² In part, this was because of property qualifications. In England, the same basic property qualification was in place from the late seventeenth century until 1972: ownership of freehold land that produced at least £10 in value a year. 4 W. & M., c. 24 (1692); 3 Geo. 2, c. 25 (1730). (This qualification was repealed in

every trial jury in one sample from the eighteenth century had served before. John M. Beattie, *Crime and the Courts in England, 1660-1800*, at 386 (1986). On average, more than a third of jurors on a panel had served at a previous court session. *Id.* at 385–386. In London, most of the dozen jurors impaneled for a given session of court had served in prior sessions. Langbein, *Criminal Trial*, *supra*, at 276–277. In theory, jurors in England were not supposed to serve more than one session every two years. Jury Act of 1730, 3 Geo. 2, c. 25. But in practice, this rule was frequently disregarded. *See* Beattie, *supra*, at 386.

Moreover, a juror was likely to hear many cases in a row once he appeared for a particular court session, which lasted several days. A juror could decide dozens of cases during a single session. *See* James S. Cockburn, *Twelve Silly Men? The Trial Jury at Assizes, 1560-1670*, in *Twelve Good Men and True* 158, 165–166 (James S. Cockburn & Thomas A. Green eds., 1988) (*Twelve Good Men and True*); Beattie, *supra*, at 380–382; Langbein, *Criminal Trial*, *supra*, at 274–276. By the middle of the eighteenth century, it was “entirely typical” for eight men out of the twelve to hear all of the dozens of cases “tried between Friday

the Criminal Justice Act 1972, c. 71.) The property qualification meant that juries largely consisted of yeoman farmers in rural areas and merchants in cities. *See* P.J.R. King, “*Illiterate Plebeians, Easily Misled*”: *Jury Composition, Experience, and Behavior in Essex, 1735-1815*, at 254, 261, and Douglas Hay, *The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century*, 305, 349, 357, both in *Twelve Good Men and True* (James S. Cockburn & Thomas A. Green eds., 1988).

afternoon and the following Thursday,” in the English criminal courts. Beattie, *supra*, at 382 n.175.

In England, foremen exercised considerable leadership, helping the twelve jurors to make decisions rapidly. Beattie, *supra*, at 397–398; Cockburn, *Twelve Silly Men*, *supra*, at 158, 170–171. The position of foreman became almost an office. He was often a person of higher standing in the community than the typical juror. Thomas A. Green, *A Retrospective on the Criminal Trial Jury, 1200-1800*, in *Twelve Good Men and True*, *supra*, at 358, 378; Cockburn, *Twelve Silly Men*, *supra*, at 158, 167–171. Above all, foremen were called to serve repeatedly. For instance, in Kent in the mid-seventeenth century, one person, Robert Day, served as a juror in at least 118 trials, 111 of them as foreman, over the course of 13 years. Cockburn, *Twelve Silly Men*, *supra*, at 158, 168.

Information about eighteenth-century American juries is sparser, but suggests that, as in England, American courts relied on experienced jurors and foremen. William E. Nelson, *The Legal Restraint of Power in Pre-Revolutionary America: Massachusetts As a Case Study, 1760-1775*, 18 Am. J. Legal Hist. 1, 13–14 (1974); William E. Nelson, *Americanization of the Common Law* 21 (1975). For instance, records from the federal circuit court in Virginia indicate that roughly twenty-five percent of jurors served as repeat members of the grand jury. Wythe Holt & Brent Tarter, *The Apparent Political Selection of Federal Grand Juries in Virginia, 1789-1809*, 49 Am. J. Legal Hist. 257, 262–263 (2007). One person, William

Branch Giles, served as foreman of the federal grand jury in Virginia three years in a row, from 1803 to 1805. He had been a member of the U.S. House of Representatives and was a U.S. Senator from 1804 to 1815. *Id.* at 263.

The prior experience of the jurors had great effect on a jury's ability to deliberate efficiently. Experienced foremen and experienced jurors helped guide the other members of the panel to an efficient decision, a result that would otherwise be difficult with a group of twelve.

