Plea Bargaining for the People

Daniel S. McConkie Jr.

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PLEA BARGAINING FOR THE PEOPLE

DANIEL S. McCONKIE, JR.*

Our criminal justice system must be democratic enough to allow for significant citizen participation. Unfortunately, our current system cuts the people out. Instead of juries, plea bargaining professionals like prosecutors, defense attorneys, and judges decide most cases. Plea bargaining does efficiently process cases but, in addition to its well-known coercive aspects that warp case outcomes, ignores what I call “criminal justice citizenship.” This refers to the people’s privilege to participate on an equal basis in the criminal justice system. That participation strengthens our democracy, shores up the legitimacy of the system, and helps to ensure that the system, within constitutional constraints, does not become untethered from the people it is supposed to serve. Because the jury trial has all but disappeared, other participatory democratic institutions, like grand juries and plea juries, must play a more prominent role.

Criminal justice citizenship is best described by three key principles: membership, participation, and deliberation. Participation refers to public participation in democratic processes, including jury service and advisory boards. Membership requires distributing opportunities to participate broadly and equally. Deliberation means public dialogues that are enriched by broad participation and which influence official action.

This Article’s distinct contribution to plea bargaining literature is in its analysis of plea-bargaining reform through the lens of criminal justice citizenship. Plea bargaining is terrible for citizenship, and while many reforms to plea bargaining have been proposed, only a few support citizenship. Any reform that tends to increase the system’s reliance on juries would likely strengthen criminal justice citizenship. But even where jury trials are rare,

* Associate Professor of Law, Northern Illinois University College of Law. Former Assistant United States Attorney, 2008–2013 (Sacramento). J.D., Stanford Law School, 2004. Many thanks to Hannah Bloch-Wehba, Carliss Chatman, Mihailis Diamantis, Sarah Fox, Thomas F. Geraghty, Heidi Kuehl, Andrew Mamo, Eric Miller, Jeffrey Omari, Jeff Parness, Anna Roberts, Maybell Romero, Ric Simmons, Matt Timko, and Jenia Turner. I also received helpful comments from the Marquette Law School faculty workshop, the Chapman Junior Faculty Conference, and the Northern Illinois University College of Law Summer CrimWIP Workshop. Ryan Marcotte provided helpful research assistance. All errors are my own, but these colleagues were generous with their time and this Article is much better for it.
other forms of citizen juries can still be devised to give a broader swath of the people a more direct role in influencing and deciding case outcomes.

I. INTRODUCTION

In 2020, the American Academy of Arts & Sciences’ Commission on the Practice of Democratic Citizenship issued a report titled “Our Common Purpose: Reinventing American Democracy for the 21st Century.” That report defined citizenship as not simply a legal status; citizenship included “a broader ethical conception of engagement in community and contribution to the greater good.”

The report discussed a series of foundings in America’s history—periods when the country was born or reborn for the better. The first founding of our

2. Id. at 3.
3. Id.
nation in the eighteenth century is well known. A “second founding” occurred with the adoption of the post-Civil War Reconstruction Amendments, which more firmly established equal citizenship under the law.4

The Civil Rights movement of the 1960s might be termed a “third founding.” The Commission found that, in our time, “the profoundly challenging conditions of the twenty-first century pose an urgent threat to the future of our democratic way of life . . . .”5 It called for a “fourth founding” to revitalize our democracy through participation.6 The fourth founding would be rooted “not only in the actions of government, but also in the commitments of citizens; not only in the reinvention of federal structures, but also in devolution of power to local governance; not only in research and analysis, but also in love of country and one another.”7

This hoped-for fourth founding could do wonders for our whole society, but especially for our criminal justice system. Although some progress has been made, America’s dysfunctional justice system has largely discarded citizen participation. Thus, it is no surprise that the national uprisings against police violence and racism in summer 2020 were characterized by mass demonstrations organized on a grassroots level, a testament to the power of direct citizen participation. One common demand that civil rights groups make to address systemic racism in policing is local control by the people.8

Another example of the decline of local control in criminal justice is the rarity of jury trials. The jury trial is “mostly dead.”9 Plea bargaining experts run the system, and this has severed the direct link between the people and criminal justice. Unsurprisingly, the consequence is that the system’s

4. Id. at 3; see, e.g., Bruce A. Ackerman, The Storrs Lectures: Discovering the Constitution, 93 YALE L.J. 1013, 1052 (1984); Bruce A. Ackerman, Constitutional Politics/Constitutional Law, 99 YALE L.J. 453, 515–16 (1989).

5. OUR COMMON PURPOSE, supra note 1, at 3.

6. Id.

7. Id.

8. See, e.g., Community Control, THE MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms/community-control/ [https://perma.cc/EJ8T-ECSL] (“We demand a world where those most impacted in our communities control the laws, institutions, and policies that are meant to serve us—from our schools to our local budgets, economies, police departments, and our land . . . .”); 8 TO ABOLITION, ABOLITIONIST POLICY CHANGES TO DEMAND FROM YOUR CITY OFFICIALS, https://static1.squarespace.com/static/5edbb321b6026b073fe97d4/t/5ee0817e955eaa484011b8fe/1591771519433/8toAbolition_V2.pdf [https://perma.cc/QEU4-8TME] (advocating defunding the police, closing down local jails, investing in community self-governance, and investing in healthcare, housing, education, transportation, and youth programs).

legitimacy has suffered.\(^\text{10}\) Plea bargaining is certainly in need of reform, and a good deal of academic literature focuses on making our system of pleas fairer, more rational, and less coercive. Although this is desirable, what’s often missing from proposed reforms is popular participation. Our system requires justice to be by the people so that it can be for the people.\(^\text{11}\)

Without significant democratic features, the criminal process cannot achieve its true purposes. The criminal law’s purposes are ultimately social: declaring and reinforcing what conduct is unacceptable and reprehensible and responding to crime in a socially productive way, including providing for convicts a path back to full membership in society. Professionals have an important role to play here, to be sure, but not more important than the people’s role. Our criminal justice system’s essential functions are more than sorting the guilty from the innocent, respecting defendants’ rights, and sentencing the guilty. It matters who performs these tasks. Society’s interest in the outcome of criminal cases is too great, and the balancing of interests too fine, for the people not to have a significant role. Our justice system must in a meaningful way reflect self-rule, and the institution of the jury has a sufficiently distinguished pedigree to accomplish this end, even if it must be modified in some ways in response to modern challenges, such as our somewhat dystopian plea-bargaining system.

We must design a system that gives the people meaningful opportunities to participate and to deliberate in its workings. That system would have several advantages: It would enjoy special legitimacy as the people’s justice, not imposed from the outside but an expression of what was on the inside. Its workings would improve the people who temporarily served in it by teaching them about government and giving them opportunities to labor with their fellow citizens in a manifestly important cause. It would provide important opportunities for discussion of the people’s most important values and deliberation about how those values applied in particular cases. Its procedure would begin to re-stitch torn social fabric by giving the accused an opportunity to have their cases heard at various stages by their peers, giving opportunities for accountability and redemption.


In short, infusing public participation into our plea bargaining system would help to revitalize what I call "criminal justice citizenship," by which I mean "the rights and privileges of the citizenry [defined geographically and not by reference to immigration law] to participate directly in some aspects of the criminal justice system and to deliberate in some of its workings."12 In prior work, I have described this idea and its three key principles: membership, participation, and deliberation.13

1. "Membership" refers to who can participate and whether they can participate on an equal basis."14 A justice system built on this principle sends a strong message to all citizens that they have an equal voice; it promotes solidarity by giving people the opportunity to work together for the common cause of justice; it engenders trust in the system because people can see from the inside how it works and respect that process, even if they do not always agree on the outcomes.

2. Deliberation refers to dialogues between lay persons to influence or determine official decisions. Juries are model bodies for this type of deliberation to occur, although they must be carefully designed and supported to help ensure quality deliberations.

3. "Participation" refers to public participation in democratic processes," including service on any kind of jury or advisory board.15 "Institutions and procedures must be designed to give the people an important role in government, but the nature and extent of that role are limited by other considerations," such as procedural accuracy, guarding against over-severity, and racial justice.16

This Article thus contributes to two distinct literatures: first, the literature about expanding participatory citizenship in criminal justice; and second, the

12. Daniel S. McConkie, Jr., Criminal Justice Citizenship, 72 FLA. L. REV. 1023, 1025 (2020) [hereinafter McConkie, Criminal Justice Citizenship]. Much citizenship literature focuses on membership issues, like alienage and naturalization. See, e.g., ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 137–64 (1997). My theory of citizenship includes those who are not American citizens in the immigration sense of the term because such persons have a stake in our criminal justice system and limited opportunities to participate in it.


14. Id. (emphasis added).

15. Id. (emphasis added).

16. Id.
literature about reforming plea bargaining. Examining plea bargaining through the lens of criminal justice citizenship illuminates the way forward in plea bargaining reform. We will likely never return to system that doesn’t rely on plea bargaining, but technocratic plea-bargaining reforms are incomplete because they leave no room for popular participation, a core insight of American democracy and criminal justice.

This Article proceeds as follows. Part II provides a brief history of citizenship, especially in America. It also discusses how the idea of citizenship in America has changed and diminished over time. Today’s justice system is seriously deficient in regard to membership, participation, and deliberation. Furthermore, the virtues that these pillars demand of and cultivate in the citizenry have great social value: Membership principles require a belief in the moral equality of other citizens. Participation requires of citizens a willingness to lay aside some self-interest and dedicate some energy toward a common civic project. Deliberation requires open-mindedness and a willingness to dialogue with those whose views differ from our own.

Part III applies this theory to plea bargaining reform. Plea bargaining is not just terrible for defendants; it also weakens citizenship. The jury trial right belongs to the people; nevertheless, plea bargaining allows prosecutors and defendants to routinely waive that right. Plea bargaining deprives citizens of the privilege of participating in adjudication. Therefore, a good plea-bargaining reform reduces the number of plea bargains and increases the number of trials (or alternative dispositions, like diversion and treatment).

In terms of citizenship qua membership, plea bargaining diminishes the justice system’s credibility, and its outcomes disproportionately disadvantage people of color. Furthermore, several of its procedural features, especially its inherent coercion, distort outcomes and lead innocent people to plead guilty. Finally, plea bargaining eliminates jury deliberations. It often coerces defendants into pleading guilty instead of going to trial, and by its opacity it prevents the public from deliberating about criminal justice generally.

Several procedural reforms have been proposed that would mitigate these harmful effects on citizenship, including reforms that put juries back into the center of criminal adjudication. I discuss these reforms in Part IV, emphasizing jury-based reforms, because juries, for all their flaws, still enjoy special legitimacy and public prestige.17 Jury service is an important civil right that should not be categorically denied to any group of citizens, even felons. Jury service is a crucial component of citizenship, ensuring that the people are represented and their interests are protected. In addition to increasing public trust in the justice system, jury service promotes civic participation and engagement, fostering a sense of community and responsibility among citizens.

17. See Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017) (“The jury is a central foundation of our justice system and our democracy. . . . Over the long course its judgments find acceptance in the community, an acceptance essential to respect for the rule of law. The jury is a tangible implementation of the principle that the law comes from the people.”).
deliberations can suffer from bias and lack of expertise, but they can be improved by empaneling more diverse juries and by training jurors to listen to each other (especially in the face of countervailing gender dynamics). Juries specialize in case-specific balancing of concrete interests and moral judgment, but experts should be permitted to provide input where necessary. This could include input about how any particular sentence might affect a community and its safety, deter future crime, or aid in the defendant’s rehabilitation and re-integration. Finally, participation on juries is consistent with our legal traditions, promotes denser social networks and opportunities to work together for the common good, and provides an important way to constrain and challenge government power.

Even if trial juries are not likely to return, other kinds of juries might help to supplement them. Grand juries perhaps provide the best hope—this ancient institution already seeks citizen input at the gates of a criminal prosecution, but in plea bargaining, prosecutors overshadow the grand jury, both by controlling the grand jury at the indictment state and bypassing it altogether in plea bargaining. Certain reforms could re-enthrone the grand jury and put citizens back in the middle of charging and adjudication. Perhaps the most important reforms would be changing state statutes to require grand jury indictments; providing the grand jury with independent legal counsel to counterbalance the prosecutor’s presentation and put other legal options before the grand jury; and broadening the role of the grand jury to consider not only whether there is probable cause to support the prosecutors’ desired charges but also whether a criminal prosecution is advisable under all the circumstances, and if so, which charges best fit.

There are other ways to give citizens a greater voice in the prosecution of cases outside of the jury box. “Community prosecution” means prosecutors working more closely with their constituents, and a closer relationship there might allow for greater community input into policies affecting charging and plea bargaining. A similar reform would be citizen policy advisory boards, which would provide direct input to prosecutors in the formulation of plea policies. (Restorative justice is a promising community-based, non-jury reform that I hope to examine in future work.)

Given the right reforms, our plea-bargaining system can become a better vehicle for participatory self-government. The reasons for this will become clearer if we turn, first, to the history of idea of citizenship, how it relates to juries, and why criminal justice citizenship must be revived.

Electronic copy available at: https://ssrn.com/abstract=3802075
II. CRIMINAL JUSTICE CITIZENSHIP

Citizenship “consists of membership of a political community where all citizens can determine the terms of social cooperation on an equal basis.”18 This Part discusses historical and contemporary manifestations of citizenship, an ideal conception of it, and how these citizenship principles apply to the criminal justice system.

As I have discussed at length in a previous article relating to jury trials, “criminal justice citizenship” considers the role of citizens in our criminal justice system.19 A criminal citizen has membership in a particular political jurisdiction, meaning that he or she is “subject to its criminal laws and its processes and is protected, at least theoretically, by those laws and processes” and “is able through participation or deliberation to exert influence over those laws and processes.”20 Criminal justice citizenship is generally concerned with citizenship in cities, counties, and federal districts21 because criminal adjudication is inherently local. Popular participation is generally more practical at the local level. However, local community preferences should still be consistent with federal constitutional guarantees, like Equal Protection.22

A. American Conceptions of Citizenship, Past and Present

Citizenship for our purposes must be situated within democratic theory. Two basic strands of democracy are popular sovereignty and collective self-government.23 Elements of both are present in the American system. Popular sovereignty is, at its heart, direct democracy, sometimes described as rule by the people. Direct democracy can be dangerous because it can devolve into pure populism that devalues minority rights. The other strand of democracy,

18. RICHARD BELLAMY, CITIZENSHIP: A VERY SHORT INTRODUCTION 17 (2008) (“This status not only secures equal rights to the enjoyment of the collective goods provided by the political association but also involves equal duties to promote and sustain them . . . .”); McConkie, Criminal Justice Citizenship, supra note 12, at 1036.
20. Id. at 1035.
21. In the federal system, more populous states have been divided into smaller jurisdictions. Illinois, for example, has a Northern, Central, and Southern District.
22. Cf. Pena-Rodriguez, 137 S. Ct. at 861–62, 871 (vacating conviction where juror clearly voted to convict based on racial basis) (“It is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history. The Court now seeks to strengthen the broader principle that society can and must move forward by achieving the thoughtful, rational dialogue at the foundation of both the jury system and the free society that sustains our Constitution.”).
collective self-government, is also called democratic pluralism. This strand seeks to govern diverse groups peacefully and equitably through democratic representation. It, therefore, might take as its motto *e pluribus unum*. Democratic representation is no panacea either because it can devolve into rule by elites who serve their own interests, not those of the people.

