

The Jury Veto

Stephen E. Henderson*

While the American civic religion is to be distrustful of government, feelings of discontent regarding our systems of criminal investigation and adjudication feel historic. And while those systems are capable of great carnage en route, the endgame is, ultimately, criminal punishment. Yet before punishment can be imposed, every prosecution—and therefore every defendant—is meant to encounter a potential “circuit breaker”: the jury. I propose that we re-inject this democratic voice into our criminal adjudications, but through an entirely novel structure: the defendant (and perhaps the prosecutor) would have the choice of invoking a jury empowered to ‘veto’ any judicial sentence. By carefully designing the ex post system, including to discourage over-invocation, we could provide more democratic results in individual cases, hold prosecutors to their charging threats, and obtain a meaningful sense of whether—as many of us believe—our institutions of criminal justice are dangerously out of touch with popular conceptions of what ought to be.

* Judge Haskell A. Holloman Professor of Law, University of Oklahoma. For helpful comments and criticisms on previous drafts, I am indebted to Vanessa Edkins, Andrew Guthrie Ferguson, Adam M. Gershowitz, Carissa Byrne Hessick, Joshua Kleinfeld, Nancy J. King, Matthew L. Jensen, Thea Johnson, Michael J.Z. Mannheimer, Sara Mayeux, Alan C. Michaels, Robert Mikos, Jamelia Morgan, Ngozi Okidegbe, Christopher Slobogin (including for hosting the Fourteenth Annual Vanderbilt Criminal Justice roundtable), Kelly Sorensen, Dean A. Strang, and George C. Thomas. I also wish to thank Selena Kitchens, Broderick Johnson, and every student at *YLPR* who improved this article, and Anamayan Narendran, both for excellent research assistance and for many a great conversation about football. Finally, I thank Shawnda and Katrina Henderson. We sat down at our kitchen table and sketched out a jury veto, and the concept will always rightfully be ours—yours every bit as much as mine.

THE JURY VETO

INTRODUCTION..... 489

I. SYSTEM DESIGN..... 496

II. RUNNING SOME NUMBERS..... 513

 A. *A Simple Start*..... 514

 B. *The People’s Review*..... 515

 C. *A Response to “Maximum Frank” (Judicial High Sentence)*..... 517

 D. *Bordenkircher* 519

 E. *Bordenkircher Alternative One (Defense Plea)*..... 520

 F. *Bordenkircher Alternative Two (Vetoing a Deal)*..... 521

 G. *Bordenkircher Alternative Three (Charge Dismissal)* 522

III. FURTHER CONSIDERATIONS AND EMPIRICAL WORK 522

 A. *Prosecutorial Invocation*..... 522

 B. *Over-Invocation (Especially for Life Sentences)*..... 524

 C. *Implied Threats*..... 527

 D. *Jury Sentencing* 529

 E. *Parole* 531

 F. *Empirics*..... 532

CONCLUSION 533

INTRODUCTION

Imagine a defendant—we might name him “Paul”—charged with forging a \$538 check. If convicted, Paul faces a punishment of two to ten years in prison. But the prosecutor offers a “deal.” If Paul pleads guilty, the prosecutor will recommend a sentence of five years. But if Paul refuses—invoking his constitutional right to trial¹—the prosecutor will indict under the state’s Habitual Criminal Act. Given two priors—one of which Paul committed while a minor, and the other of which resulted only in probation—that threat means that trial conviction would result in mandatory life in prison.

While there are various defenses to a criminal charge, our imagined scenario cries out for one of the most instinctive and least legalistic:

1. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”).