C. Jurors were subject to systematic deprivation and sequestration.

In the late eighteenth century, another important tool that the English and American legal systems used to achieve unanimity among twelve jurors was the time pressure of systematic deprivation and sequestration. (Sequestration was also referred to as prohibiting separation of the jury.) In the early seventeenth century, Edward Coke gave the classic formulation of the rule:

By the Law of England a Jury after their Evidence given upon the Issue, ought to be kept together in some convenient place, without Meat [food] or Drinke, Fire or Candle, which some Bookes call an Imprisonment, and without speech with any, unlesse it be the Bailife, and with him onely if they be agreed.

Edward Coke, *The First Part of the Institutes of the Laws of England* 471 (1628) ("Of Estates" § 366, folio

227b). Coke declared this formulation in the context of discussing civil cases, but elsewhere he emphasized the necessity of strict adherence to the rule of juror confinement in felony cases. Edward Coke, *The Third Part of the Institutes of the Laws of England* 121 (1680) (“Larceny or Theft” ch. 47, folio 110); *see also* 2 Matthew Hale, *History of the Pleas of the Crown* 297 (1736) (repeating the rule) (Hale, *Pleas of the Crown*).

The rule of deprivation and sequestration of jurors appeared early in English law, and English judges refined and enforced it through the Middle Ages and into the eighteenth century. A rule concerning jury deprivation and sequestration appears in the *Fleta* treatise in the 1290s. *Fleta, Of the Verdict of the Jurors, in Book III and Book IV*, 89 Selden Society 66 (H.G. Richardson & G.O. Sayles trans., 1972). Judges enforced the rule by imprisoning jurors caught snacking or separating from their fellows (before the eighteenth century), fining jurors, and sometimes rejecting verdicts. David J. Seipp, *Jurors, Evidences and the Tempest of 1499, in The Dearest Birthright of the People of England: The Jury in the History of the Common Law* 75, 86–89 (John Cairns & Grant McLeod eds., 2002); J.H. Baker, *Introduction, in The Reports of Sir John Spelman Part II*, 94 Selden Society 83, 112–113 (1978).

In explaining the existing practice in 1768, William Blackstone declared that the purpose of the rule was “to avoid intemperance and causeless delay.” 3 William Blackstone, *Commentaries* *375–376. Commentators on this rule have linked it with the need for

the common-law system to encourage speedy jury unanimity among a jury of twelve. *See, e.g.*, Baker, *supra*, at 112; Seipp, *supra*, at 88–89. Another reason was to prevent parties from treating the jurors or tampering with them and causing partiality or the appearance of partiality. Baker, *supra*, at 112; Seipp, *supra*, at 87–88.

Blackstone and other eighteenth-century writers suggested that the rule of deprivation had begun to relax somewhat. Blackstone added an exception to Coke’s formulation and stated that jurors are to be kept “without meat, drink, fire, or candle, *unless by permission of the judge*, till they are all unanimously agreed.” 3 William Blackstone, *Commentaries* *375–376 (emphasis added). By the eighteenth century, the question of allowing the jurors refreshment was thus left to the discretion of the judge. Judges routinely made exceptions for jurors who were ill. *See* 2 Hale, *Pleas of the Crown*, *supra*, at 297 n.(c); *The Complete Jurymen* 169 (1752). Still, in many cases in the eighteenth century the judges did enforce the rule, as repeated references in cases, legal treatises, and the broader culture indicate.³

³ In a case in 1735, the Court of Common Pleas set out the basic rule that was followed in England and widely in the American colonies and United States from the eighteenth through the early nineteenth century: If the jury separated or ate or drank at their own expense without the court’s permission, the jurors were misbehaving and fineable, but the verdict would not be overturned unless the jury’s impartiality were in doubt. But if a party treated the jurors to food or drink before the verdict, the judge would set aside a verdict in that party’s favor. *St. John v. Abbot*, 94 Eng. Rep. 994, 994 (C.P. 1735). For descriptions of the

