

COMMENT

Unaccountable at the Founding: The Originalist Case for Anonymous Juries

The “anonymous jury” is quickly emerging as a powerful tool to protect jurors.¹ Consider *United States v. Shryock*²: The defendants were “extraordinarily violent” mobsters, drug lords, and killers.³ They had a long history of “threatening, assaulting, killing, or attempting to kill potential witnesses.”⁴ To prevent jury tampering, the district court permanently sealed “the names, addresses, and places of employment of [venirepersons] and their spouses.”⁵ After hearing the evidence, the nameless jurors sent nine defendants to prison for life.⁶ The jurors then slipped back into obscurity—never revealing their identities.

Nearly every state and federal jurisdiction that has considered the issue allows at least some use of anonymous juries.⁷ Nevertheless, defendants

-
1. See Adam Liptak, *Nameless Juries Are on the Rise in Crime Cases*, N.Y. TIMES, Nov. 18, 2002, at A1.
 2. 342 F.3d 948 (9th Cir. 2003), cert. denied, 541 U.S. 965 (2004).
 3. See *id.* at 972, 975; see also *id.* at 959-71.
 4. *Id.* at 972.
 5. See *id.* at 970.
 6. *Id.* at 960 (listing nine life sentences, in addition to two 384-month sentences).
 7. Ten federal circuits and seven states have upheld the constitutionality of anonymous juries. See *id.* at 970-71; *United States v. Mansoori*, 304 F.3d 635, 649 (7th Cir. 2002); *United States v. Talley*, 164 F.3d 989, 1001 (6th Cir. 1999); *United States v. DeLuca*, 137 F.3d 24, 31 (1st Cir. 1998); *United States v. Childress*, 58 F.3d 693, 701 (D.C. Cir. 1995) (per curiam); *United States v. Krout*, 66 F.3d 1420, 1426 (5th Cir. 1995); *United States v. Darden*, 70 F.3d 1507, 1532 (8th Cir. 1995); *United States v. Ross*, 33 F.3d 1507, 1519 (11th Cir. 1994); *United States v. Vario*, 943 F.2d 236, 239 (2d Cir. 1991); *United States v. Scarfo*, 850 F.2d 1015, 1023 (3d Cir. 1988); *People v. Goodwin*, 69 Cal. Rptr. 2d 576, 581 (Ct. App. 1997); *State v. Brown*, 118 P.3d 1273, 1279 (Kan. 2005); *Commonwealth v. Angiulo*, 615 N.E.2d 155, 171 (Mass. 1993); *People v. Williams*, 616 N.W.2d 710, 712 (Mich. Ct. App. 2000); *McKenzie v.*

continue to challenge the constitutionality of anonymous juries under the Sixth Amendment. In response, courts use balancing tests to weigh defendants' constitutional rights against jurors' security concerns.⁸

This Comment argues that the courts overlook important Founding-era evidence on juror accountability. It concludes that the Public Trial Clause does not require juror identification. Part I describes the Public Trial Clause accountability argument made against the anonymous jury. Part II then turns to the evidence rebutting this argument—namely, that the First Congress treated juror identification requirements as statutory law, not constitutional law, and that the accountability argument is inconsistent with the theory of juries that prevailed at the Founding.

I. THE PUBLIC TRIAL CLAUSE AS AN ACCOUNTABILITY REQUIREMENT

Criminal defendants strenuously resist the spread of anonymous juries. The *Shryock* defendants,⁹ for example, claimed that juror anonymity violated their Public Trial Clause¹⁰ rights. This argument, elaborated more fully in other sources, is essentially that “public trials produce greater reliability because the [jurors] are accountable” to the observing public.¹¹ Conversely, the “deindividuation” of anonymity strips jurors of personal responsibility and dilutes their sense of duty.¹² The Public Trial Clause, they argue, checks

State, 583 N.W.2d 744, 747 (Minn. 1998); *State v. Hill*, 749 N.E.2d 274, 282 (Ohio 2001) (holding only that anonymous juries do not constitute structural constitutional error); *State v. Tucker*, 657 N.W.2d 374, 379 (Wis. 2003). Two states have denied motions for an anonymous jury without reaching the constitutional questions. *See State v. Accetturo*, 619 A.2d 272, 275 (N.J. Super. Ct. Law Div. 1992) (finding no need for an anonymous jury); *People v. Watts*, 661 N.Y.S.2d 768, 769 (Sup. Ct. 1997) (citing statutory law).