“Really?”² Five years in prison for forging a single check of under a thousand dollars? And, in order to avoid even worse, the defendant must admit guilt, when he might have a thing or three to say on that issue? And if he *won't* cave and waive his most fundamental rights, he'll get *life* if a jury ultimately decides he did try to unjustly enrich himself to the tune of a very nice blender?³

I consider myself reasonably cynical. But like most criminal procedure professors, I've discussed these facts with students for years,⁴ and, were I this man's counsel, I'd want to encourage him to trust his lay brothers and sisters to reject the patently unjust Hobson's choice offered by this prosecutor. “If we just explain to them this situation, they will be nearly as outraged as we.”⁵ Only, strange in theory but routine for the criminal

-
2. *Gamble v. United States*, 139 S. Ct. 1960, 1999 (2019) (Gorsuch, J., dissenting). *See, e.g.*, Sarah Lustbader & Vaidya Gullapalli, *Why Do We Hide Sentences from Jurors?*, THE APPEAL (Apr. 16, 2019), <https://theappeal.org/why-do-we-hide-sentences-from-jurors/> [<https://perma.cc/HXY9-GKYC>] (“[A]fterward, we spoke to some of the jurors, and they asked what the sentence would be. I told them that the client would probably be sent to prison for about seven years, and some of them gasped. ‘I thought he was guilty, but if I’d known that would be [the] sentence, I never would have convicted—that’s just not fair,’ said one juror. ‘That’s way too much,’ said another.”).
 3. *Breville Super Q Blender*, WILLIAMS SONOMA, <https://www.williams-sonoma.com/products/breville-the-super-q/> [<https://perma.cc/T94V-K4D5>] (\$499.95 when visited on June 24, 2021). Of course, there was a time when a “life term” meant a reasonable chance of parole eligibility; more on that in a moment. *See infra* note 5.
 4. They are the facts of *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), where—to be fair—I’ve adjusted the forged check’s amount of \$88.30 to reflect 2021 amounts. *See* U.S. INFLATION CALCULATOR, <https://www.usinflationcalculator.com/> [<https://perma.cc/GK7F-KXYB>] (reporting that \$88.30 in 1973 represents \$538.89 in 2021 money); CPI INFLATION CALCULATOR, <https://www.officialdata.org/us/inflation/1973?amount=88> [<https://perma.cc/TQ2P-U8ET>] (reporting that the same represents \$538.89). For additional *Bordenkircher* facts, see the circuit court opinion, *Hayes v. Cowan*, 547 F.2d 42, 42 (6th Cir. 1976).
 5. Of course, the facts did not sway a majority of the United States Supreme Court as a matter of federal due process (*see Bordenkircher*, 434 U.S. at 362), but they did sway four Justices there (*see id.* at 365 (Blackmun, J., dissenting, joined by Brennan, J., and Marshall, J.); *id.* at 368 (Powell, J., dissenting)) and a panel of the Sixth Circuit (*see Hayes*, 547 F.2d at 43). And, according to Hayes’ attorney, Vince Aprile, the facts swayed the parole board: Hayes was paroled

THE JURY VETO

practitioner, that's not an option our systems offer. If this man goes to trial, he is very unlikely to be permitted to argue nullification,⁶ and besides, the jury won't even be told of the possible sentence upon conviction,⁷ which is where the greatest injustice lies. So, he either takes the five or almost surely gets life. (In the actual case, Paul Lewis Hayes got life.)

In what sense, then, is a citizen jury "function[ing] as circuitbreaker in the State's machinery of justice"?⁸ None at all. And as so many have

on first eligibility, which in those days was triggered by roughly a decade of imprisonment. Telephone Interview with J. Vincent Aprile II (Oct. 18, 2021). Unfortunately, relatively soon after release, Hayes was killed in an automobile accident. *See id.*; *Driver Dies When Car Hits Wall in Lexington*, COURIER-JOURNAL, Sept. 18, 1988, at B10; *Hayes*, LEXINGTON HERALD-LEADER, Sept. 19, 1988, at B12.

6. Nullification is (mostly) a fascinating topic for another day, but one can get the modern judicial gist from these oft-quoted words of a panel of the D.C. Circuit that included then-Judge Ruth Bader Ginsburg:

It cannot be gainsaid that juries can abuse their power and return verdicts contrary to the law and instructions of the court, and thus nullify the criminal law, but courts generally have refused to give such an instruction to the jury A jury has no more "right" to find a "guilty" defendant "not guilty" than it has to find a "not guilty" defendant "guilty," and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law. Such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power.