Along with many other English practices concerning juries, the rule of juror deprivation and sequestration crossed the Atlantic to the North American colonies. For example, a Virginia statute of 1645 provided that jurors were “to be kept from food and releife till they have agreed upon their verdict according to the custome practised in England.” Act 10, 20 Car. 1 (1645), in 1 William Waller Hening, *The Statutes at Large: Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619*, at 303 (1823); see also Act 37, 14 Car. 2 (1662), in 2 Hening, *supra*, at 74 (“[W]hen ever a jury is sent out, an officer sworn to that purpose shall keep them from meat and drink untill [sic] they have agreed on their verdict.”). A Connecticut statute in force in 1702 declared: “And when the court have committed any case to the consideration of the jury, the jury shall be confined, under custody of an officer appointed by the court until they are agreed on a verdict.” Conn. Gen. Stat., tit. 6, c. 1, § 11. Two federal

rule in treatises, see, e.g., *The Complete Juryman*, *supra*, at 158–159, 168–173; Hale, *History of the Common Law*, *supra*, at 165; 1 Giles Duncomb, *Trials per Pais* 247–249 (8th ed. 1766); 5 John Comyns & Stewart Kyd, *A Digest of the Laws of England* 535–537 (4th ed. 1793) (“*Pleader*,” §§ 44–46). For references in wider culture, see Charles Clay Doyle & Clement Charles Doyle, “*Wretches Hang That Jury-men May Dine*,” 28 Just. Sys. J. 219, 220 (2007) (commenting on a couplet in Alexander Pope’s 1714 mock epic *The Rape of the Lock*); Thomas Rowlandson, “*A Lamentable Case of a Jury-Man*” (1815) (etching satirizing the confinement of jurors without necessities), reprinted in John H. Langbein, Renée Lettow Lerner & Bruce P. Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* 420 (2009).

court opinions quoted or cited this statute as remaining in force in 1808 and 1809. *See Lester v. Stanley*, 15 F. Cas. 396, 396–397 & n.2 (C.C.D. Conn. 1808) (No. 8,277) (setting aside verdict because the jury separated before agreeing on the verdict); *see also Howard v. Cobb*, 12 F. Cas. 636, 636 (C.C.D. Conn. 1809) (No. 6,755) (“[J]udgement must have been arrested if it had been proved that the jury separated before they had agreed upon a verdict.” (citing Conn. Gen. Stat., tit. 6, c. 1, § 11)). Both of these federal opinions suggest that state judges in Connecticut sometimes allowed juries to separate before agreeing on a verdict.

Generally, the sequestration of jurors did not present a problem in the eighteenth century, because trials almost never lasted longer than a day. A notable exception was the Boston Massacre trials in 1770. Several of those trials lasted about a week. The jurors in each case were kept together and confined to the courthouse or to the jailer’s house under keepers for the entire period of the trial, to conform with the sequestration rules. 3 John Adams, *The Legal Papers of John Adams* 19, 21 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (quoting early accounts); Hiller B. Zobel, *The Boston Massacre* 225, 250, 273–274 (1970).

In the debates over the ratification of the U.S. Constitution, ratification supporter John Dickinson referred to the rules of jury deprivation and sequestration. Responding to the Anti-Federalists’ objection to the lack of a right to civil jury trial, Dickinson jokingly argued that the Anti-Federalists were such lovers of liberty that they would never have allowed jury

trial to develop in the first place, as the system depended on coercion. “What! Can freedom be preserved by imprisoning its guardians? Can freedom be preserved, by keeping twelve men closely confined without meat, drink, fire, or candle, until they unanimously agree . . . ?” “Fabius” (John Dickinson), *Letter IV: Observations on the Constitution* (Apr. 19, 1788), reprinted in 17 *The Documentary History of the Ratification of the Constitution* 180, 183 (John P. Kaminski & Gaspare J. Saladino eds., 1995).