8. *See, e.g., Mansoori*, 304 F.3d at 650–51 (balancing impartial jury rights against security).
9. Appellants' Joint Opening Brief at 88, *Shryock*, 342 F.3d 948 (No. 97-50468).
10. U.S. CONST. amend. VI.
11. Death Eligible Defendants' Response to Motion To Empanel Anonymous Jury and Delay Disclosure of Witness Names and Places of Abode at 9, *United States v. Cisneros*, No. 03-0730 (D. Ariz. filed Apr. 18, 2005).
12. Ephraim Margolin & Gerald F. Uelmen, *The Anonymous Jury: Jury Tampering by Another Name?*, CRIM. JUST., Fall 1994, at 14, 61; *see also* Philip E. Tetlock, *Accountability and the Perseverance of First Impressions*, 46 SOC. PSYCH. Q. 285, 286, 290–91 (1983) (indicating that accountability expectations may affect a juror's level of care).

misconduct by creating personal and reputational accountability for jury verdicts.¹³

Although not cited by the *Shryock* defendants, three historical facts support their claim. First, venirepersons in the Founding era were local, drawn from relatively intimate communities.¹⁴ Because these individuals were often known (or at least identifiable) to onlookers, juror identification may have been an assumed characteristic of early trials. Second, the First Continental Congress expressly cited reputational accountability as a virtue of jury trials. In the *Letter to the Inhabitants of Quebec*, the Continental Congress stated that jurors “cannot injure [a defendant], without injuring their own reputation[s].”¹⁵ Third, Thomas Jefferson famously supported local juror accountability. In fact, if Jefferson had any reservation about reputational checks, it was because he thought them too weak.¹⁶ Jefferson repeatedly petitioned for more concrete electoral checks on jurors.¹⁷

Several jurists and commentators have accepted the *Shryock* defendants’ fundamental proposition, as a matter of both policy and history. As to the former, Justice Harlan commented in a concurrence that “the public-trial guarantee embodies a view of human nature, true as a general rule, that . . . jurors will perform their respective functions more responsibly in an open

-
13. See Marvin Zalman & Maurisa Gates, *Rethinking Venue in Light of the “Rodney King” Case: An Interest Analysis*, 41 CLEV. ST. L. REV. 215, 238 (1993) (“Understandably sensitive to community reputation,” a local juror in a small town “may indeed feel a sense of personal responsibility . . . that a resident of an urban area . . . may not.” (quoting *Corona v. Superior Court*, 101 Cal. Rptr. 411, 418 (1972))).
 14. See generally AKHIL REED AMAR, *THE BILL OF RIGHTS* 88–93 (1998) (describing Founding-era jurors as provincials, accustomed to local ways and manners).
 15. CONT’L CONG., *LETTER TO THE INHABITANTS OF THE PROVINCE OF QUEBEC* (1774), reprinted in 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1779, at 105, 107 (Worthington Chauncey Ford ed., 1904). The *Letter* also refers to jury trials as a “full enquiry, face to face, in open Court, before as many of the people as chuse to attend.” *Id.* But this language does not fairly implicate juror identification. Rather, “face to face” was a term of art in the late eighteenth century, referring to the requirement of face-to-face confrontation between accusing witnesses and the defendant. See, e.g., MASS. CONST. art. XII; N.H. CONST. art. XV. For a discussion of “open courts” and public trials, see *infra* notes 36–38 and accompanying text.
 16. See Enclosure in Letter from Thomas Jefferson to James Madison (Oct. 26, 1798), in 2 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN JEFFERSON AND MADISON 1776–1826, at 1076, 1077 (James Morton Smith ed., 1995).
 17. See, e.g., *id.*; Letter from Thomas Jefferson to John Taylor (Nov. 26, 1798), in 30 THE PAPERS OF THOMAS JEFFERSON 588, 589–90 (Barbara B. Oberg ed., 2003); Letter from Thomas Jefferson to John Tyler (May 26, 1810), in 12 THE WRITINGS OF THOMAS JEFFERSON 391, 393 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).