United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983). For rich refutations of such a cramped notion of the jury's role, see Jenny Carroll, *Nullification as Law*, 102 GEO. L.J. 579 (2014) [hereinafter Carroll, *Nullification as Law*]; Jenny Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657 (2012); Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149 (1997); Paul Butler, *Racially Based Jury Nullification*, 105 YALE L.J. 677 (1995). *See also* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 903–11 (1994) (explaining founding juries' ability to decide both law and fact as well as early, ultimately successful, challenges thereto).

7. *See generally* Daniel Epps & William Ortman, *The Informed Jury*, 75 VAND. L. REV. 823 (2022) (explaining this jury ignorance and forcefully arguing that it is mistaken under most any lens).
8. *Blakely v. Washington*, 542 U.S. 296, 306 (2004) ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."); *see also* Alschuler & Deiss, *supra* note 6, at 876 (according to the Sixth Amendment, "[j]ury trial was a

bemoaned, that's far from limited to these facts. When some 95% of criminal convictions result from guilty plea,⁹ we've relegated the criminal jury out of the criminal-justice business.

What if we could put it back? And what if we could do so in a manner that wouldn't overwhelm our plea-dominant system, meaning it would be invoked with sufficient discretion to avoid overtaxing already tragically overburdened criminal systems?¹⁰ Then I think we ought, and there might be a way: grant the defense (and perhaps the prosecution) the right to convene a jury empowered to "veto" any judicially-imposed sentence.

I'll consider details below, some of which are difficult. But in very broad strokes it would go something like this: an accused check-forgery might go to trial and put the court on notice that, if convicted, he will retain the jury for possible sentence veto. And then, assuming conviction and following judicial sentence, the prosecution and defense would independently decide what penalty each wants to propose, each choosing a value within system-prescribed parameters. The jury would then select from that three-way

valued right of persons accused of crime, and it was also an allocation of political power to the citizenry."'). The *precise* role of the framing jury can be debated, of course, and it would take this Article too far afield to venture into that historic argument. What cannot be debated is the massively increased role the framing jury played compared to our own. The interested reader might wish to consult Jeff Hetzel, *The Original Criminal Jury* (Nov. 1, 2021) (unpublished manuscript), <https://ssrn.com/abstract=3953880> [<https://perma.cc/3TTF-KNXX>], and the many sources it cites, as well as the classic Supreme Court case of *Sparf v. United States*, 156 U.S. 51 (1895), in which the Court definitively broke from the framing model with regard to deciding matters of law. And there is, of course, our contemporary overwhelming reliance on plea bargaining, which was entirely unknown to the founding era. See Kiel Brennan-Marquez & Stephen E. Henderson, *Artificial Intelligence and Role-Reversible Judgment*, 109 J. CRIM. L. & CRIMINOLOGY 137, 160–63 (2019) [hereinafter Brennan-Marquez & Henderson, *AI and Role-Reversible Judgment*] (gathering sources and commenting on that change).

9. See Kiel Brennan-Marquez, Darryl K. Brown & Stephen E. Henderson, *The Trial Lottery*, 56 WAKE FOREST L. REV. 1, 4–5, 7–9 (2021) [hereinafter Brennan-Marquez et al., *The Trial Lottery*] (gathering data and sources).
10. When it comes to criminal justice, *both* sides are often tragically under-resourced. See Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 262–63 (2011). Thus, in other coauthored work I have also suggested a system of trial lottery to bring back more—but not too many more—criminal trials. See generally Brennan-Marquez et al., *The Trial Lottery*, *supra* note 9.

THE JURY VETO

option: the judicially-imposed sentence, the prosecution proposal, and the defense proposal. (Giving only a binary or trinary choice I take from ancient Athens, as I'll develop herein.)

Or the defendant could plead guilty, get the five-year sentence, and invoke the same veto procedure. Only here one could imagine the prosecution proposal having a different tune: it might *exceed* the judicially-imposed sentence.¹¹ And since a jury might sometimes accept such invitation, that's intended to temper the procedure from being too often invoked. Quite obviously, every defendant would try her hand if offered a one-way downward ratchet, and that would hardly suffice in our already overburdened systems.¹² Still, a prosecutor had better be careful, because any "over ask" pushes the jury towards the defendant's own, comparably more reasonable proposal.