These basic forms of democracy roughly correspond to two ancient ideals of citizenship that continue to influence modern notions of citizenship. The Greek ideal, which corresponds to popular sovereignty, requires significant political participation from its citizens and a commitment to the common good. In fact, the reality was a highly unequal society in which an underclass labored to support the privileged few who were counted as citizens. The Roman ideal, corresponding to collective self-government, gave citizenship to many more people in a much larger society and centered that citizenship in legal rights instead of participation. But the republic eventually morphed into an empire controlled by elites.

These classical ideals of citizenship can be seen in America’s founding. America’s republicanism drew on Greek ideals, prizing participatory “We-the-People” citizenship and “promot[ing] the general welfare.” Although rule by “the People” was in some sense the ideal, the reality was far less inclusive. Eighteenth-century American reformers had an exclusive vision of citizenship, one that required “a minimum property franchise to ensure some education, some responsibility, [and] some stake in the land.” This small group represented “the People,” and vast numbers of potential citizens were excluded, including women, Indians, enslaved persons, and those without taxable property.

24. *Id.*
25. *Id.*
26. *Id.*
29. *Id.* at 31.
30. *Id.* at 34–36.
31. *Id.* at 36.
32. U.S. CONST. pmbl.
33. BERNARD CRICK, DEMOCRACY: A VERY SHORT INTRODUCTION 45 (2002).
34. *Id.*
In the broader sense of community life citizenship was more inclusive, at least for those of European heritage. Alexis de Tocqueville, an astute observer of the early American Republic, wrote: “I have seen Americans making great and sincere sacrifices for the common good . . . .” This dedication to the common good, embraced by an “involved citizenry,” was a novel approach to government. The American approach featured a less muscular central state and stronger intermediate institutions, such as local governments and civic organizations.

On the other hand, the Founders did not establish unlimited Greek-style participatory citizenship; they balanced that concept against a more liberal Roman-style citizenship. Sometimes called “passive citizenship,” this type of citizenship seeks to maximize individual freedoms and private gain by granting negative rights (the right to not be harmed or interfered with by others) and minimizing duties to the state. Liberal citizenship is especially suited to large societies where widespread political participation beyond voting may seem impractical. It allows a diversity of thought and lifestyle to flourish. Instead of a single common good, it seeks to allow as many people, and peoples, as possible to pursue their own conception of the good.

America’s large, free market economy has strengthened and modified the liberal conception of citizenship. Modern economies are based on a “community of interest,” where workers perform a wide array of specialized tasks to create wealth, both individually and for society generally. The accumulation of wealth enhances individual autonomy. Of course, the benefits of this system are unequally distributed, leaving the poor with fewer protections


36. Id.


39. CRICK, supra note 33, at 110, 112–13 (“The liberal state as it developed in the last two centuries in Europe and North America created a framework within which people could lead their private and commercial lives with a minimum of interference. Their interventions were limited in the main to voting in public elections. . . . Among moral and political writers of the Renaissance, it was widely agreed that the only way to maximize the liberty of individual citizens must be to ensure that everyone plays an active role in political affairs. . . . Since the seventeenth century, however, the leading Western democracies have repudiated this view in favour of a strongly contrasting one. It has been an axiom of liberal theories about the relationship between government and the governed that the only way to maximize freedom must be to minimize the extent to which public demands can legitimately be made on our private lives.”); see generally JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM & DEMOCRACY (1943); QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM (1998).
and liberties. A minimal safety net is provided, in part because it is recognized that everyone benefits economically from that net. At the same time, consumer choices and boycotts have become an important way for people to exercise power as consumers. These economic aspects of citizenship have partially eclipsed political citizenship: many people see themselves more as consumers than citizens.

Contemporary American attitudes towards citizenship are complex and reflect both sides of these basic historical and theoretical debates. Public attitudes toward citizenship often turn on the size of the polity involved. People may be more inclined to participate in local causes because they perceive a more personal stake in the outcome. People of all political persuasions generally recognize the importance of individual rights and autonomy as well as the importance of contributing to the greater good. However, there is substantial disagreement about what exactly that greater good is, how much time should be devoted to seeking it, and whether doing so should be a legal duty, a moral duty, or a praiseworthy choice for those who have the time, inclination, and resources to participate.

B. Ideals of Membership, Participation, and Deliberation

Some key themes about citizenship can be discerned in this long arc of history. These ideals, although never fully realized, still provide students and practitioners of democracy with conceptual clarity and guidance. Political scientists have identified three key foundations of democratic citizenship: membership, participation, and deliberation. These three conditions ideally serve as the foundation for just and democratic self-rule in the American tradition.

41. Citizens or Consumers?: Social Policy in a Market Society 10–11 (Dave Broad & Wayne Antony eds., 1999) (“[T]he mid-twentieth-century politics of citizenship has been replaced by a notion of citizens as consumers, whose medium of social interaction and source of economic and social security is the capitalist market.”).
Membership

Membership for citizens has to do with belonging, equality under the law, reciprocity, solidarity, and legitimacy. These ideals are important criteria for judging our current criminal justice system or any proposed reforms. Although we fall pitifully short of them, a clear understanding of our ideals is a necessary prerequisite to reform (or even revolution).

"Belonging" asks who belongs to the polity and who does not. Those who belong should have "a sense of inclusion in the larger society, such that one's voice is considered and one's participation makes a difference." Those who belong should be treated equally under the law, including allowing for equal opportunities to participate in governmental processes. Equality includes inclusivity, the intentional design of democratic institutions to maximize participation.

Citizenship requires "a condition of civic equality and consists of membership of a political community where all citizens can determine the terms of social cooperation on an equal basis." Citizens in a democracy should view each other as moral equals, equally deserving of the law's protection. Otherwise, dominant groups might act in such a way as to erode, intentionally or not, the equal rights of minority groups.

Equality under law requires reciprocal legal duties. This notion of reciprocity was articulated by the Supreme Court in 1795, which defined citizens as "members of the society" who "claim rights in society which it is the duty of the society to protect," each of whom are in turn "under a solemn obligation to discharge all those duties faithfully, which he owes, as a citizen, to the society of which he is a member . . . ."


45. McConkie, Criminal Justice Citizenship, supra note 12, at 1039.

46. Id. at 1036–37 (internal quotation marks omitted) (quoting Bellamy, supra note 18); see also Bellamy, supra note 18, at 17 ("This status not only secures equal rights to the enjoyment of the collective goods provided by the political association but also involves equal duties to promote and sustain them.").


48. Talbot v. Johnson, 3 U. S. 133, 162 (1795) (Iredell, J.) (quoted in Mark Moller & Lawrence B. Solun, Corporations and the Original Meaning of "Citizens" in Article III, 72 Hastings L.J. 169, 182 n.51, 185 (2020) ("[S]peakers in the 1780s, while disagreeing about many particulars about the meaning of 'citizenship,' agreed that to be a 'citizen' was to owe a reciprocal duty of 'attachment'".)
Membership requires enough political solidarity among the citizenry “to create a sense of a shared civic project.” This can also be described as social interdependence, a recognition that social problems have widespread effects and require a common effort to address. Although the Constitution and government can design institutions to foster political solidarity, solidarity must also be widely shared at the grassroots level.50

Finally, membership includes legitimacy: the trust people have in the government. This includes “broad acceptance of the legitimacy of the prevailing rules of politics.”51 Even those whose views do not prevail should at least feel that their fellow citizens have listened to them and considered their point of view.52 When citizens can participate in government, they are more likely to believe that government is legitimate.53 Of course, legitimacy is no substitute for justice because it can be manipulated. People can be made to feel that the government is fair when in fact it is not.54

ii. Participation

Participation is the second pillar of citizenship and refers to self-government.55 This relates to a theory of democracy called participatory democracy. In contrast to democratic pluralism, which focuses on elections, rule by the experts, and end results, participatory democracy “sees widespread, continuous engagement in self-government not only as the best way to ensure

(sometimes, but not always, described as ‘allegiance’) to a republican community in exchange for its protection. This attachment, in turn, was understood as an affective or solidaristic tie. As a result, part of what it meant to be a ‘citizen’ was to be ‘someone who was a proper object of an expectation of an affective tie to a society or its ideals.’ “)).

49. McConkie, Criminal Justice Citizenship, supra note 12, at 1039 (internal quotations omitted).

50. Id. at 1041.

51. BELLAMY, supra note 18, at 13.


that government promotes the common good, but also as something valuable in and of itself, part of a life well-led and a community well-constituted."

In the civic republican tradition, citizens should participate with an eye toward the public good. Participation can be considered a right to be exercised at will (like voting) or a legal responsibility (like jury service). Participation and membership must sustain each other. As the late, great Representative John Lewis wrote: “Democracy is not a state. It is an act, and each generation must do its part to help build what we called the Beloved Community, a nation and world society at peace with itself.”

The Constitution establishes several mechanisms for direct public participation in criminal justice, including the grand jury, petit criminal trial jury, and civil jury (which was originally intended to address official misconduct, although that function has largely been replaced by the exclusionary rule). The Constitution also contemplates indirect participation in criminal justice, such as free speech, peaceable assemblies, and the criminal court audience that witnesses public trials. The law also now commonly provides the people with a right to vote for legislators, judges, prosecutors, and sheriffs.


58. John Lewis, Together, You Can Redeem the Soul of Our Nation, N.Y. TIMES (July 30, 2020), https://www.nytimes.com/2020/07/30/opinion/john-lewis-civil-rights-america.html [https://perma.cc/UX5S-GUZ5]; see also Jamelle Bouie, John Lewis was the Anti-Trump, N.Y. TIMES (July 31, 2020), https://www.nytimes.com/2020/07/31/opinion/john-lewis-trump-election-2020.html [https://perma.cc/1Q7J-QQW] ("Americans have lived with democratic institutions for so long that it’s become easy to think of democracy as something that is defined and embodied by those institutions. But the Constitution and Congress and elections and courts aren’t democracy themselves as much as they’re instruments for its realization. Democracy itself is something larger and more expansive; it is an ethic, a way of living and, as Lewis wrote, an act, something that you must do in order to summon it into existence." (emphasis in original)).


As these examples show, participation is a key insight of American criminal justice, and jury service is at its heart. The jury empowers the people to constrain the tripartite branches, ensuring that leaders are faithfully representing the people’s interests. The Constitution’s jury trial mandate expresses “a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges” and an “insistence upon community participation in the determination of guilt or innocence” to check government power.

The Founders established juries as a profoundly democratic institution of criminal adjudication, not only to benefit the accused “but also to express and strengthen local citizenship.” In fact, the jury trial was formerly seen to be just as much as the right of the people as a right of defendants. As I have discussed elsewhere, the jury trial has always had several weaknesses, including bias and inaccuracy. Nonetheless, it became the defining feature of American criminal justice for a time.

iii. Deliberation

Deliberation is the third pillar of citizenship. It is a process for reaching better collective decisions. It generally requires people with diverse viewpoints to get informed, speak their minds in reasonable terms on important issues in a public forum, and listen to others with an open mind. It happens in specific forums (like juries or the public square) and can provide binding or non-binding results. A deliberative democracy should ideally have at least these features: (1) “Citizens regard each other as moral equals.” (2) There is a public sphere characterized by free speech, civility, and listening. (3) The public is sufficiently informed and deliberates on the most important issues. (4) “The deliberations are based on reason, as opposed to pure emotion or threats, and participants are at least in principle willing to change their minds.”

61. See Amar, The Bill of Rights as a Constitution, supra note 59, at 1133.
62. Id. at 1185.
64. McCorkie, Criminal Justice Citizenship, supra note 12, at 1028.
66. Kymlicka & Norman, supra note 38, at 298; see McCorkie, Criminal Justice Citizenship, supra note 12, at 1054.
68. Id. at 1055.
some public consensus emerges, government decision makers must be “meaningfully responsive” to it.69

Deliberations are part of the hard work that helps to make democratic governance possible. Public deliberations (such as jury trials and the court of public opinion) are built into our constitutional order and must be employed, if only at some threshold of minimal quality, for that order to succeed. Although deliberations are rarely ideal,70 we must strive for the ideal because even imperfect deliberations have value. In contrast, the alternative is plainly undesirable: regimes that lack any public deliberations are authoritarian.

Importantly, each of the foregoing pillars of citizenship implies a set of virtues that the citizenry must have. Membership principles require a belief in the moral equality of other citizens. In the criminal justice realm, there must be a commitment not only to justice but also, in appropriate cases, to mercy and redemption.71 These latter values are necessary because without them, justice alone might drive convicted citizens to the margins of society, never to return. This serves no valid social purpose except in rare and extreme circumstances. The web of lifelong collateral consequences that entangles tens of millions of Americans ought to be proof enough that permanent punishment is weakening our body politic.

Participation requires of citizens a willingness to lay aside narrow self-interest and dedicate at least some energy toward working together in a common civic project. As political scientists Will Kymlicka and Wayne Norman have argued, “procedural-institutional mechanisms to balance self-interest are not enough” to maintain a participatory democracy: “[S]ome level of civic virtue and public-spiritedness is required.”72 Deliberation requires the virtues of open-mindedness and a willingness to engage in honest, open dialogue with those whom we may disagree.

C. The State of American Citizenship and Calls for Renewal

There are good reasons to be concerned that weak citizenship virtues and norms jeopardize our democracy. The single best example of America’s lack of a strong commitment to full membership of all citizens is the widespread and systemic racism against Blacks, especially in the criminal justice system. Race

69. Id.
70. Rubin, supra note 55.
72. Kymlicka & Norman, supra note 38, at 291 (citations omitted).
discrimination leads to disparities in public health, wealth, and education. Incredibly, one in three Black males born in 2001 is likely to be imprisoned at some point in life.