court than in secret proceedings.”¹⁸ On the historical front, Professor Daniel Blinka has claimed that Founding-era jurors “risked damaging their own reputations” when they reached unpopular verdicts.¹⁹ Together, their writings suggest that anonymous juries lack the reputational stakes essential to reliable trials.

II. FOUNDING-ERA EVIDENCE SUPPORTING THE CONSTITUTIONALITY OF ANONYMOUS JURIES

The argument that the Public Trial Clause forbids anonymous juries is unpersuasive for three reasons. First, the First Congress rejected a constitutional provision that would have prohibited at least some anonymous juries. The earliest phrasing of the Sixth Amendment required criminal prosecutions to adhere to all the “accustomed requisites” of jury trials²⁰ – that is, the jury trial customs long followed in England and the colonies. When this phrase was proposed and rejected in 1789,²¹ juror identification was an accustomed requisite of criminal trials at common law.²² Further, English statutory law had expressly guaranteed limited juror identification rights for more than eighty years.²³ In this historical context, the accustomed requisites clause, had it survived, likely would have protected juror identification rights.

But in rejecting the clause, the First Congress suggested that juror identification is a nonconstitutional issue. As Justice White commented in a similar Sixth Amendment dispute, the elimination of the accustomed requisites clause

is concededly open to the explanation that “accustomed requisites” were thought to be already included in the concept of a “jury.” But that explanation is no more plausible than the contrary one: that the

18. *Estes v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring).

19. Daniel D. Blinka, “*This Germ of Rottness*”: *Federal Trials in the New Republic, 1789-1807*, 36 CREIGHTON L. REV. 135, 139 (2003).

20. See 1 ANNALS OF CONG. 452 (Joseph Gales ed., 1834).

21. See THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 393-95 (Neil H. Cogan ed., 1997) (collecting drafts of the Sixth Amendment from the First Congress).

22. See WILLIAM BLACKSTONE, 3 COMMENTARIES *352-53, *355; 4 *id.* at *344.

23. Treason Act of 1708, 7 Ann., c. 21, § 11 (Eng.) (“[W]hen any person is indicted for high treason, or misprision of treason, a list . . . of the jury, mentioning the names, profession, and place of abode of the . . . jurors, [shall] be . . . given . . . to the party indicted.”). See generally JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 103 (2003) (giving reasons why the Framers were likely to be aware of English treason laws).

deletion had some substantive effect. Indeed, . . . the latter explanation is, if anything, the more plausible. . . . [W]here Congress wanted to leave no doubt that it was incorporating existing common-law features of the jury system, it knew how to use express language to that effect.²⁴

Although it rejected a constitutional requirement, the First Congress adopted a statutory juror identification requirement. Borrowing phrases from its familiar English antecedent,²⁵ the First Crimes Act in 1790 guaranteed juror identification rights to discrete classes of criminal defendants.²⁶ That the First Congress bestowed jury identification rights through statute when it had refused to do so in the text of the Sixth Amendment provides strong evidence that the Amendment was not intended to guarantee those rights.