And that's a bit of the "magic" in a system of jury veto, which is twofold: disciplining prosecutors in their charging and, for the first time, giving the people—through individual juries—a way to meaningfully rebuke our criminal systems. First, consider prosecutors. In our current systems, they can threaten without consequence. "If you refuse to roll over and plead guilty, I'll indict you for crime *X* having much greater penalty *Y*." Or, "I've charged with your crime *X* having massive penalty *Y*, but, if you'll plead guilty to *Z*, I'll drop *X*." *Charge bargaining*. Just another day at the office. Yet typically nothing holds them accountable for such threats. Whether or not the defendant plays ball, the prosecutor is equally free to change up the charges at any time, effectively no questions asked and certainly not adequate records kept such that folks tend to pay attention to any trends of bad behavior.¹³ So, onward our system rolls—a prosecutor can threaten life

11. Here there will be further complication: how to bring a jury that knows nothing about the case quickly enough up to speed. While much more follows below, as with most any novel proposal, more work will also remain.

12. If anyone had a way of simply wishing away resource constraints, that would of course be wonderful. That nobody does leaves us looking for a second-best alternative. And lest one think over-invocation unlikely, at least something similar apparently happened in classical Athens. Not only could disgruntled defendants appeal judicial verdicts to juries, but so many did that the judges allegedly 'threw in the towel,' opting to merely preside over such jury trials in the first instance. See Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 957 n.20 (2003).

13. A rare, ultimately failed example of a judge attempting to resist that power in a politically-charged case occurred during the prosecution of Michael Flynn, who was ultimately pardoned. See *In re Flynn*, 973 F.3d 74 (D.C. Cir. 2020) (en

but then accept a five-year plea-induced sentence and call it “justice.” But not if there is a jury veto. As I will develop below, a prosecutor will be held to threats made in charging or bargaining; for the first time, there will be no “take backs.” Yes, a prosecutor can threaten life, as a prosecutor threatened Paul Hayes. But then the prosecutor will be held to that threat if the defendant summons a veto jury—allowed to propose life and nothing less—thereby letting the people decide whether that threat was warranted. Hopefully, that potential would discipline even non-optimal prosecutors to think twice “on the front end.”

Yet that conditioning is not the only gain; a system of jury veto also provides a “people’s rebuke.” Say a defendant is unjustly charged. Say that defendant is unjustly threatened with extremely punitive punishments if she won’t plead guilty. Say that defendant heroically resists and heads to trial. Say that defendant wins an acquittal. What will the prosecutor say? The legislature? “Hey, it’s good to see justice done. It was a good charge, but in our system nobody is punished before a jury finds proof beyond a reasonable doubt, and so the system did what it was supposed to do. All good here.” Only it’s not at all good—or at least many of us so believe.¹⁴ Indeed, our system is so flawed that good prosecutors routinely *lie* in order to achieve some measure of better justice.¹⁵ All is not right with that world.

-
- banc) (holding that mandamus was not appropriate); *In re Flynn*, 961 F.3d 1215 (D.C. Cir. 2020) (the panel decision—thus vacated—ordering the trial judge to dismiss the charges as the prosecutor requested); Brooke Singman, *Michael Flynn Prosecution: A Timeline of Trump’s Ex-national Security Adviser’s Case*, FOX NEWS, <https://www.foxnews.com/politics/michael-flynn-prosecution-a-timeline-of-trumps-ex-national-security-advisers-case> [<https://perma.cc/FP2Y-WSY2>] (providing a timeline of events through May 13, 2020); Executive Grant of Clemency to Michael T. Flynn, <https://www.justice.gov/pardon/page/file/1341606/download> [<https://perma.cc/QK29-ZW6E>] (granting “a full and unconditional pardon”).
14. See, e.g., Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 Nw. U. L. REV. 1367, 1370–75 (2017) (articulating a “catalogue of dysfunction” in our criminal systems).
 15. See generally Thea Johnson, *Truth, Lies and the Paradox of Plea Bargaining*, GA. ST. U. L. REV. (forthcoming), <https://ssrn.com/abstract=3868602>, <https://perma.cc/6P92-6HYL> (denouncing the systemic lies of our plea-bargaining system but arguing that honesty in our current system would cause terrible injustice in the form of cruelties to defendants). As an anecdote of overly high sentencing, see James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL’Y REV. 173, 173–74 (2010) (describing an instance in which he