Likewise, weak political rights show America’s lack of commitment to full participation by all its citizens. Several laws make voting difficult for the poor and people of color. Persons previously convicted of felonies are denied the right to vote, sometimes permanently. Legislative districts are gerrymandered to dilute the power of some communities’ votes, and minorities are still routinely excluded from jury service.

The social networks of American society are also changing. Sociologists have defined social capital as “the aggregate of the actual or potential resources which are linked to possession of a durable network of more or less...
institutionalized relationships of mutual acquaintance or recognition.”

These relationships “increase the productivity of individuals and groups in the community.”

Social capital is important because it “makes us smarter, healthier, safer, richer, and better able to govern a just and stable democracy.”

In recent decades, there have been declines in time spent with neighbors, in union membership and involvement and in church affiliation and attendance, to name a few.

On the other hand, people may have stronger social ties to their workplaces or in cyberspace.

According to a large national survey conducted in 2018, between one third and one half of Americans could rely on neither a family network nor a friend network for childcare, financial help, or transportation to an important appointment.

Declining membership in civic institutions and other social networks diminishes our collective ability to work together to solve common problems.

Political participation is low by some measures, too. Voter turnout is generally poor, especially among young voters.

True, young people participate in politics in other ways, too, as through consumer choices, online...
activities, and protests. 88 These methods are important and effective, but in a representative democracy, none of them can take the place of voting. Finally, the electorate is extremely polarized and public deliberations are strained. 89

There are many voices calling now for a renewal of citizenship in America relating to all three pillars. In terms of membership, there is a widespread civil rights movement. Hundreds of thousands of protestors took to the streets in summer 2020 seeking racial justice. There is unprecedented public support for the Black Lives Matter movement, although it is not clear whether this support will last or lead to fundamental reforms. 90

There have also been calls for a renewal of participatory citizenship to bring to fruition the promise of legal equality and greater inclusivity. This call is not new—it was famously made by John F. Kennedy in 1961. 91 Addressing his “fellow citizens,” he exhorted: “[A]sk not what your country can do for you—ask what you can do for your country.” 92 In 2020, the Commission on the Practice of Democratic Citizenship called for increased commitment from citizens to the public good, the “devolution of power to local governance,” and greater “love of country and one another.” 93 The National Commission on Military, National, and Public Service has proposed a national program to give one million Americans the opportunity to devote a year to public service. 94 Of that proposal, one commentator said: “That is an ambitious goal, but hardly a


89. See, e.g., Political Polarization, PEW RSCH. CTR., https://www.pewresearch.org/topics/political-polarization/ [https://perma.cc/WF72-HPMP] (“Political polarization—the vast and growing gap between liberals and conservatives, Republicans and Democrats—is a defining feature of American politics today . . . .”) (collecting surveys documenting political polarization).


92. Id.

93. OUR COMMON PURPOSE, supra note 1, at 3.

94. NAT’L COMM’N ON MIL., NAT’L & PUB. SERV., supra note 35, at 10–12.
moon shot, and it could help rebuild social capital in a society that sorely lacks it."95

Similarly, there have been many calls to improve the quality of public deliberation.96 Unfortunately, the electorate is deeply polarized on many issues and civil discourse seems strained. As the National Commission on Military, National, and Public Service recognized, some of America’s greatest strengths are its “ever-evolving and expanding civil society” and its “open and free discourse.”97 These can fuel our political system, enabling us “to confront or prevent crises and to seize opportunities by harnessing the power of diversity of thought, respectful debate, and collaboration focused on a common purpose.”98 However, the Commission warned, “these strengths are not a given—without attention and care, they are at risk.”99

In short, our democracy—and, as will be seen below in Part III, our criminal justice system—relies not only on elected leaders, professionals, and institutions. Its “health and stability” depend “on the qualities and attitudes of its citizens, for example, their sense of identity and how they view potentially competing forms of national, regional, ethnic, or religious identities; their ability to tolerate and work together with others who are different from themselves; their desire to participate in the political process in order to promote the public good . . . . Without citizens who possess these qualities, democracies become difficult to govern, even unstable.”100

Thus, we must design institutions that respect these three key pillars of citizenship, otherwise the government ceases to be “by the people.”101 In the words of German philosopher Jürgen Habermas: “[T]he institutions of constitutional freedom are only worth as much as a population makes of them.”102


96. OUR COMMON PURPOSE, supra note 1, at 42 (recommending that all levels of government “[a]dopt formats, processes, and technologies that are designed to encourage widespread participation by residents in official public hearings and meetings at local and state levels”).


98. Id.

99. Id.

100. Kymlicka & Norman, supra note 38, at 284 (footnotes omitted).

101. See Kleinfield, supra note 11, at 1384 (emphasis omitted).

102. Jürgen Habermas, Citizenship and National Identity, in THE CONDITION OF CITIZENSHIP 20, 27 (Bart Van Steenbergen ed., 1994); see also Kymlicka & Norman, supra note 38, at 284 (quoting Habermas, supra).
III. PLEA BARGAINING IS TERRIBLE FOR CRIMINAL JUSTICE CITIZENSHIP

Many downsides of plea bargaining are well-known. It is inherently coercive; it distorts case outcomes; it pressures innocent people to plead guilty. Although true, these procedural critiques are incomplete. In contrast, a citizenship-based critique of plea bargaining illuminates how plea bargaining harms our democracy. Plea bargaining is not just unfair to defendants; it is a system unworthy of democratic citizenship. As for citizen participation, it bypasses the jury entirely. As for membership, it often lacks legitimacy and has been disastrous for poor people and people of color. It has enabled and exacerbated mass incarceration with all its attendant social chaos. Finally, as for deliberation, plea bargaining replaces jury deliberations with decisions by criminal justice bureaucrats. Additionally, plea bargaining by its opacity prevents the public from deliberating about criminal justice generally.

A. Participation

The people rarely have the opportunity to serve as jurors in criminal trials.103 Instead, almost all criminal convictions result from trial waivers and plea bargains.104 But the jury trial right belongs not just to defendants but also to the public. The fact that defendants usually waive the right is no surprise because the system gives prosecutors tremendous and excessive bargaining leverage. Notwithstanding that, jury waivers are not always in the public’s interest. A reformed plea-bargaining system would rely less on plea bargaining and more on jury trials; it would be less coercive of guilty pleas; and it would consider the public’s interest in a trial waiver (especially in notorious cases). Where cases did plead out, it would still provide a way for meaningful public participation in the outcome. These reforms would replace summary procedure with constitutional, democratic procedure. Of course, this would put great pressure on the system if current case volumes were to be maintained. Other reforms will have to address case volume, including less punitive sanctions, diverting low-level cases to non-criminal dispositions, restorative justice, and investing in communities to prevent crime.

103. See John Gramlich, Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do are Found Guilty, Pew Rsch. Ctr. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ [https://perma.cc/E6MZ-ES75] (of all federal defendants, about 90% plead guilty, 2% go to trial, and 8% have their cases dismissed; in 2017, of the 22 states with available data, "jury trials accounted for fewer than 3% of criminal dispositions").
104. Id.
“The decline of the jury trial has upset the carefully balanced separation of powers that should define the American system.”105 What has replaced the jury trial is essentially an administrative procedure whereby prosecutors dominate, choosing the charges and, typically, the sentence.106 They are able to coerce many guilty pleas, especially in misdemeanor cases.107 Voters can theoretically hold chief prosecutors accountable at elections, but voters have a hard time discerning whether prosecutors are doing a good job, partly due to a lack of transparency.108

This administrative system is a powerful bureaucracy, with all the strengths and weaknesses that it brings.109 In theory, prosecutors are perfect professionals with specialized knowledge. They can be detached and neutral, applying the law evenly across the board. In practice, though, their specialized knowledge does not necessarily exceed that of ordinary people when it comes to how justice, or mercy, might be applied in individual circumstances. And they too often administer justice in a way that is at odds with their constituents’ norms and values and desires, or at least at odds with what their constituents might want if the system were more transparent, if constituents had other options before them besides incarceration, and if the political process were not warped. Finally, the administrative, professionalized apparatus of criminal justice—


106. Depending on a range of factors, including the leverage they have in a particular case under the applicable law. See generally Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 HARV. L. REV. 2463 (2004); Gerard E. Lynch, Our Administrative System of Criminal Justice, 66 FORDHAM L. REV. 2117 (1998).

107. See generally Issa Kohler-Hausmann, Managerial Justice and Mass Misdemeanors, 66 STAN. L. REV. 611 (2014). Rachel Barkow has described how the central premises of administrative law are at odds with nongovernmental and extrajudicial expressions of mercy. Barkow, supra note 71, at 1333–36.

108. See McConkie, Criminal Justice Citizenship, supra note 12, at 1030 (“The inner workings of prosecutorial offices, including charging decisions and plea bargaining, are largely concealed from public view, leaving the public even more powerless.”); see also EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 76 (2019); KATHERINE K. MOY, DENNIS M. MARTIN & DAVID ALAN SKLANSKY, RATE MY DISTRICT ATTORNEY: TOWARDS A SCORECARD FOR PROSECUTORS’ OFFICES 4 (2018) (proposing prosecutorial scorecard for voters).

109. “Bureaucracy” has been defined as rule by professionals, characterized by instrumental rationality, which involves identifying an end goal and seeking to achieve it most efficiently using the technical apparatus of government. See Kleinfeld, supra note 11, at 1379. Its methods are applying pre-determined rules, based on technical and scientific knowledge, in an even-handed manner. Id.
enabled by elected officials—has meted out unnecessarily harsh punishment to unprecedented numbers of Americans.

The jury is a popular check on official power, and plea bargaining does an end run around that check. The jury is designed to lower agency costs in all three branches, ensuring that elected representatives are faithfully representing the people’s interests. Although we typically speak of the jury trial right as belonging to defendants, the public too has a strong interest and even the right to provide jury trials. The Supreme Court has recognized that we have an “established tradition in the use of juries as instruments of public justice” and, furthermore, that the public has a “civic responsibility” to “share[e] in the administration of justice” through jury service. In *Batson v. Kentucky*, the Court found that discrimination in jury selection harms not just the excluded jurors but also “touch[es] the entire community” and “undermine[s] public confidence in the fairness of our system of justice.” In *Blakely v. Washington*, the Court stated: “Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, [a] jury trial is meant to ensure their control in the judiciary.” The People have a right to control the judicial branch through the institution of the jury.

Relatedly, other Supreme Court precedent implies that the public should have a greater say in the defendant’s waiver of the jury trial right. For example, in *Hopt v. Utah*, the Court held that the state court erred in allowing a defendant to absent himself at his own trial in contravention of a state statute requiring his presence at trial. The Court reasoned that the public had an interest in trying the defendant according to democratically enacted procedures.

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111. *Id.* at 1210 (“[N]o phrase appears in more of the first ten amendments than ‘the people.’”). This insight must be modified in light of later constitutional amendments, e.g., the Fourteenth Amendment. See generally Ackerman, *The Storrs Lectures: Discovering the Constitution*, supra note 4; Ackerman, *Constitutional Politics/Constitutional Law*, supra note 4.
114. Batson v. Kentucky, 476 U.S. 79, 87 (1986); see also Flowers v. Mississippi, 139 S. Ct. 2228, 2238 (2019) (“Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process.”).
and the defendant could not waive that right or interest on the public’s behalf.118 Citing Hopt, Judge Joseph R. Goodwin of the Southern District of West Virginia recently rejected a plea deal, finding that the parties had “not overcome the weighty interest of the people in participating in their criminal justice system, and because the plea bargain in this case reflects an agreement which erodes that interest without a compelling, case-specific reason beyond mere expediency.”119

Judge Goodwin continued: “The Founders clearly intended and articulated a preeminent role for the people’s direct participation in that criminal justice system. . . . Plea bargains like this one perpetuate the ongoing metamorphosis of the criminal justice system into nothing more than an administrative system controlled entirely by bureaucrats.”120 No doubt with these concerns in mind, some states do not permit defendants to waive a jury trial without the state’s consent, although it can hardly be said that prosecutors are more interested in jury trials than most defendants.121 In many cases, the public has a greater interest in exercising this right than any of the lawyers involved. Backroom deals that culminate in brief change-of-plea hearings deprive the public of the satisfaction of not only seeing that justice is done but doing justice themselves. This is especially true of high-profile cases.

Allowing fewer guilty pleas (and correspondingly greater public participation in adjudication) would logically seem like a good way to address these issues. Commentators have called for plea bargaining’s abolition since at least the 1970s, but their cries from the wilderness have gone largely unheeded.122 In fact, since that time, many other countries have adopted plea

118. Id.
120. Id.; see also id. at 655 (citing Stephanos Bibas, Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?, 94 GEO. L.J. 183, 196–97 (2005) (“Article III is not phrased as a right belonging to the accused. It was meant to be a right of We the People to administer justice, not simply a right of defendants to waive (or be coerced into waiving).”)); LAURA I. APPLEMAN, DEFENDING THE JURY: CRIME, COMMUNITY, AND THE CONSTITUTION 126–27 (2015) (explaining the original understanding of jury trial right was that it belonged to the community and “was heavily intertwined with a combined retributive and restorative understanding of punishment[,] . . . a philosophy closely tied to the sovereign will of the people”).
121. See, e.g., Tex. Code Crim. Proc. Ann. art. 1.13 (West 2019); Ala. R. Crim. P. 18.1(b); Mich. R. Crim. P. 763.3(1); Fed. R. Crim. P. 23(a); CAL. CONST. art. 1, § 16; see also United States v. Alcantara, 396 F.3d 189, 196 (2d Cir. 2005) (describing public’s right of access to plea agreements).
bargaining procedures. A simple yardstick to measure a reform’s effect on criminal justice citizenship is to ask whether the reform would reduce the number of plea bargains and increase the number of jury trials. But the problem is the more a reform increases the number of jury trials, the greater the cost it imposes on the system. Because the primary benefits of plea bargaining are that it is fast and cheap, the proposed reform would be decried as too expensive.