Second, early American policymakers rejected overt means of securing juror accountability, fearing a threat to juror autonomy. Jurors were a buffer on—the servant of—popular passions. Justice Story, echoing other esteemed constitutional writers in the early Republic, summarized the operative theory:

The great object of a trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter, than the former.²⁷

This principled commitment to jury autonomy is evident throughout Founding-era trial procedure. Take, for starters, the process of choosing a venire: Random selection was the Founding-era norm.²⁸ The political

24. *Williams v. Florida*, 399 U.S. 78, 97 (1970) (White, J.) (considering whether the Constitution requires a twelve-person criminal jury); *see also* U.S. CONST. amend. VI (protecting expressly, not impliedly, the right to a local jury).

25. *See* Treason Act of 1708, § 11.

26. Act of Apr. 30, 1790, ch. 9, § 29, 1 Stat. 112, 118 (“[A]ny person who shall be accused and indicted of treason, shall have . . . a list of the jury . . . mentioning the names and places of abode of such . . . jurors, delivered unto him at least three entire days before he shall be tried for the same; and in other capital offences, shall have such copy of the indictment and list of the jury two entire days at least before the trial . . .”). The current version of this statute, codified at 18 U.S.C. § 3432 (2000), applies in all capital cases except those in which it “may jeopardize the life or safety of any person.”

27. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1774, at 653 (photo. reprint 1991) (Boston, Hilliard, Gray & Co. 1833); *see, e.g.*, JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 209 (photo. reprint 1998) (1814) (“[W]e expect the independence of juries” from “kings, presidents, factions, and demagogues . . .”).

28. *See* 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 17 n.* (Henry Reeve trans., London, Saunders & Otley, 3d ed. 1838) (1835). Even so, some juror selection processes were more

consequences of this method are significant, as random selection insulated jurors from political pressures. Juries did not—at least formally—answer to the public at large, and they had little incentive to engage in demagoguery. Even after the empanelment process, jurors enjoyed marked independence. Juries had the right to deliberate in secret, without meddling eyes.²⁹ Juries decided questions of both law and fact,³⁰ controlling case outcomes with nearly absolute finality.³¹ Moreover, jurors could announce decisions without fear of personal loss or liability, even if the judge had demanded a different verdict.³² The early Republic minimized outside influences and constraints on jury deliberations and discretion.

Thus, in supporting juror accountability, Thomas Jefferson stood in sharp contrast to his peers. He derided randomly selected venirepersons as “accidental” juries,³³ repeatedly proposing juror elections as a method for increasing accountability. But Jefferson’s ideas were “politically stillborn”;³⁴ his petitions invariably failed to find the support of an electoral majority. Even close friends responded coolly, if politely, to Jefferson’s recommendations.³⁵ In

random than others. *Compare* Act of Dec. 13, 1756, in 18 THE COLONIAL RECORDS OF THE STATE OF GEORGIA 144, 145-47 (Allen D. Candler ed., 1910) (selecting jurors by blindly drawing from a box containing the names of all qualified individuals), *with* Act of Oct. 11, 1744, in 9 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 45, 45-46 (Charles J. Hoadly ed., Hartford, Case, Lockwood & Brainard Co. 1876) (appointing panels of venirepersons annually, from which jurors were randomly selected).