In the early nineteenth century, the rules about deprivation and sequestration relaxed on both sides of the Atlantic. In 1819, the Court of King’s Bench declared that judges could permit the jury to separate before the verdict in misdemeanor cases. *King v. Kinnear*, 106 Eng. Rep. 434, 435–436 (K.B. 1819); see also Marcy Strauss, *Sequestration*, 24 Am. J. Crim. L. 63, 71–72 (1996) (describing the later history of sequestration). Some American states maintained the rigor of the traditional rule, particularly regarding separation of the jury in a capital case. See, e.g., *Commonwealth v. McCaul*, 3 Va. 271, 301–306 (1812); *McClain v. State*, 18 Tenn. 241, 241–243 (1837); *Hare v. State*, 5 Miss. 187, 195–196 (1839). But English and American judges increasingly permitted jurors to take refreshment and to separate before returning a verdict. See, e.g., *Commonwealth v. Purchase*, 19 Mass. 521, 525 (1824); *Commonwealth v. Clue*, 3 Rawle 498, 503 (Pa. 1831).

The relaxation of the ancient rule created a new problem: the hung jury. In 1867, an English commentator pointed out that juries being supplied with refreshments but required to be unanimous had led to difficulty with getting twelve persons to agree expeditiously. He observed that the “modern custom seems to be for the judge to discharge the jury” so the case could be tried again to a new jury. George Overend, *The Preservation and Amendment of Trial by Jury*, 23 Law Mag. & L. Rev. Q.J. Juris. 191, 200 (1867). In 1870, an act of Parliament formally ratified the practice of the jury being allowed refreshment. Act of 1870, 33 & 34 Vict. c. 77. Somewhat earlier, some American states likewise began the practice of discharging a jury which could not agree and ordering a new trial. See, e.g., *Purchase*, 19 Mass. at 525; *Johnson v. Root*, 13 F. Cas. 798, 806–807 (C.C.D. Mass. 1862) (No. 7,409) (hearing the case after a retrial; a jury disagreed after the first trial and a new trial was ordered). New trials were an expensive and time-consuming remedy; the system of jury trials became evermore cumbersome. Removing the rules of deprivation and sequestration provoked difficulties in getting twelve jurors to agree, a problem which was hard to solve.

II. Jury selection was swift, with limited or no voir dire, which allowed rapid empanelment of twelve jurors and efficient jury trial.

Besides providing mechanisms to persuade twelve jurors to agree on a verdict in a timely manner, the common law streamlined the trial itself. This

streamlining took many forms, but one of the most notable, from a modern perspective, directly bears on the number of jurors. In criminal cases, jury selection was very swift. In modern practice, with its extended voir dire, requiring a greater number of jurors lengthens the process even more. In contrast, eighteenth-century practice encouraged impaneling twelve jurors quickly. This rapidity helped to make jury trials workable as a routine matter.

In late eighteenth-century England and the United States, as in England today, jury selection was strictly limited. Voir dire was swift or non-existent. The defendant or counsel could ask questions directly related to for-cause challenges, such as whether the juror met the property qualifications. John H. Langbein, Renée Lettow Lerner & Bruce P. Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* 540 (2009). But in the late eighteenth century, few did so. Langbein, *Criminal Trial*, *supra*, at 275–276. Further, neither side could ask a potential juror whether he had prejudged the case or about other issues of prejudice. Langbein, Lerner & Smith, *supra*, at 540; April J. Anderson, *Peremptory Challenges at the Turn of the Nineteenth Century*, 16 Stan. J.C.R. & C.L. 1, 12–13, 17–18 (2020). This restriction drastically limited the scope of questioning; it speeded jury selection and helped to prevent exhausting the pool of available jurors. See *The Trial of Peter Cook*, Y.B. 8 Will. 3 (1696), reprinted in 13 How. St. Tr. 311, 334 (1812) (establishing the rule). For American examples, see *State v. Baldwin*, 1 Tread. 289, 292 (S.C. 1813); *id.* at 296–301 (opinion of

Nott, J.); *id.* at 321–325 (opinion of Bay, J.); *State v. Flower*, 1 Miss. 318, 318–319 (1829); *King v. State*, 6 Miss. 730, 734 (1841); *State v. Creasman*, 32 N.C. 395, 397 (1849); *Crippen v. People*, 8 Mich. 117, 126 (1860).