That line of reasoning is myopic: it considers the costs of running the courts but ignores the astronomical costs of mass incarceration. In fact, providing more jury trials might in two ways help to remedy mass incarceration. First, jury trials strengthen criminal justice citizenship. Jury service provides many social benefits for those who serve and for everyone else in the community, like a greater sense of belonging, solidarity, legitimacy, and trust in government. Entire communities might perceive the system to be fairer if they were not excluded from jury service. Furthermore, jury service educates and empowers the people and invites them to seek the common good. Those who serve on juries are more likely to vote. And their jury deliberations may give greater nuance to their understanding of criminal justice issues at the ballot box.

Second, because obtaining convictions by jury trial is considerably more resource-intensive than doing so by plea bargaining, we can expect that, if the system is to rely more on jury trials, it will have to process fewer cases. That in turn would be a good thing because there is no need for the current volume of traditional prosecutions. That volume has increased dramatically since the 1970s, far out of proportion to the population gains over that same time period. The improvement to public safety is debatable, but it is far outweighed by the negative effects of mass incarceration. In recent years we have seen a few criminal justice reforms that have slowed down mass incarceration. This is encouraging, but we are nowhere near the incarceration

125. McConkie, Criminal Justice Citizenship, supra note 12, at 1065.
rates from before 1970.\textsuperscript{128} Every effort is going to need to be made to deal with crime in ways other than incarceration. Society has other tools to address low level misconduct besides criminal prosecutions. Many cases that are currently charged as misdemeanors could be charged as infractions, handled in civil courts or through restorative justice, or not brought at all.\textsuperscript{129}

\textbf{B. Membership}

Plea bargaining raises a host of issues relating to membership. This section deals with equality, solidarity, and legitimacy. First, plea bargaining has disproportionately harmed people of color. While the inequalities of mass incarceration are well documented,\textsuperscript{130} the inequalities inherent to plea bargaining are less well known. A recent study of plea bargaining in Wisconsin state courts found troubling racial disparities in plea-bargained cases.\textsuperscript{131} It found that white defendants facing initial felony charges were more likely than Black defendants to have those charges reduced to misdemeanors.\textsuperscript{132} And white defendants who were initially charged with misdemeanors were similarly more likely to be convicted of crimes that carried no possibility of incarceration or simply not to be convicted at all.\textsuperscript{133} Interestingly, these disparities seemed to be driven by cases in which defendants had no criminal history and were charged with less serious crimes.\textsuperscript{134} This may suggest that, in “low information” cases, prosecutors assumed that Black defendants were more likely to recidivate.\textsuperscript{135} The author also concluded that “Black defendants are

\begin{itemize}
  \item \textsuperscript{129} See Jenny Roberts, Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts, 45 U.C. DAVIS L. REV. 277, 279–82 (2011) (documenting heavy misdemeanor caseloads in state courts) (“A 2008 analysis of eleven state courts revealed that misdemeanors comprised 79% of the total caseload in those courts.”).
  \item \textsuperscript{130} See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).
  \item \textsuperscript{133} Id.
  \item \textsuperscript{134} Id. at 1240–41.
  \item \textsuperscript{135} Id. at 1241.
\end{itemize}
50% more likely than white defendants to be incarcerated and receive sentences that are on average two months longer than white defendants.\footnote{136}

A 2014 study of New York state cases likewise found disparities in plea-bargained cases between white defendants and Black and Latino defendants.\footnote{137} The district attorney of New York county had prosecuted nearly all the cases that police brought to the office, so no racial disparity was detected at the charging stage.\footnote{138} However, for all combined offenses, “compared to similarly situated white defendants, [B]lack and Latino defendants were more likely to be detained at arraignment (remanded or have bail set, but not met), to receive a custodial sentence offer as a result of the plea bargaining process, and to be incarcerated . . . .”\footnote{139} Somewhat paradoxically, “they were also more likely to have their cases dismissed.”\footnote{140}

These plea-bargaining disparities may result in part from prosecutors’ implicit biases.\footnote{141} Researchers have provided practical advice for prosecutor offices to address this issue.\footnote{142} Judges, too, are partially at fault for racial disparities.\footnote{143}

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\footnote{136. Id. at 1191 n.12; see also David S. Abrams, Marianne Bertrand & Sendhil Mullainathan, \textit{Do Judges Vary in Their Treatment of Race?}, 41 J. LEGAL STUD. 347, 356 (2012) (noting that in Chicago, “African American defendants receive longer sentences on average and are more than 30 percent more likely to be incarcerated than are white defendants, not controlling for any case characteristics”).}


\footnote{138. KUTATELADZE, TYMAS & CROWLEY, supra note 137, at 4.}

\footnote{139. Id. at 3.}

\footnote{140. Id.}


\footnote{142. See generally VERA INST. OF JUST., A PROSECUTOR’S GUIDE FOR ADVANCING RACIAL EQUITY (2014); AM. CIV. LIBERTIES UNION, UNLOCKING THE BLACK BOX: HOW THE PROSECUTORIAL TRANSPARENCY ACT WILL EMPOWER COMMUNITIES AND HELP END MASS INCARCERATION (2019).}

Any discussion of inequality in plea bargaining would be incomplete without the baseline comparison to inequality in jury trial outcomes. There is history of race disparities in jury verdicts, although there is evidence that some of those disparities are narrowing and can be narrowed by the right reforms. The fact is, given America’s long history of racism, racism will be found in any system of adjudication, whether it is administered by the experts or by lay persons. That racism will have to be confronted and dealt with. But the racial disparities in charging and plea bargaining are likely caused by prosecutors and judges, not the laity. Designing a justice system with strong citizen participation and appropriate safeguards to ensure equal rights for all could be an effective way to address disparate outcomes and invigorate participatory citizenship.

A second membership critique of plea bargaining is that, by minimizing citizen participation, it weakens social solidarity. It sends the message to defendants (and their families and communities) that the accused are banished from civil society to be dealt with by unelected, unrepresentative, and unsympathetic bureaucrats. In conjunction with over severe sentences to be served at faraway prisons and lifelong collateral consequences, plea bargaining has helped send a message that convicted criminals are not and will never be a part of our society. It contributes to the permanent marginalization from power of those caught up in the criminal justice system’s expansive net.

The solidarity critique illuminates an important feature of any respectable criminal justice system: its efficacy ultimately derives from the relationships between citizens. The criminal law should prohibit acts (1) that the polity has selected, (2) that cause serious harms, and (3) that require formal moral condemnation and likely other measures backed by the force of the state. Those measures, like treatment, restitution, probation, or incarceration, should seek to deter crime and assist wrongdoers in making amends and reintegrating as full, contributing citizens. Like criminal law, criminal procedure is also inherently relational because it operationalizes criminal law, allowing citizens to call each
other to account for their wrongdoing.\textsuperscript{147} Plea bargaining, because it lacks popular participation, bypasses those relationships and does not focus on repairing them.

Moreover, relational membership theory leads to a surprising conclusion for defendants in well-functioning criminal justice systems (not our own). Criminal law is “for all citizens, not just for law-abiding citizens.”\textsuperscript{148} Offenders, therefore, are citizens and have civic duties relating to criminal justice.\textsuperscript{149} Professors R.A. Duff and S.E. Marshall have argued that they have a moral (not legal) duty, under certain circumstances, to participate in criminal proceedings by pleading guilty\textsuperscript{150}:

[A] defendant who knows he is guilty of a crime (and what crime he is guilty of) has a civic responsibility to report himself to the police, and to plead guilty if he is then prosecuted. In doing that, he displays his continuing (or renewed) commitment, as a citizen, to a law that he recognizes as his law, and to those whom he recognizes as his fellow citizens; and in accepting his plea and convicting him the court, speaking in the name of his fellow citizens, must also show that it recognizes him as a citizen—as a full member of the polity to whom respect and concern are owed, as they are to all citizens. The court might speak in censorial tones of the character and implications of his crime: but it must address him as a citizen who has in this respect erred, not as an enemy, or an outsider, or a person of lesser civic status.\textsuperscript{151}

Professors Duff and Marshall temper this striking claim by clarifying that these duties only apply in a “tolerably just system of law” with a “tolerably just criminal process and punishment”\textsuperscript{152} and that his theory resists “the exclusionary tendencies that characterize current penal practices.”\textsuperscript{153}

Unfortunately, the necessary pre-conditions of Duff and Marshall’s arguments

\begin{itemize}
\item \textsuperscript{147} R. A. Duff, \textit{Relational Reasons and the Criminal Law}, in \textit{2 Oxford Studies in Philosophy of Law} 175, 207 (Leslie Green & Brian Leiter eds., 2013) (noting that criminal procedure “depends on the criminal law’s status as the law of a political community whose members can collectively claim such authority over each other”).
\item \textsuperscript{149} \textit{Id.} at 39–41.
\item \textsuperscript{150} \textit{Id.} at 45.
\item \textsuperscript{151} \textit{Id.} at 45 (emphasis added).
\item \textsuperscript{152} \textit{Id.} at 41.
\item \textsuperscript{153} \textit{Id.} at 39–40.
\end{itemize}
often do not obtain in our troubled system. But Duff and Marshall’s thought
experiment shows us how the ideal system of relational plea bargaining would
work: a citizen would voluntarily plead guilty before her fellow citizens (to do
it outside their presence, as the current system allows, would not allow them to
effectively accept responsibility for violating community norms) and receive in
turn just treatment that strengthened civic bonds and provided a fair path back
to the fold.154

Third, plea bargaining contributes to the perceived illegitimacy of
American criminal justice. Most Americans hold negative attitudes toward plea
bargaining. “The few surveys that have examined public views of plea
bargaining have generally found high levels of disapproval.”155 Although it
should be noted that interpreting surveys is difficult because we cannot easily
determine what is the public’s understanding of plea bargaining.156 There are
many reasons for plea bargaining’s unpopularity. Survey evidence shows that
the public, as a whole, often feels that plea bargaining offenders get unduly
lenient sentences.157 (Some segments of the public hold the opposite view, that
plea bargaining is much too harsh.) Plea bargaining also engenders mistrust
because it is opaque and because the public sees the process as prioritizing deal-
making over the search for truth.158 There is also frustration that victims are
usually excluded from the process.159 On the other hand, the public often sees

(arguing that, in the case of Alford pleas, “[p]rocedural efficiency does not justify ignoring these
important substantive values, because substance is the very raison d’être of procedure”).

155. Turner, supra note 137, at 996 n.132.

156. Bibas, supra note 154, at 1387 n.133 (citing AMERICANS VIEW CRIME AND JUSTICE: A
NATIONAL PUBLIC OPINION SURVEY 54–55, tbl. 4.2 (Timothy J. Flanagan & Dennis R. Longmire eds.,
1996)) (“Two-thirds of Americans think plea bargaining is a problem.”); Mawia Khogali, Kristyn
Jones & Steve Penrod, Fairness For All? Public Perceptions of Plea Bargaining, 14 APPLIED PSYCH.
IN CRIM. JUST. 136, 136 (2018) (“Current evidence, however, suggests that people hold negative
attitudes toward plea bargains.”). But see Thea Johnson, Public Perceptions of Plea Bargaining, 46
AM. J. CRIM. L. 133, 156 (2019) (describing the difficulty of discerning what the public actually thinks
about plea bargaining because people hold so many conflicting narratives about how plea bargaining
works).

TRIAL PROCESSES 73, 76 (Erik Luna ed., 2017).

158. Turner, supra note 137, at 996 n.132; see Kenneth S. Klein, Truth and Legitimacy (in
Courts), 48 LOY. U. CHI. L.J. 1, 4 (2016) (“The public perception of the truth-finding function of
courts is at odds with the inside, systemic meaning of the truth-finding function of courts.”).

159. See ME. STAT. tit. xv, § 812 (2015) (“The Legislature finds that there is citizen
dissatisfaction with plea bargaining that has resulted in some criticism of the criminal justice process.
The Legislature further finds that part of the dissatisfaction is caused because victims of crimes and
law enforcement officers who respond to those crimes have no subsequent contact with the cases as
the virtue of plea bargaining as a way to punish the obviously guilty without
the time and expense of a trial.\textsuperscript{160} In contrast, jury trials generally enjoy great
legitimacy.\textsuperscript{161}

C. Deliberation

In addition to participation and membership issues, plea bargaining raises
serious deliberation issues concerning the accuracy of plea bargaining (i.e.,
coercion) and the public’s ability to assess plea bargaining (i.e., transparency).
The single most important factor impacting plea bargaining’s accuracy is
coercion.\textsuperscript{162} In a variety of ways, the system pressures some innocent
defendants into pleading guilty.\textsuperscript{163} It does this especially through large trial
penalties (sometimes termed “plea discounts”), such that innocent defendants
plead guilty to lesser sentences because by going to trial they would risk getting
much higher sentences.\textsuperscript{164} In other words, the innocent defendant’s decision to
plead guilty is not based on the merits of the state’s case but rather the
procedural posture of that case. Plea bargaining procedure is thus the antithesis
of democratic deliberations: instead of a jury of twelve citizens deliberating the
merits of the case, the plea-bargaining defendant, counselled by his or her
attorney but acting alone, declares his or her own guilt based in part on
considerations extrinsic to the merits of the case. The public, too, is excluded
from the deliberations because there are only minimal in-court, public
proceedings to be viewed and discussed.

Many reforms have been put forth to address this coercion. Some would
reduce the trial penalty or eliminate it entirely.\textsuperscript{165} Others would give judges
greater power to oversee charging decisions and require prosecutors to justify

\begin{thebibliography}{999}
\bibitem{160} Johnson, supra note 156, at 152 (survey of 70 law students).
\bibitem{161} Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017) (stating that juries’ “judgments
find acceptance in the community, an acceptance essential to respect for the rule of law”).
\bibitem{162} See Emily Yoffe, \textit{Innocence Is Irrelevant}, \textsc{The Atlantic} (Sept. 2017),
[https://perma.cc/CAT3-7JLK].
\bibitem{163} Turner, supra note 157, at 81.
\bibitem{164} Russell Covey, \textit{Reconsidering the Relationship Between Cognitive Psychology and Plea
Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal
\bibitem{165} Turner, supra note 157, at 88–90.
\end{thebibliography}
new charges or satisfy other requirements before adding new charges. Others would reduce or eliminate mandatory minimum penalties, which effectively shifts sentencing discretion from judges to prosecutors. Others have taken issue with plea waivers: prosecutors often require defendants to waive valuable procedural rights as a condition of a guilty plea, including rights to DNA testing of evidence and exculpatory evidence, the right to appeal the plea and sentence, and ineffective assistance of counsel claims. These rights offer important procedural protections to protect the falsely accused. To the extent that they minimize coercion, they might reduce the incidence of plea bargaining and, therefore, enhance public deliberations relating to criminal justice.