29. See *Shaftesbury’s Trial*, (1681) 8 Howell’s State Trials 759, 772 (K.B.) (Eng.) (acknowledging the jury’s ancient right to secret deliberations). *But see* John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 289-96 (1978) (describing how, without lawyers in the courtroom, a jury’s right to secret deliberations could be jeopardized).
30. *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794) (Jay, C.J.).
31. AHKIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 235, 238 (2005) (describing presumptive judicial deference to jury findings in the Founding era).
32. See *Bushell’s Case*, (1670) 124 Eng. Rep. 1006 (K.B.) (establishing legal immunity for juror decisions). This immunity represented a dramatic shift in favor of juror autonomy. 3 BLACKSTONE, *supra* note 22, at *403-04; 4 *id.* at *354 (describing how, before the abandonment of writs of attainder, jurors supporting “false” verdicts were imprisoned, condemned to permanent infamy, and stripped of all property, while their homes were torn down and their wives and children cast outdoors).
33. See *Enclosure in Letter from Thomas Jefferson to James Madison*, *supra* note 16, at 1076.
34. See *Blinka*, *supra* note 19, at 180 (describing the failure of Jefferson’s 1798 petition).
35. See, e.g., *Letter from John Taylor to Thomas Jefferson* (n.d.), in 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 17, at 601, 602 (“The idea of reforming our jury . . . was deserted on account of the difficulties which presented themselves, and the opinion that congress would disregard it.”).

consistently declining Jeffersonian juror election schemes, early policymakers indicated ongoing satisfaction with the relative lack of juror accountability.

Third, most of the Founding figures did not endorse even reputational checks on jury discretion. Although it would have been logically consistent to accept reputational accountability while rejecting more overt checks, this does not appear to have been their method. At the Founding, there were reputational accountability arguments, and there were arguments in favor of local jurors—but these two ideas were separate and distinct. Today’s criminal defense bar anachronistically conflates these two arguments, asserting that local jurors in the Founding era were seen as more reliable because they were known and reputationally accountable for their actions.

To be sure, Founding-era literature³⁶ on the Public Trial Clause discusses reputational accountability extensively. But the literature contemplates reputational checks on judges and witnesses—not on jurors. Publius, William Blackstone, and Matthew Hale, among others, agreed that public observation incentivized judges to behave properly: “[I]f the judge be partial, his partiality and injustice will be evident to all by-standers.”³⁷ Blackstone and Hale further agreed that witnesses would be less apt to lie in public settings: “[A] witness may frequently depose that in private, which he will [b]e ashamed to testify in a public and solemn tribunal” in the “presence of all mankind.”³⁸ But as for the public reputations of jurors, the original Public Trial Clause literature is silent.

Meanwhile, the Founding-era literature supports local jurors, but for non-reputational reasons. Local juries “were supposed to have . . . a prior and a perfect knowledge . . . of the characters of the parties themselves, as of the witnesses.”³⁹ Local juries were further known to have “private knowledge of [the] facts,” which they were to consider in addition to any evidence presented at trial.⁴⁰ The jurors were valued for their familiarity with the locale—not for the locale’s familiarity with the jurors.

The “stranger jury” debate illustrates this distinction well. When submitted to the states for ratification in 1787, the Constitution guaranteed only that a

36. Cf. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 11-22 (1997) (discussing the primary sources of the Founding era).

37. MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 344 (London, Butterworth, 6th ed. 1820); see also 3 BLACKSTONE, *supra* note 22, at *372; THE FEDERALIST NO. 83 (Alexander Hamilton) (“The temptations to prostitution, which the judges might have to surmount, must certainly be much fewer while the co-operation of a jury is necessary . . .”).

38. 3 BLACKSTONE, *supra* note 22, at *373; see also HALE, *supra* note 37, at 345.

39. HALE, *supra* note 37, at 338 n.B; see also 3 STORY, *supra* note 27, § 1775.

40. 3 BLACKSTONE, *supra* note 22, at *374.

jury trial would be “held in the State where . . . the [alleged] Crimes shall have been committed.”⁴¹ Some delegates in various state ratification conventions were concerned about the prospect of “jur[ies] of strangers” from far-off parts of the state.⁴² These delegates focused on two criticisms: Stranger juries were unfamiliar with the trustworthiness of the defendant and the witnesses, and stranger juries were unacquainted with the facts of the crime.⁴³ (Other delegates actively supported stranger juries because of their impartiality⁴⁴—a perspective that appears to have won out over time.)