The English legal system maintained the policy of discouraging extended voir dire; the American system diverged dramatically, allowing ever-more detailed and intrusive questioning that lengthened jury trial. Two cases, in particular, launched this change: the trial of James Callender for seditious libel in 1800, *United States v. Callender*, 25 F. Cas. 239, 244 (C.C.D. Va. 1800) (No. 14,709), presided over by Justice Samuel Chase, and the trial of Aaron Burr for treason in 1807, *United States v. Burr*, 25 F. Cas. 49, 77 (C.C.D. Va. 1807) (No. 14,692g), presided over by Chief Justice John Marshall. Both these cases were politically charged and notorious. At the time, U.S. marshals, who were responsible for summoning jurors in federal courts, were suspected of packing juries with political supporters. *See, e.g.*, Carl E. Prince, *Federalists and the Origins of the U.S. Civil Service* 264 (1977); James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* 235–236 (1956); Peter Charles Hoffer, *The Treason Trials of Aaron Burr: Landmark Law Cases and American Society* 129–132, 146–147 (2008); R. Kent Newmyer, *The Treason Trial of Aaron Burr: Law, Politics, and the Character Wars of the New Nation* 91–94 (2012). Justice Chase and Chief Justice Marshall understandably believed it was necessary for a fair trial (or at least the appearance of it) to allow the defendant and his counsel to question the jurors more extensively than

had been previously allowed. But in doing so, they opened the floodgates. American lawyers seized upon this opportunity to question jurors and stretched it immensely, in both criminal and civil cases.

In extending voir dire, lawyers and judges helped to destroy the efficiency of jury trial. As a treatise writer in 1877 declared, voir dire has been “lengthened to a tedious and exasperating extent in trials of great importance . . .” John Proffatt, *A Treatise on Trial by Jury* 220 (1877). Today, this lengthening has occurred in trials of all kinds. Elaborate modern jury selection is far removed from the streamlined eighteenth-century practice. The more jurors need to be selected, the longer modern jury selection takes. And the less the legal system relies on jury trials to resolve criminal cases.

III. Mandating rigid rules for jury trials can result in more plea bargains, often meaning no adjudication of any kind.

The Court’s efforts to further or to preserve jury trial have sometimes backfired. A notable example is requiring the states to provide jury trial under the Sixth and Fourteenth Amendments for misdemeanor charges carrying the potential for more than six months’ imprisonment. *Duncan v. Louisiana*, 391 U.S. 145, 149–150, 159 (1968). *Duncan* has not led to many jury trials in misdemeanor cases. Rather, the vast majority of misdemeanor charges are resolved by plea bargains.

Flexibility and experimentation are key to making jury trials workable, meaning reasonable in

cost and length. If jury trials are not efficient, they will only be held in a very few cases. The legal system will develop and permit workarounds. The chief workaround, plea bargaining, effectively involves no adjudication at all. A federal judge has to certify that there is a “factual basis” for the plea, Fed. R. Crim. P. 11(b)(3), but that is a weak and highly variable standard. In the United States, defendants are routinely sentenced to years of imprisonment without a formal determination by a jury or a judge that the person is in fact guilty. A decision to require twelve jurors will promote further punishment without adjudication.

A principled originalism does not pluck out one or two features of a complex common-law institution such as the jury and impose them on the states. It is essential to consider the broader procedural context of that institution and how it operated historically. Without that deeper consideration, efforts to preserve the jury will backfire.

CONCLUSION

The Court should affirm the judgment of the Fourth District Court of Appeal of Florida.

Respectfully submitted,

RENÉE LETTOW LERNER
Counsel of Record
THE GEORGE WASHINGTON
UNIVERSITY LAW SCHOOL
2000 H Street NW
Washington, DC 20052
(202) 994-5776
rlerner@law.gwu.edu

October 2, 2026