A second impediment that plea bargaining poses to public deliberations is its lack of transparency. Plea bargaining’s opacity leaves the public out of the deliberations. Prosecutors do not have to explain their charging decisions or disposition of cases to the public. Charge bargaining and fact bargaining are especially deceptive and opaque. Discovery is unavailable to the public; the grand jury proceedings are secret; plea negotiations are conducted in private, off the record, and with no judicial participation; and jury trials are very rare. Most court hearings in a plea-bargained case reveal little information about the underlying case, leaving victims and the public scratching their heads as they try to make sense of the proceedings. The secret nature of plea bargaining makes it unpopular with the public and hard for scholars to study.

There are practical reasons for this secrecy. It encourages candor in plea negotiations and expedites those plea discussions because there is less formality and less paperwork. It prioritizes prosecutorial discretion by obviating the need to explain or defend tough choices in cases with messy facts. It protects cooperators. But these reasons are outweighed by the costs in public participation and oversight. Professor Jenia Turner has convincingly argued

166. Id.
169. Ronald Wright & Marc Miller, Honesty and Opacity in Charge Bargains, 55 STAN. L. REV. 1409, 1411 (2003); Turner, supra note 157, at 78.
170. Turner, supra note 157, at 86.
171. Bibas, supra note 53, at 923.
172. Turner, supra note 157, at 87 (unpopularity of plea bargaining); Turner, supra note 137, at 999 (stating that because the government makes insufficient publicly available records relating to plea bargaining, it’s difficult to study).
that greater transparency is key to reforming plea bargaining.\textsuperscript{174} Plea bargaining’s opacity “stands in marked contrast to the constitutional commitment to public criminal proceedings, enshrined in the Sixth Amendment right to a public trial and the First Amendment right of public access to the courts.”\textsuperscript{175}

Secrecy in plea bargaining “limits the public’s understanding of plea bargaining and inhibits informed public debate about criminal justice reform.”\textsuperscript{176} Transparency enhances the truth-seeking function of courts.\textsuperscript{177} “The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.”\textsuperscript{178} All of this enhances legitimacy and improves public deliberations. To that end, Professor Turner has proposed (1) that all plea agreements be put in writing and on the record; (2) that rejected plea offers also be put on the record when the case is set for trial; (3) that a digital, searchable database be created for prosecutors, defense attorneys, and judges that records “plea offers, charging decisions, sentencing outcomes, and other key facts about a criminal case”; and (4) that there be greater judicial review of plea agreements.\textsuperscript{179} Of course, there are limits to what transparency can accomplish, and transparency alone cannot hope to shoulder the entire burden of reforming the work of prosecutors.\textsuperscript{180}

A public location for plea bargaining helps ensure more public participation. The more that can happen in the courthouse and on the record, the better. The courthouse holds a special place in American democracy and is an ideal place for that to occur. “[M]odern courtrooms are often the sole sites in which the public can witness the adjudication of disputes and thereby hold the state accountable for the ways in which it administers that adjudication.”\textsuperscript{181} A courthouse is a secular temple of justice, a central gathering place in many towns and cities, a place where citizens expect justice to be done.\textsuperscript{182} Plea bargaining at the courthouse can be made more transparent still by broadcasting

\textsuperscript{174} Id. at 1000.
\textsuperscript{175} Id. at 975.
\textsuperscript{176} Id. at 976.
\textsuperscript{177} Id. at 984.
\textsuperscript{178} Id. (citing In re Oliver, 333 U.S. 257, 270 (1948)).
\textsuperscript{179} Id. at 976–77.
\textsuperscript{181} Simonson, Criminal Court Audience, supra note 60, at 2183.
\textsuperscript{182} Judith Resnik & Dennis E. Curtis, Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms 15–17 (2011).
it via technology to the public and by preserving a more easily accessible record of the proceedings.183

To the extent that plea bargaining is conducted on the record in court, the courtroom audience has an important and often unrecognized role to play in the process. Professor Jocelyn Simonson has written about the criminal court audience, “who wait in lines and fill courtrooms to watch the cases in which they or their friends, family, or community members appear as victims, defendants, or witnesses to a crime.”184 That audience is likely to be poor people or people of color.185 Their role as members of the public differs from the jury: whereas the jury is supposed to be disinterested, the criminal trial audience usually has a personal stake in the case; that’s why they showed up.186 Unfortunately, the process is rushed, and what small fragments of it are on the record may make little sense to the audience.187 Professor Simonson argues that their presence curtails the abuse of official power, enhances legitimacy,188 and enhances self-government and democracy.189 Even though the audience has no formal role to play, their exercise of the freedom to listen (and observe) “has a structural role to play in securing and fostering our republican system of self-government.”190 This goes not just for jury trials but also for change of plea proceedings.191

One striking example of the role of courtroom audiences can be seen through the courtwatching movement.192 “Courtwatching” is when organizations send volunteers to watch what happens in courtrooms. Their


184. Simonson, Criminal Court Audience, supra note 60, at 2185.

185. Id.

186. Id. at 2189.

187. Id. at 2191.

188. Id. at 2197–200 (“Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.”).

189. Id. at 2200.

190. Id. (emphasis omitted) (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring)).


purposes include gathering and disseminating information about what is seen
to the public and pressuring judges and prosecutors to change their decisions in
particular cases and entire policies, like bail practices. The effect can be
profound. Courtwatching shifts power from professional criminal justice actors
to the public. Criminal justice actors “know that they’re being watched” by
the public and may change the way they do things as a result. As one activist
put it, “The whole system is like a house of cards... It’s propped up on the
reliance of the public’s false understanding of what’s happening. As soon as
people really appreciate what’s happening, it will be forced to change.” I am
not aware of whether any in this movement have focused specifically on plea
bargaining, but this would be possible, particularly if more plea bargaining were
done on the record as Professor Turner has proposed.

What is needed are new participatory democratic institutions that can fulfill
the essential functions of the jury that have been lost. Juries can be particularly
effective in applying local values and norms, in making factual determinations,
and in considering the equities relating to sentencing. At the same time, juries
can fall sway to populist excess, especially against unpopular or too-popular
defendants. The question becomes, in what contexts and to what extent is the
common good served by popular participation in plea bargaining? I seek to
answer this question in the next Part.

IV. PLEA BARGAINING FOR THE PEOPLE: JURY-BASED REFORMS

The People can participate in criminal justice in several different ways. They
usually do so indirectly, through elected officials, and very indirectly,
through the experts and bureaucrats who are on some level accountable to those
elected officials. But they can participate directly as jurors. This Part
reviews the basic citizenship principles behind juries generally and then
discusses how these principles might apply to various forms of juries relating

193. Schwartzapfel, supra note 192.
194. Bryce Covert, The Court Watch Movement Wants to Expose The ‘House Of Cards’, THE
    APPEAL (July 16, 2018), https://theappeal.org/court-watch-accountability-movement/
    [https://perma.cc/AW7H-YCRT].
195. Id.
196. Id.; see also Schwartzapfel, supra note 192.
197. Cf. NAT’L COMM’n ON MIL., NAT’L & PUB. SERV., supra note 35 (“The United States of
    America is a country built on service—to one another, to the community, and to the Nation. . . . Service
    in America is a critical ingredient of a vibrant and healthy democracy.”).
to plea bargaining, like grand juries, plea juries, as well as community prosecutions and advisory boards to prosecutors’ offices.\textsuperscript{198}

The literature surrounding plea bargaining reform is vast. Most proposed reforms tinker with procedural aspects of plea bargaining. Such reforms, if they improved the fairness or accuracy of plea bargaining, would be desirable.\textsuperscript{199} But they usually fail to consider the people’s potential role in plea bargaining and other important criminal justice goals relating to citizenship. This Part considers the nature of juries generally and then discusses jury reforms that could inject appropriate public participation into plea bargaining.

\textbf{A. Citizen Juries Generally}

The key role of grand and petit juries at common law and the Founding has already been set forth above. Manifestly, the jury need not be preserved in amber. It must be adapted to modern criminal procedure, allowing for citizen participation and input at certain key points of the case.\textsuperscript{200} This subpart

\textsuperscript{198} I have omitted any discussion of sentencing juries because plea bargains typically include bargained-for sentences. Although some states allow defendants who plead guilty to be sentenced by jury, defendants rarely exercise this option. Jenia Iontcheva, \textit{Jury Sentencing asDemocratic Practice}, 89 VA. L. REV. 311, 355 (2003). There is no space here to consider all types of juries that have been proposed, including bail juries and Fourth Amendment juries. \textit{See Appleman, supra} note 120, at 119–23 (proposing bail juries); Josh Bowers, \textit{Upside-Down Juries}, 111 NW. U. L. REV. 1655, 1674 (2017) (proposing Fourth Amendment juries). Furthermore, there is no space here to consider prosecutorial electoral reforms, although such reforms are a very significant way for citizens to participate in criminal justice. \textit{See, e.g., Moy, Martin & Sklansky, supra} note 108 (proposing a rating system to assist the public in determining whether an elected prosecutor has achieved the public’s prosecutive priorities).


describes the important citizenship benefits of juries. Although juries are flawed, they can be reformed, and their benefits still outweigh their drawbacks.\textsuperscript{201} The basic citizenship principles to be considered in jury design are membership, deliberation, and participation.

In terms of membership, jury service should be a civil right. Juries should represent to the extent practicable the diversity of the citizenry. Eligibility for jury service should be broadly defined so as not to become unnecessarily exclusive. One troubling counterexample of this is that, in most states, felons are categorically excluded from juries.\textsuperscript{202} This is particularly problematic because nearly 20 million Americans, including a third of Black men, have been convicted of a felony.\textsuperscript{203} Jury service can help those who serve to feel that they belong and have an important contribution to make. Jury service “can strengthen social solidarity by solidifying a sense of the public good and strengthening people’s resolve to work toward that public good.”\textsuperscript{204} Jury service can also improve people’s trust in the system and strengthen governmental legitimacy.\textsuperscript{205}

In terms of deliberations, some functions of the justice system require “sensitive, individualized moral judgments,”\textsuperscript{206} like whether to bring charges in light of all the circumstances and which charges to bring; deciding whether someone is factually and normatively guilty; and imposing punishment.

Furthermore, deliberations should be essentially reasonable, although emotion can inspire and give force to rational arguments. Juries benefit from training from the court in how to deliberate. Courts should foster norms of careful, respectful listening and genuine open-mindedness. Courts should encourage juries to deliberate based on a careful and thorough discussion of the evidence presented (evidence-based deliberations) instead of staking out ultimate positions from the get-go, such as when jurors, upon retiring for

\begin{footnotesize}
\begin{enumerate}
\item[$111$] NW. U. L. REV. 1693, 1697 (2017) (“Juries should be included in the criminal justice process whenever reasonably possible, including at the investigative, charging, trial, and sentencing phases of criminal procedure.”).
\item[201.] See McConkie, Criminal Justice Citizenship, \textit{supra} note 12, at 1081.
\item[203.] Gullapalli, \textit{supra} note 202.
\item[204.] McConkie, Criminal Justice Citizenship, \textit{supra} note 12, at 1068.
\item[205.] Id. at 1042.
\item[206.] Id. at 1055
\end{enumerate}
\end{footnotesize}
deliberation, immediately take a preliminary vote. This is called verdict-driven deliberations. Deliberating in this way would require attention to gender dynamics because male jurors tend to dominate the discussions and engage in verdict-driven deliberations.207

If jury deliberations are not free of racial bias, equal citizenship will be undermined and the institution’s legitimacy will suffer. Because prejudice is less likely to infect the deliberations of racially diverse juries than all-white juries, courts should take steps to diversify jury pools.208 Steps should be taken during jury selection to provide a diverse venire, and courts should train empaneled jurors on how to recognize and counteract implicit bias.209 All jurors should have an equal voice. In more serious cases, juries might be required to provide a brief written statement of reasons for their decisions, or even check boxes on a guided form.210 This might help them to be more thorough in their deliberations. Written decisions are a powerful protection against arbitrariness and discrimination.211

Another promising reform could be allowing more interaction between the jury and other trial participants, especially expert witnesses, during the trial. For example, in many courtrooms, jurors are allowed to submit questions to witnesses or the judge before the close of the evidence. Where an expert witness had given complex testimony, jurors would ask questions of the witness to seek clarification. This would, in a sense, begin the jury deliberations before

207. See id. at 1057.

208. This would include better compliance with the fair cross section requirement of the Sixth Amendment as well as addressing racial disparities in both peremptory and for-cause challenges. Thomas Ward Frampton, For Cause: Rethinking Racial Exclusion and the American Jury, 118 MICH. L. REV. 785, 786–90 (2020).


211. Goldbach & Hans, supra note 126, at 2724–25 (citing Thaman, supra note 210).
the close of the evidence, with the aid of those experts who were present and with whom jurors wished to consult.\footnote{212}

Turning to popular participation in criminal justice, its benefits are legion. First, our political system and traditions compel it to some degree. America’s supersized criminal justice system is prominent and ubiquitous. Everyone is affected by crime and criminal justice in some way, and people are consistently interested in criminal justice issues. Furthermore, the stakes of criminal justice are unusually high and personal, both for defendants and society. Finally, our criminal justice politics are dysfunctional. Our elected representatives do not necessarily represent the people. We should not “assume[] that the prosecution and the police adequately represent, or at least are capable of adequately representing, the interests of a local ‘community.’”\footnote{213}

Second, jury service provides citizens with a mechanism to constrain and challenge government power. This is important to participatory citizenship in the tradition of civic republicanism. Philip Pettit, one of civic republicanism’s most prominent modern proponents, has written that two of its fundamental tenets are public non-domination and an ever-vigilant citizenry.\footnote{214} Public non-domination, meaning that the government should not unduly infringe on individual autonomy, can be satisfied by checks and balances and mixed constitutionalism. Juries fit this bill well because they are bodies of citizens outside of government that check and inform official action.\footnote{215} Pettit has further written that “the citizenry should be ever vigilant of public power and be ready to contest and challenge it at the slightest suspicion or sign of abuse.”\footnote{216} Again, juries provide an excellent opportunity for vigilance.