This stranger jury debate is significant not so much for what the participants said, but for what they failed to say. None of the delegates suggested that local jurors were more reliable or conscientious because they were reputationally accountable in the community. Instead, the delegates made the traditional arguments found in the contemporaneous literature; they discussed knowledgeable jurors, but not a community knowledgeable about an individual’s behavior inside the jury box. If reputational accountability for jurors had been a commonly accepted principle at the Founding, one would expect at least one delegate to have articulated an argument on its behalf. But nobody did.

The most plausible explanation is that support for reputational checks on jurors was anomalous and unorthodox. Although the First Continental

41. U.S. CONST. art. III, § 2, cl. 3.

42. See 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 109-10, 400, 517 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT’S DEBATES]; 3 *id.* at 447, 547, 578-79; 4 *id.* at 295; see, e.g., Letter from Agrippa, MASS. GAZETTE, Dec. 11, 1787, reprinted in 4 THE COMPLETE ANTI-FEDERALIST 77, 78-79 (Herbert J. Storing ed., 1981). These concerns were not unfounded. See Blinka, *supra* note 19, at 169-70 (describing how a majority of jurors in some early federal trials were summoned from relatively distant places).

43. See 3 ELLIOT’S DEBATES, *supra* note 42, at 547 (recording Edmund Pendleton’s observation at the Virginia ratification convention that the latter was more faithful to the traditional vicinage rationale). Thomas Tredwell of New York noted a third problem with stranger juries that, although not supporting an objection to juror anonymity under the Public Trial Clause, might support an objection under the Impartial Jury Clause of the Sixth Amendment. Tredwell claimed defendants could not use their preemptory challenges effectively because strangers’ biases would be unknown. 2 *id.* at 400. If the criminal defense bar uses Tredwell’s statements to advance an argument under the Impartial Jury Clause, it will likely face two counterarguments. First, several Founding figures believed stranger venires would yield more impartial juries, not fewer impartial juries. See *infra* note 44 and accompanying text. Second, Tredwell could not foresee modern juror questionnaires and voir dire procedures, which help ensure Impartial Jury Clause compliance.

44. See, e.g., 2 ELLIOT’S DEBATES, *supra* note 42, at 112-13; 4 *id.* at 150; see also Letter from the Federal Farmer, Oct. 12, 1787, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 42, at 245, 249.

Congress's *Letter* expressly cites jurors' reputational incentives, the *Letter* appears to be the only reference to jurors' reputational accountability within a voluminous early literature on juries. Its singularity stands in telling contrast to the contemporaneous literature's chorus on judicial and witness accountability.

CONCLUSION

Anonymous juries are a powerful but controversial prophylactic against jury tampering. As seen in *Shryock*, criminal defendants emphatically resist juror anonymity. They claim, in part, that the Public Trial Clause requires reputational accountability for jurors.

But to the historian, a different reading of that Clause seems more defensible. After empanelling twelve unbiased citizens – a microcosm of We the People⁴⁵ – most Founding figures felt little need to hold juries accountable.⁴⁶ Juries were not an institution in need of oversight or direction. Disinterested jurors were themselves the checking mechanism, serving as both a buffer to public passions and a populist restraint on judicial tyranny.

Founding-era juries were, in a word, trusted. The Public Trial Clause contemplates popular supervision of judges and witnesses. But jurors need not be reputationally accountable.⁴⁷

KORY A. LANGHOFER

45. See TAYLOR, *supra* note 27, at 208-11 (conceptualizing the jury as Article III's populist lower house, counterbalancing aristocratic professional judges in the upper house).

46. Or in the memorable words of an Anti-Federalist describing the trustworthiness of juries: "[An] impartial [juror] . . . would . . . as soon do you right as wrong . . ." Essay by a Farmer, MD. GAZETTE, Mar. 21, 1788, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 42, at 36, 39.

47. Osborn Maledon, a Phoenix law firm, generously and graciously sponsored the bulk of my historical research. For their support, I am grateful.