Third, citizens can expect to enjoy several benefits from their participation in government, including denser social networks, shared legal and ethical standards, and firsthand knowledge of the workings of government. Lay participation can strengthen relationships with fellow citizens and increase social capital. This participation in turn should be expected to strengthen

\footnote{212. For further discussion of this point, see McConkie, \textit{Criminal Justice Citizenship}, \textit{supra} note 12, at 1074–75.}

\footnote{213. Simonson, \textit{supra} note 192, at 253; \textit{see id.} at 257 (“A criminal legal system responsive to all facets of a local ‘community’ should be one that facilitates collective forms of participation that challenge powerful institutional actors and dominant ideas of justice.”).}


\footnote{215. McConkie, \textit{Structuring Pre-Plea Criminal Discovery, supra} note 105, at 4.}

\footnote{216. Pettit, \textit{supra} note 214, at 136.}
citizenship relating to other government functions, helping instill in the citizenry strong “habits of freedom” (such as participation in politics, deliberation, or desire to seek the common good), which are necessary to a healthy democratic society. Community participation in criminal justice could also strengthen commitment to shared ethical standards. Another major benefit of citizens’ active participation in government is that they learn firsthand about how our system works.

Fourth, juries provide a way for citizens to work together for the common good. The Supreme Court has recognized that “[o]ther than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process.” That “democratic process” is not limited to voting. It includes small-scale citizen collaboration to solve local problems. Professor Dan Kahan has written about a theory of reciprocity and collective action in community policing, which, like juries, involves popular deliberation and participation in criminal justice. Kahan found that where citizens feel that others are contributing to the collective good, “then honor, self-respect, honesty, and like dispositions motivate most individuals to contribute to that good as well, even if doing so is personally costly.” But if they think others are free riding, “then pride and resentment will move most persons to withhold contributions.” His analysis suggests that the best way to encourage “reciprocal cooperation” is to employ “highly decentralized and participatory” systems “that integrate[] private citizens into many law-enforcement functions.”

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217. Yuval Levin, Taking the Long Way: Disciplines of The Soul are the Basis of a Liberal Society, FIRST THINGS (Oct. 2014), https://www.firstthings.com/article/2014/10/taking-the-long-way [https://perma.cc/T4J3-GHW8] (discussing the political philosophy of Tocqueville); see also Vincent Ostrom, The Challenge of Modernity: Seeing Like Citizens, 10 GOOD SOC’Y 40, 40 (2001) (reviewing JAMES C. SCOTT, SEEING LIKE A STATE (1998)) (“[Tocqueville’s] Democracy in America was written . . . about a great experiment to construct a self-governing society in contrast to the European idea of the State.”); OUR COMMON PURPOSE, supra note 1, at 47 (“[Citizen juries] impart long-term civic skills and habits; they facilitate communication between elected officials and their constituents; and they help citizens better understand what goes into governing.”).


219. OUR COMMON PURPOSE, supra note 1, at 47 (“[Citizen juries] help citizens better understand what goes into governing.”).


222. Id. at 1514.

223. Id.

224. Id. at 1514–15.
with his findings because, like community policing, juries give citizens a satisfying opportunity to work together for the public good.

Of course, jury service is no magic cure-all to our system’s ills. One main criticism is that, when it comes to criminal justice, the people are too vengeful and retributive or too ignorant of important scientific perspectives relating to recidivism, rehabilitation, and deterrence. This criticism should be taken seriously but, because there are no perfect alternatives, can be addressed without getting rid of juries altogether. Stephanos Bibas has argued: “[T]he public is on average no more punitive than judges and sometimes a good deal less punitive than legislators. Excessive punitiveness comes not from outsiders’ contextual moral intuitions, but from a warped political process.” The public is not necessarily more bloodthirsty than the experts. On the other hand, other research implies that juries could generally be harsher and less predictable than judges. Regardless of that, mass incarceration is a recent phenomenon; prior generations of citizens and jurors did not think that such strong severity was necessary. To the extent that the public currently wants severe punishments, it is possible that those attitudes will change as the array of options before voters and jurors for dealing with crime and punishment


226. See, e.g., Bruce A. Green & Rebecca Roiphe, A Fiduciary Theory of Prosecution, 69 AM. U. L. REV. 805, 848 (2020) (“Doing so risks undermining prosecutorial independence by allowing the influence of those who may lack a commitment to the processes and traditions of the office and who certainly lack the information to make appropriate decisions. While lay input might arguably mitigate an unjustifiably harsh system, public influence may also threaten greater harshness toward unpopular defendants.”).


229. Adriaan Lanni, The Future of Community Justice, 40 HARV. C.R.-C.L. L. REV. 359, 361 n.11 (2005) (citing William J. Stuntz, The Pathological Politics of Criminal Law, 100 MICH. L. REV. 505, 510 (2001)) (“I focus on two flaws: (1) the disjuncture between general public opinion polls and sentencing preferences in specific cases; and (2) the effective and literal disenfranchisement of inner city communities most damaged by crime and harsh sentencing policies. William Stuntz has detailed another form of political pathology in the institutional design and incentive structure that affects criminal law-making.”).

230. Id. at 360–61.
change. For example, the public may support treatment as an alternative to incarceration as treatment programs improve.

Another set of criticisms has to do with practical limits on citizen involvement. The public is often not very interested in attending meetings and serving on boards, so there will have to be careful thought about the time commitment required and possible compensation for those who participate.\footnote{231}{See John R. Hibbing & Elizabeth Theiss-Morse, Stealth Democracy: Americans’ Beliefs About How Government Should Work 1–3 (2002); Crick, supra note 33, at 110 (“Most people today want to keep their engagements with the state and public affairs to the minimum.”).} If not, poor people may effectively be excluded from this important public service. Furthermore, a small subset of vocal citizens or interest groups may dominate the discussions unless care is taken to seek broader input.\footnote{232}{See Lanni, supra note 229, at 380–81 (outlining shortcomings of popular participation).}

All of these are real concerns that must be addressed.\footnote{233}{Id. at 390 (pointing out that “(1) ordinary citizens lack the expertise required to make sentencing decisions and policies; (2) there are disparities in how different locales respond to similar offenses, which violates the principle of equality before the law; and (3) the effects of crime are not limited to a localized community”).} Notwithstanding, democracy is a driver of innovation and change, and the power of the people needs to be harvested in seeking solutions to the problems that beset our justice system. As the authors of the Our Common Purpose report state: “We do not naively claim that more democracy simply in the form of more participation will solve our problems. We seek instead to achieve healthy connections between robust participation and political institutions worthy of participation.”\footnote{234}{Our Common Purpose, supra note 1, at 3.}

**B. Grand Juries**

Here, I examine the use of grand juries as a way to reform plea bargaining along democratic lines.

i. Their Purpose, History, and Decline

The grand jury has deep roots in our history, going back about nine centuries.\footnote{235}{United States v. Calandra, 414 U.S. 338, 342 (1974).} The grand jury is a body of citizens who in theory act as a sword and a shield. As a sword, they have “sweeping investigatory powers” and the power to issue an indictment.\footnote{236}{Thaddeus Hoffmeister, The Grand Jury Legal Advisor: Resurrecting the Grand Jury’s Shield, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1172 (2008).} At the same time, they can shield “citizens
against unfounded criminal prosecutions,” an especially important role for unpopular individuals or groups. In theory, criminal justice professionals could do all this, but the grand jury must be composed of lay citizens to serve as an external check on law enforcement’s decision to bring criminal charges. Historically, grand jurors in the Colonies could be elected, chosen by lot, or specially selected by the sheriff or court. The grand jury was championed by Anti-Federalists and Federalists alike before being enshrined in the Constitution. Curiously, the Supreme Court never incorporated the Fifth Amendment’s Grand Jury Clause against the states.

Grand juries have historically played a broad role in our system. When considering ordinary criminal cases, “grand juries have always done more than simply measure evidence against a given legal standard . . . .” The cases before them have frequently called for discretionary and even political judgments, too, about the overall equities and implications of cases. As Professor Ric Simmons noted, having reviewed several grand jury cases throughout American history, “When given the power to influence the outcome of specific cases, the grand jury wielded that power to bring about an outcome consistent with the majority view of the community at that time and place, regardless of the strength of the case or the prevailing legal standard.”

Grand juries may choose not to indict even where there is probable cause to do so; this is not “grand jury nullification” but rather an exercise of grand jury discretion. As the gatekeeper to the justice system, the grand jury must determine whether a prosecution is in the interest of justice. Sometimes, even when a crime has been committed, the law itself is unjust or its application would be unjust. Such instances are relatively rare but do illustrate the

238. Wood v. Georgia, 370 U.S. 375, 390 (1962) (noting that the grand jury “serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will”).
241. Id. at 477.
243. Simmons, supra note 53, at 3.
244. Id.; see also Bowers, supra note 198, at 1666–67.
245. Simmons, supra note 53, at 16.
independence and discretion entrusted to the grand jury as the voice of the community.246 Outside of criminal cases, grand juries have also played an important historical role by monitoring other governmental functions, issuing public reports, and even removing public officials from office.247 In the nineteenth century, these broader functions were limited by statute.248

Grand jury service brings similar benefits of popular participation that have been discussed above. It was commonly believed that grand jury service was a matter of civic virtue that educated grand jurors about their government and allowed them to provide service to their fellow citizens.249 Tocqueville believed that jury service, including grand jury service, instilled “some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free.”250 Second, grand juries are essentially political because by design they represent the public as an external check on government action.251

The grand jury has the potential to maximize membership benefits, too, of equality and legitimacy. True, like the petit jury, the populist grand jury has a dark side: it was popular in the Reconstruction Era in the South to resist the federal government.252 But the potential for the grand jury to represent the entire community in positive ways is large. For example, because a grand jury typically has twenty-three members, it can more easily represent a larger cross-section of a diverse community.253 Grand juries tend to enjoy legitimacy because they imbue their participants “with a sense of procedural justice.”254 Their deliberations are aided by the fact that they usually sit for a period of months, so they can have more time to become more knowledgeable about the work they are doing.255

246. Id. at 46–49.
248. Id. at 485.
249. Id. at 479.
250. Id. at 480.
252. Simmons, supra note 53, at 19.
254. Simmons, supra note 53, at 3.
255. Fairfax, supra note 253, at 353.
Despite the grand jury’s great potential, prosecutors over time began to play a much larger role in the charging process. As populations grew, particularly in the cities, it became impractical for grand juries to have intimate knowledge of the local community. At the same time, the legal system was becoming more complex with more numerous and hard-to-detect crimes (e.g., mail fraud or Mann Act violations).256 Whereas the grand jury had previously worked independently of prosecutors, handing them indictments when their job was done, they came to rely on prosecutors to make presentations of fact and law to them.257 Modern grand juries are frequently—and justly—criticized as rubberstamps for prosecutorial charging decisions.258

The rise of plea bargaining and the decline of the grand jury are related. Both trends stem from massive growth in population and the size of government and bureaucracy. This in turn has led to rising criminal justice caseloads, increased power and influence of prosecutors, and the concomitant decrease in the people’s direct influence over charging decisions. Now, most criminal charges nationwide do not emanate from the grand jury.259 Even in the small percentage of cases in which prosecutors do seek an indictment, the grand jury usually goes along with the prosecutor’s proposed charges.260 This is no doubt due in part to the fact that the grand jury typically lacks any legal independent counsel to provide possible alternatives to the proposed indictment.261 Where indictments do issue, prosecutors can obtain guilty pleas to lesser charges by the simple expedient of letting the defendant waive the right to indictment on those lesser charges. Recently, a district court judge, rejecting a proposed plea agreement, lamented: “The plea bargaining prosecutor fails to recognize the voice of the people reflected in the true bill returned by the grand jury and simply uses the indicted charges as leverage to obtain a guilty plea to the charge(s) that he deems appropriate.”262 Alternatively, some guilty pleas are obtained pre-indictment without any grand jury involvement at all.263 Either way, our current system of prosecutor-dominated charging and plea bargaining minimizes the role of the grand jury.

256. Hoffmeister, supra note 236, at 1189–90.
257. Id. at 1190.
259. See supra text accompanying notes 256–58.
260. Fairfax, supra note 253, at 342; Simmons, supra note 53, at 31.
261. I discuss this much-needed reform below. See infra notes 274–301.
263. Id.
As detailed above in Part III(A), the grand jury can suffer from essentially the same deficiencies as the trial jury. Poor people and people of color may be excluded from service. Deliberations may be superficial or skewed or biased. Notwithstanding its weaknesses, the grand jury can be reformed. The Supreme Court, in *Hurtado v. California*, chose not to incorporate the grand jury right against the states. This gives the institution great flexibility. “[T]he grand jury’s historical prestige makes it an ideal vehicle for bringing needed reform to the criminal justice system.” At the same time, the *Hurtado* court recognized that due process could be found in other procedures besides the grand jury, or presumably a heavily modified grand jury, that were sufficiently protective of individual rights. In fact, the *Hurtado* court espoused a view of due process as not frozen in place by the original meaning of the Constitution; instead, reviewing the historical shortcomings of the grand jury,

[i]t is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.

Unfortunately, the *Hurtado* court, in finding that a preliminary hearing before a judge satisfied due process, failed to recognize the importance of popular participation in criminal justice.

In contrast, the lone dissenter, Justice Harlan, argued forcefully that the grand jury was necessary to due process. He cited Blackstone for the proposition that, even though the grand jury process was cumbersome, it was the best bulwark against more convenient forms of trials that might be devised in certain circumstances, and that if those other seemingly more convenient

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266. “[W]e are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law.” *Hurtado*, 110 U.S. at 538.
267. *Id.* at 530.
268. If anything, the opinion cautioned against majoritarian criminal procedure and trusted in the judiciary to protect individual and minority rights. *Id.* at 536. For an analysis situating *Hurtado* in the Supreme Court’s due process jurisprudence, see McConkie, *supra* note 105, at 40–41.
269. *Hurtado*, 110 U.S. at 539 (Harlan, J., dissenting).
forms were allowed to take root, they might eventually displace the jury altogether, even in cases where juries were most needed.270

Today, America’s “grand jury system” is a patchwork of “over fifty different types of grand juries, each with its own unique blend of structural rules, procedural constraints, and informal culture among the courts, prosecutors, and defense bar.”271 Only nineteen states and the federal system have robust grand jury requirements for indictment.272 In the others, the grand jury is rarely used.273

ii. Reforms to Increase the Power of the Grand Jury

Grand juries could be reformed to allow citizens to play a greater role in plea bargaining. I focus this following discussion on essentially two kinds of proposals. The first set (#1–6) would be designed to put more cases before the grand jury for review before a plea bargain (or jury trial). These proposals seek to increase the grand jury’s independence and decrease the influence of the prosecutor in charging.274 The second set of proposals (#7–9) would expand the role of grand juries to take on tasks that they do not typically do anymore. Finally, I consider a proposal (#10) for greater court supervision of the grand jury.

1. The State should proceed by way of indictment in all serious cases. Most states do not require this, but for all the reasons stated above, it is a fundamental and necessary reform. The limitation to “serious cases” (felonies) tracks the Fifth Amendment’s grand jury clause, which required a grand jury indictment only for “capital” or “infamous” crimes, balancing the lower stakes of misdemeanor crimes against the public resources required for a grand jury indictment to issue.

2. Courts should not permit defendants to waive indictment. The jury trial right belongs not only to defendants but also to the people, who have an interest in participating in the case. That same reasoning should

270. Id. at 544–45 (quoting 4 Bl. Comm. 349–50).
271. Simmons, supra note 53, at 16.
272. Id. at 19.
273. Id.
274. Kleinfeld, Appelman, Bierichbach, Bilz, Bowers, Braithwaite, Burns, Duff, Dzur, Geraghty, Lanni, McLeod, Nadler, O’Rourke, Robinson, Simon, Simonson, Tyler & Yankah, supra note 200, at 1700–01.
apply to the grand jury right.\textsuperscript{275} Defendants wish to plead guilty pre-indictment should appear before the grand jury to declare their guilt. This would greatly simplify the grand jury proceedings, saving both the prosecutor and the grand jury time and effort. It would accordingly justify a plea-bargaining concession from the prosecutor, while at the same time allowing the grand jury to meaningfully participate in the case. In cases where an indictment has already issued and the defendant wishes to plead guilty to different charges, the defendant should not be permitted to waive the grand jury right for the superseding indictment. Instead, the prosecutor should return to the grand jury and explain the need for different (typically lesser) charges. This procedure would honor the public’s role in the process through the grand jury.

Furthermore, these first two proposals put together would allow the public to directly participate in all serious cases without doing away with plea bargaining. It is Solomonic, allowing petit jury waivers but disallowing grand jury waivers. The grand jury procedure is a relatively summary procedure but, if improved along the lines that are proposed here, offers a reasonable balance between meaningful public participation and procedural efficiency.

3. \textit{Give prosecutors only one chance before the grand jury to get an indictment.} In most states, prosecutors who unsuccessfully seek an indictment before the grand jury can try again as many times as needed; only four states that

\textsuperscript{275} Unfortunately, the popularity of plea bargaining has proved too much for those would limit the ability of defendants to waive their grand jury rights. For example, in New York, the court of appeals at one time declined to permit a defendant to waive his right to grand indictment on state constitutional grounds because such a right was “a public fundamental right, the exercise of which [was] requisite to jurisdiction to try, condemn and punish.” Simonson v. Cahn, 261 N.E.2d 246, 247 (1970). This decision ultimately led to a state constitutional amendment specifically allowing defendants to waive the right to a grand jury indictment. \textit{See} 4 WAYNE R. LAFAVE, JEROld H. ISRAEL, NANCY J. KING \& ORIN S. KERR, CRIMINAL PROCEDURE § 15.1(f) (4th ed. 2020). \textit{See generally} Susan R. Klein, \textit{Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining}, 84 TEX. L. REV. 2023, 2035–36 (2006) (discussing permissible waivers of most constitutional rights in plea bargaining, including grand jury waivers).
require grand jury indictment prohibit re-presenting the case to a different grand jury.\textsuperscript{276}

Giving the prosecution multiple bites at the apple diminishes the value of a “no true bill.”\textsuperscript{277} The original grand jury’s decision should stand, except perhaps in truly extraordinary circumstances, such as where a judge found that no reasonable grand jury could have declined prosecution. Then, and only then, could a second grand jury re-consider the case. Such a procedure would also encourage prosecutors to make more thorough and better prepared presentations to obtain indictments.\textsuperscript{278}

4. \textbf{Let defendants testify at the grand jury hearing.} Defendants are not usually given the opportunity to testify before the grand jury. Most of the time, they would not want to because it would not likely lead to a no true bill and their grand jury testimony might be used against them at trial. But in some closer cases, where defendants already have notice of the grand jury investigation, defendants might judge that their testimony would dissuade the grand jury from indicting, and they should have the option to do so. This might be in cases where the evidence is weak, where the defendant is particularly sympathetic, or where law enforcement has been overzealous.\textsuperscript{279} Depriving defendants of this chance inhibits the grand jury from fairly and fully deliberating the indictment.

The U.S. Attorney’s Manual recommends that prosecutors allow the targets of investigations testify to avoid creating “the appearance of unfairness,” as long as the testimony would occasion “no burden upon the grand jury or delay of its proceedings.”\textsuperscript{280} This standard gives federal

\textsuperscript{276} Simmons, \textit{supra} note 53, at 19–20. The Double Jeopardy Clause does not prohibit a later grand jury from issuing an indictment that a previous grand jury refused to issue. \textit{Ex Parte} United States, 287 U.S. 241, 250–51 (1932); United States v. Thompson, 251 U.S. 407 (1920).

\textsuperscript{277} But see, e.g., Roger A. Fairfax, Jr., \textit{Grand Jury Discretion and Constitutional Design}, 93 \textit{CORNELL L. REV.} 703 (2008) (arguing that grand jury decisions not to indict should be reviewable by future grand juries and that such decisions send a sufficiently strong signal to the executive about the wisdom of a particular prosecution).

\textsuperscript{278} Id.

\textsuperscript{279} Id. at 23; see also Lanni, \textit{supra} note 229, at 397 (similar proposal).

Prosecutors too much discretion not to allow the testimony because any defense testimony could be considered a delay in or burden to the proceedings.

5. **Require prosecutors to present material exculpatory evidence.** The Supreme Court decided in *United States v. Williams*\(^{281}\) that prosecutors need not present exculpatory evidence to the grand jury. This likely helps to explain why the grand jury rarely issues a no true bill. The procedure is insulting to the grand jury because it deprives them of the ability to fully deliberate the case.

In some circumstances, prosecutors should be required to present exculpatory evidence already in their possession to the grand jury. As the dissenters in *Williams* noted, "Before the grand jury the prosecutor has the dual role of pressing for an indictment and of being the grand jury adviser. In case of conflict, the latter duty must take precedence."\(^{282}\) The grand jury proceeding by its nature is ex parte, and its purpose is for a neutral body of citizens to determine whether there is probable cause to issue an indictment. Thus, it would be neither necessary nor practicable at that early stage of the proceedings for prosecutors to present all exculpatory evidence. The policy of the Department of Justice in the United States Attorney's Manual, endorsed by the *Williams* dissenters, strikes the right balance: "When a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person."\(^{283}\)

281. 504 U.S. 36, 37 (1992) ("[R]equiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory body . . . into an adjudicatory body."); see id. at 51 ("It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge.").

282. Id. at 63 (Stevens, J., dissenting).

6. **Let an independent attorney, not a prosecutor, advise the grand jury.** Hawaii has done this since 1978.\footnote{2} The advisor may not be a government employee but would ideally be a retired judge or retired criminal practitioner. This serves to “ensure the independence of the grand jury”\footnote{2} and protects prosecutors from conflicts that inevitably arise out of the functions of seeking indictments and providing legal advice to the grand jury.\footnote{2} A record is made of all communications between the attorney and the grand jury.\footnote{2}

This innovation has been effective in Hawaii but has not been copied in other jurisdictions, although the military has a grand-jury-like procedure called the Article 32 investigation, which also employs an independent advisor.\footnote{2} Perhaps other jurisdictions have been slow to act on this commonsense reform because of its cost and because it might be perceived as an impediment to prosecutors or a boon to defendants.\footnote{2}

7. **Normative grand juries.** The role of the grand jury is typically technical: to determine whether there is probable cause to indict in each case. (Trial juries are similar, in that they determine whether the defendant is guilty beyond a reasonable doubt of each element of the charged offense or offenses.) But the grand jury would be even better suited to consider whether a case is normatively, rather than...
legally, justified.\textsuperscript{290} One scholar has proposed requiring grand jury indictments in misdemeanor cases.\textsuperscript{291} Low-level cases can raise the most difficult normative questions because often times the offenses involved are public order offenses and the equities do not necessarily clearly weigh in favor of involving the machinery criminal justice with its attendant costs and long-term consequences for both defendants and communities. In these cases, a grand jury might do as well as a prosecutor in looking at the big picture and deciding in light of community values whether a particular prosecution was normatively justified.\textsuperscript{292}

8. \textbf{Let grand juries review proposed plea agreements.}

Another proposal is for grand juries to act essentially as a plea jury would in reviewing proposed plea agreements and providing their nonbinding input as representatives of the community.\textsuperscript{293} They could decide whether probable cause supported the agreed-upon charges. Although they might ordinarily approve the proposed agreements, there would be some cases in which they did not, and in those cases, they might provide a statement of reasons. The prosecution could always choose to ignore such advisory verdicts, but the local press or others might choose to publicize the verdict and statements of reason. That could in turn force prosecutors, in at least some cases, to provide justifications to the public for their decisions.

9. \textbf{Grand juries can also serve as policy advisory bodies.}

Instead of focusing on issuing indictments in individual cases, grand juries could also serve as “focus groups to set policing and prosecution priorities for the neighborhood.”\textsuperscript{294} This could help the prosecutor’s office to formulate “community-based charging guidelines” in


\textsuperscript{292} \textit{Id.} at 337.

\textsuperscript{293} Fairfax, supra note 253, at 356–57. This is similar to what a plea-bargaining jury would do. See infra Part IV(C).

\textsuperscript{294} Lanni, supra note 229, at 399.
10. **Provide for greater judicial review of grand juries.**

This last proposal cuts against the prior proposals in that it would decrease the independence of grand juries. In a long line of cases, the Supreme Court has sharply limited the ability of federal courts to supervise the role of grand juries. These cases have sought to protect the independence of the grand jury, but in practice, grand juries have often done whatever prosecutors asked. In contrast, in some states like New York, there is limited judicial review of grand jury proceedings to ensure that they provide necessary protections to prospective defendants. For example, New York courts may dismiss an indictment that is not supported by sufficient evidence. On balance, New York’s carefully limited judicial supervision of grand juries is superior to the hands-off federal approach. Independent legal counsel during the grand jury proceedings may largely obviate the need for this judicial review.

A note of skepticism will likely be sounded about any proposed involvement by the grand jury in plea bargaining. Such involvement would, of course, slow down the plea mill, which constantly churns to efficiently process as

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295. *Id.*


297. *Id.* at 26–27.

298. *Id.* at 27–29; N.Y. CRIM. PROC. LAW § 210.30 (McKinney 2021) (motion to dismiss for insufficiency of evidence to the grand jury).

299. See, e.g., People v. Harwood, 183 A.D.3d 1281, 1282 (N.Y. 2020) (“Legally sufficient evidence is defined as competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant’s commission thereof. The court must consider whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted would warrant conviction.” (citations omitted) (internal quotation marks omitted) (first quoting People v. Swamp, 646 N.E.2d 774 (N.Y. 1995); then quoting People v. Jensen, 654 N.E.2d 1237 (N.Y. 1995))).
many defendants as funding allows. But slowing down the mill is precisely what must happen to address mass incarceration, and not just for the sake of charging fewer people. Direct public involvement in the process can help to lay bare the ineffectiveness of our overreaching criminal-justice process.

C. Plea Bargaining Juries

One innovative proposal for direct democratic involvement in plea bargaining is the plea jury. The idea works like this: After the parties strike their plea bargain, they would go to court for the plea hearing. There, the plea jury (instead of the judge) would listen to the allocution and then decide, by a majority vote, “(1) whether the facts stated fit the alleged crimes; (2) whether the plea was knowing and voluntary; (3) and whether the proposed sentence was appropriate.” The judge would have some oversight over the process. The plea jury would be composed of lay citizens chosen from the community who sat for some extended period of time, at least a month.

Plea juries would need to examine a pre-sentence report containing more information about the defendant and the charged offense(s) to get a sense of what an appropriate sentence might be. Instead of devising a sentence de novo, the jury might be called upon to decide whether the agreed-upon sentence was “appropriate” (reasonable) based on all the facts and circumstances of the case and the purposes of punishment. Where the reasonableness of the sentence was not apparent, the parties might have to persuade the plea jury. The plea jury might reject a plea agreement, stating its reasons on the record, which could

300. See Fairfax, supra note 253, at 341–42 n.12 (documenting judicial resistance to grand jury reform).
303. Id. at 748.
304. Id.
305. Id.
306. Id. A group of scholars discussing democratic criminal justice reform was open to jury participation in plea bargaining, too. Kleinfeld, Appleman, Biersbach, Bilz, Bowers, Braithwaite, Burns, Duff, Dzur, Geraghty, Lanni, McLeod, Nadler, O’Rourke, Robinson, Simon, Simonson, Tyler & Yankah, supra note 200, at 1701 (“[J]udges, magistrates, or juries should be given the information, authority, and responsibility necessary to engage in genuine and substantial supervision over the plea bargaining process and its outcomes.”).
force a trial even on unwilling parties, unless the parties come back with a new plea agreement.

Although it does not appear that this idea has yet been attempted in any jurisdiction, it has promise.\(^{307}\) It resonates well with the theory of criminal justice citizenship because it allows for meaningful lay participation in the adjudication of cases. This proposal is consistent with Blakely v. Washington.\(^{308}\) There, following a guilty plea, the defendant had received an exceptionally long sentence based on facts that he had not admitted. The Supreme Court held that the sentence violated the Sixth Amendment’s jury trial right because in the absence of an admission by the defendant, only the jury could find those facts: Blakely “underlined the jury’s function as the lay public’s representative and as the primary provider of community-based punishment.”\(^{309}\) The plea jury ideas recognizes that criminal law responds to harms done to the community that can only be judged by the community. Plea juries would enhance citizens’ direct role in adjudication.

Plea juries could be composed of a broad cross-section of the community and thus could enjoy some legitimacy as the community’s voice.\(^{310}\) The process of adjudication by the defendant’s peers becomes itself an attempt to repair the social breach, thus paving the way for reconciling the defendant to the community.\(^{311}\) An offender judged by his or her peers is more likely to feel the

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307. Leon Neyfakh, No Deal: Should Prosecutors be Forced to Have Their Plea Bargains Approved by Juries?, SLATE (Apr. 07, 2015, 8:00 AM), https://slate.com/news-and-politics/2015/04/plea-bargains-should-prosecutors-be-forced-to-have-their-plea-bargains-approved-by-juries.html [https://perma.cc/29SH-W676]. Interestingly, according to a Virginia law firm: “In states like Virginia, where the juries do the sentencing, the jury sometimes functions somewhat like the plea jury . . . . At our firm, we have on several occasions taken cases to trial in Virginia that we knew we would lose, based on the calculated risk that the jury would give a fairer sentence than the government would agree to in a plea bargain. So far, the strategy has never failed.” Charles Burnham, Plea Juries, BURNHAM & GOROKHOV: L. BLOG (Apr. 07, 2015), https://burnhamgorokhov.wordpress.com/2015/04/07/plea-juries/ [https://perma.cc/3AAD-TPRD].

308. 542 U.S. 296, 296 (2004); Appleman, supra note 218, at 732.

309. Appleman, supra note 218, at 732; see also Washburn, supra note 301, at 2347–49 (arguing that grand juries can help to replace petit juries); id. at 2362–63 (“Since much of the rhetoric about the jury suggests that the role of the citizen juror is to represent the public at large, and the community in particular, the increasing institutional role of juries at trial and in sentencing reflects the increasing status of the public and the community in criminal justice.”). On a related note, one scholar has proposed “trial bargaining,” which would allow for the parties to have a jury trial but bargain around key features, like the length of the trial, the number of jurors, or the defendant’s decision to testify. Gregory M. Gilchrist, Counsel’s Role in Bargaining for Trials, 99 IOWA L. REV. 1979, 1988–95 (2014).


311. Appleman, supra note 65, at 407.
full weight of his or her wrongdoing. Likewise, the deliberations inherent to the plea juries’ work are likely to provoke thoughtful discussion and, perhaps, enlightenment.

The principal criticisms of this idea are common to most jury-based proposals. First, injecting any form of input into plea bargaining will be cumbersome and slow down the mill. As I have already argued, this is a feature, not a bug. Furthermore, the slowing effect may only be modest: plea juries participate in summary proceedings based largely on the plea allocution and whatever other information the parties or probation feel is necessary for them to approve the bargain and sentence. The plea jury would likely support the parties’ bargain in most cases. Although in some cases the plea jury might force a case to trial that neither party wants, this result would be expected to be rare and fully justified from a citizenship perspective as an opportunity for both the plea jury and the trial jury to have their say about the case. Other commentators have proposed limiting plea juries to very serious crimes in which public participation was critical.

Another criticism has to do with the competence of a plea jury. Lay persons may have difficulty assessing case-specific factors like the need for cooperation and likelihood of conviction. Here is where expert input from prosecutors, probation officers, or others may be needed. The plea jury’s core competence is judging the overall context of the crime and the defendant’s life in determining a just resolution. Plea juries might strike a reasonable balance between letting the experts and insiders do their part and letting citizens of the affected jurisdiction have at least some say, considering the overall justice of the disposition according to local values and priorities.

D. Other Forms of Direct Citizen Input into Plea Bargaining

Outside of juries, there is a larger movement of community justice reforms seeking to “involv[e] citizens in the formulation of crime control policies customized to fit the needs of the local community.” I consider below a few principal direct forms of citizen input into the plea bargaining decisions of

312. Appleman, supra note 218, at 740.
313. Lanni, supra note 229, at 398.
314. Stephanos Bibas & Richard A. Bierschbach, Integrating Remorse and Apology into Criminal Procedure, 114 YALE L.J. 85, 141 (2004) (arguing that the plea jury would serve an important symbolic function in representing the community affected by the crime).
315. Lanni, supra note 229, at 398.
317. Lanni, supra note 229, at 362.
prosecutors’ offices. These reforms are especially important because prosecutors are not sufficiently constrained or informed by elections. Prosecutorial elections result in very little public oversight, “in part because the public knows so little about how prosecutors’ offices operate.” To remedy this, citizens may deliberate together and provide input to prosecutors. Additionally, they can even collaborate directly with prosecutors, through community prosecution efforts and advisory boards.

The community prosecution movement began in the 1990s. The core idea of this somewhat amorphous movement is incorporating greater public participation into the prosecution function, decentralizing prosecutorial authority. A more radical strain of the movement would seek “to broaden the role of the prosecutor and question the limits of the conventional charge-convict-sentence paradigm that propels most offices.” Community prosecution essentially seeks to empower the communities that prosecutors serve and call on prosecutors to exercise their power only “in consultation with community members.”

Instead of relying on the supposed mandate of elections, community prosecutors seek a relationship with their constituents “that mutually informs and shapes their agendas and their strategies.” These relationships can be fostered through public meetings or working with community organizations, voting

319. Shima Baradaran Baughman, Subconstitutional Checks, 92 Notre Dame L. Rev. 1071, 1103 (2017) (“Another check on the state level is elections for prosecutors. This check is not effective in practice because elections are often pro forma, do not set policy for prosecutors, and lack transparency for voters to decide whether the individual shares their priorities.”)
320. Sklansky, supra note 56, at 296.
322. Id. at 323.
323. Id. at 326.
324. Sklansky, supra note 56, at 282. A more recent movement has been to reform the role of prosecutors through “progressive prosecutions.” See Jeffrey Bellin, Defending Progressive Prosecution: A Review of Charged by Emily Bazelon, 39 Yale L. & Pol’y Rev. 218, 221 (2020) (“Outside the ivory halls, the reform conversation no longer centers prosecutorial power as the disease afflicting the criminal justice system. Prosecutors are the cure. The Darth Vader of criminal justice commentary has become its Captain Marvel.”); Maybell Romero, Rural Spaces, Communities of Color, and the Progressive Prosecutor, 110 J. Crim. L. & Criminology 803 (2020). The only clear role for the people in this model is to elect progressive prosecutors, but progressive prosecutions might go hand in hand with direct citizen involvement as well, as in San Francisco. See infra note 338.
325. Thompson, supra note 321, at 330.
like criminal justice reform groups, victims’ rights groups, neighborhood groups, mental health centers, and faith-based organizations. They might also work with other governmental agencies that broaden prosecutors’ perspectives, like health departments, social service agencies, and employment agencies. Some prosecutors have placed local branch offices in various communities; others have established special community prosecution units.

Prosecutors have a strong political incentive to engage in community prosecution. First, these efforts might result in greater trust and legitimacy. Second, the success of community policing and problem-solving courts has created greater expectation in communities that prosecuting offices will respond to local needs in partnership with communities. Furthermore, prosecutors may realize that by responding to public demand regarding plea policies, they may gain political capital for other, less popular prosecutorial decisions. Unfortunately, the political incentives are not perfect: many of the constituencies that could most benefit from community prosecutions may be less likely than others to turn out at the ballot box.

The question of who exactly constitutes the “community” is complex. The simplest definition might simply be the jurisdiction that prosecutors served, be it a city, county, or federal district. Of course, within that jurisdiction will always be a welter of subcommunities. In practice, “the community” is really “a series of communities with competing and often conflicting sentiments about everything that occurs within and surrounding their borders.” And the larger the jurisdiction, the more complicated is the task of discerning community needs.

326. Id. at 333–34; see also Justin Murray, Reimagining Criminal Prosecution: Toward A Color-Conscious Professional Ethic for Prosecutors, 49 AM. CRIM. L. REV. 1541, 1596 (2012) (“It is crucial that outreach extend not only to natural allies, but also to other members of the community—such as mothers of juvenile offenders, ex-offenders who have reentered the community, and even gang members—in order to develop a comprehensive understanding of the entire community and the appropriate set of prosecutorial strategies for meeting that community’s needs.”)

327. Thompson, supra note 321, at 355–57.

328. Id. at 346–47.

329. Id. at 344.

330. Josh Bowers, Grassroots Plea Bargaining, 91 MARQ. L. REV. 85, 87 (2007) (“By grassroots plea bargaining, I mean a systematic prosecutorial reduction of plea prices—even in circumstances where prosecutors find such reductions otherwise unwarranted—in order to purchase communal acquiescence to enforcement policies that otherwise lack public support.”).

331. Id. at 111.

332. Thompson, supra note 321, at 358; see also Robert Weisberg, Empirical Criminal Law Scholarship and the Shift to Institutions, 65 STAN. L. REV. 1371, 1388 (2013) (“The term ‘community’ in criminal justice studies is a temptingly dangerous one, its sentimental value often obscuring very troubling line-drawing problems within demographic and political entities.”).
sentiment and partnering with the community. Prosecutors must take pains in their outreach efforts to reach out and listen to and empower those members of the community who are marginalized or who have traditionally been treated poorly by the criminal justice system. This is especially urgent in communities of color where law enforcement has not always played a constructive role.

There is some evidence that community prosecution is effective. One careful study of Cook County, Illinois, concluded that their community prosecution program was cost-justified because it resulted in a decrease of murder, rape, and aggravated assault. Anecdotal evidence shows that a program in Milwaukee was also effective. Community prosecution is also ubiquitous: a 2003 survey found that “nearly half of all prosecutors’ offices engage in some activity defined as community prosecution.” In spite of many

333. Ronald F. Wright, Community Prosecution, Comparative Prosecution, 47 WAKE FOREST L. REV. 361, 364 (2012); Bibas, supra note 227 (“[I]dentifying the relevant community is far harder in our mobile, far-flung, heterogeneous modern society than it was in the colonial era of tight little villages.”).


335. Anthony V. Alfieri, Community Prosecutors, 90 CALIF. L. REV. 1465, 1466 (2002) (“[T]he enlargement of citizen participation, institutional decentralization, and accountability of federal and state prosecution offices to local communities stimulates citizen-state collaboration and grassroots equality initiatives broadly within the criminal-justice system, thereby ameliorating the conditions of poverty, disempowerment, segregation, and crime pervading communities of color.”).


successes, both the Chicago and Milwaukee programs have had trouble maintaining adequate funding.  

Although community prosecution efforts have not focused on plea bargaining alone, they have been and can continue to be an important way for prosecutors and communities to be in dialogue about the appropriate resolution of criminal cases. Professor Angela J. Davis has proposed public information departments in prosecution offices that provide the public with information about prosecution decisions and policies, including “general information on the charging decision, the grand jury, and plea bargaining.” These outreach efforts could complement community prosecutions by allowing community input relating to official actions.

Another way for the public to participate directly in criminal prosecutions besides citizen juries is community advisory boards. Professor Stephanos Bibas has proposed allowing citizen advocates to serve for two weeks at a time in prosecutors’ offices to make non-binding recommendations about charges and dispositions in felony cases. This would provide an element of popular participation, giving valuable community input without displacing the professional decisions of prosecutors. It could also serve an important role in educating the public. Professor Bibas himself acknowledges that such advocates are not likely to be very effective because they could make only advisory recommendations and they would not have sufficient tenure to fully appreciate all the considerations that prosecutors must consider.

339. See, e.g., James E. Causey, Milwaukee’s Promise: Fannie Lou Hamer’s Declaration ‘I’m Sick and Tired of Being Sick and Tired’ is Still a Rallying Cry for Black People in Milwaukee, MILWAUKEE J. SENTINEL (June 25, 2020, 9:40 AM), https://www.jsonline.com/in-depth/news/special-reports/2020/06/25/milwaukee-has-made-little-progress-towardequity-how-can-change/3181671001/ [https://perma.cc/W2KZ-2MZR] (in Milwaukee, the number of community prosecution units dropped from seven to three); Miles, supra note 336, at 119 (loss of funding to Cook County State’s Attorney community prosecution units).

340. See also Taylor Romine & Lauren del Valle, New Commission in Three Major Cities Targets Past Misconduct within Criminal Justice Systems, CNN (July 1, 2020, 8:38 PM), https://www.cnn.com/2020/07/01/us/truth-justice-and-reconciliation-commission-trnd/index.html [https://perma.cc/GY95-ZRPB] (“The goal, the group said, is to help ‘create a process for District Attorneys and their communities to hear from victims of police and prosecutor misconduct and find ways for those victims to heal.’ . . . ‘Creating new institutions to address historic atrocities and modern inequities embedded in the fabric of society is essential if we are ever going to turn the page on America’s bloody legacy . . .’”).


342. Id.

343. Bibas, supra note 53, at 959. Such advocates could be compensated for their time.

344. Id. at 959–60.
In many prosecuting offices, community advisory boards provide valuable input to prosecutors. In San Francisco, for example, the elected prosecutor has established eight community advisory boards consisting of “residents, neighborhood representatives, community-based organizations, merchants, and businesses.” There are dedicated boards to represent the interests of Blacks, Latinos, Asian/Pacific Islanders, Arab/Middle Eastern/Muslim/South Asian, LGTBQ, Jews, Women, and Formerly Incarcerated Persons. “Each advisory board identifies relevant policy issues affecting the communities they represent for further investigation and action.”

It might be argued that such expansive community participation is cumbersome, and that there is no clear way to prioritize the wishes of one constituency over those of another. It might even be argued, more cynically, that San Francisco prosecutors have license to shop around community boards until they find whatever input they want. But where prosecutors are listening in good faith, and can convince the community of that, there is real value in such broad participation. It is smart politics for prosecutors in areas that have well-organized interest groups. And it helps prevent prosecutors from becoming insulated from their constituents. It gives them many sounding boards so that they can charge and prosecute and resolve cases according to the values and law enforcement priorities of the various constituencies in their community. Ultimately, a chief prosecutor is elected to make those decisions. But the right amount of community input at the right stage in the process is good for democracy and can promote better case outcomes.

V. CONCLUSION

Plea bargaining is the most bureaucratic and least democratic aspect of our criminal justice system. Our adjudicatory procedure would benefit from a much-needed fourth founding—a rededication to the ideals of participatory citizenship. A reformed system would pay close attention to the social benefits of widespread participation that includes a broad diversity of voices and encourages productive deliberation. Any procedural reform that reduces the number of plea bargains, increases the number of jury trials, and improves accuracy is a step in the right direction, but the work of plea-bargaining reform will not be complete without giving space for a broad, representative swath of citizens, as jurors, to participate in and deliberate about criminal justice.

346. Id.
347. Id.
Plea bargaining can be reformed to reflect those principles. We should strengthen grand juries and experiment with plea bargaining juries. More community prosecutions would allow greater popular participation in the formulation of prosecutorial policies and priorities relating to charging and plea bargaining. Any of these changes, or all of them, could reform plea bargaining from a professionalized system of adjudication that sits uneasily in our tradition of democratic citizenship into a system of adjudication that is done by the people and for the people.