THE JURY VETO

But unlike a jury acquittal, which can be framed simply as “good business being done,” a jury veto that decreases a sentence *rebukes* the system. It is not a statement that this person, after a full and fair trial, was not proved guilty by sufficient margin. It is a statement that this person was convicted *and was about to be punished in this amount*, only “We the People” stepped in to declare that punishment wrong.¹⁶ Every jury veto, then, is a statement that all is *not* right in the system. Perhaps the legislature did wrong. Perhaps the prosecutor did wrong. Perhaps the judge did wrong. Perhaps all three. Whichever the case, *someone* has done wrong and the people—via this jury—have stepped in to stop an injustice at the last minute, much like a parent might do for a wayward child. And if, by contrast, veto juries all choose *not* to chastise or rebuke the system—if they all accept the judicial sentence or even sometimes depart above it at prosecutorial request—well, then, some of us criminal justice professors will have to adjust our critiques.¹⁷ Perhaps *we* don’t like what we see, but we could no longer claim that our criminal systems are meaningfully out of touch with what common people actually desire.¹⁸

So, that’s the impetus and the broad-brush theory; now’s the time for some detail. First, Part I steps back to consider in a systematic manner why we might want a system of jury veto and explains how I’ve looked to the “wisdom of the ancients” (particularly Athens) in its construction. Part II works through a handful of examples in order to explicate (and lay bare for criticism) the proposal’s nuts and bolts. Finally, Part III briefly addresses several matters that deserve note or future analysis, including the potential for empirical work to investigate the efficacy of such a jury.

unknowingly sentenced a defendant to 488% of the jurors’ mean recommendation); *cf.* Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 896 (2004) (quoting an Arkansas prosecutor as saying, “juries will really lay it on somebody who deserves it,” and chronicling how jury sentencing in several states tends to coerce guilty pleas).

16. U.S. CONST. pmbi.
17. *See* King & Noble, *supra* note 15, at 895–940 (reporting on experienced prosecutors claiming very harsh jury sentencing leads to more guilty pleas and developing empirical evidence for the same). Still, some defense attorneys in those states manage the opposite perception. *Id.* at 947–48.
18. *Cf.* John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 719 (arguing that desires to democratize criminal justice “rest[] on conceptually problematic and empirically dubious premises”).

I. SYSTEM DESIGN

The American criminal jury is complicated through most any lens, be it historic, contemporary, or theoretical.¹⁹ Ditto for the massive problems most of us see in our systems of plea dominance.²⁰ But here I'd like to try and set most things aside—including the two particular benefits of a jury veto I've already sketched—and ask a single question: whether, relying upon only a few, very significant assumptions, it is plausible to propose a system of jury sentencing-veto as a practical improvement to our systems of criminal adjudication.²¹

-
19. See, e.g., Alschuler & Deiss, *supra* note 6, at 868 (finding an ironic “central theme” in their historical sketch of the transformation of the American jury over the nineteenth and twentieth centuries: “as the jury’s composition became more democratic, its role in American civic life declined”); Shari Seidman Diamond & Mary R. Rose, *The Contemporary American Jury*, 14 ANN. REV. L. & SOC. SCI. 239 (2018) (developing the same increase in inclusion and decrease in usage and contrasting knowledge regarding individual juror decision-making with gaps in knowledge regarding group deliberation); Carroll, *Nullification as Law*, *supra* note 6 (arguing for a rich notion of jury decision-making that includes the right to nullify).
 20. See Brennan-Marquez et al., *The Trial Lottery*, *supra* note 9, at 5 n.10 (gathering sources). See also Johnson, *supra* note 15 (denouncing the systemic lies of our plea bargaining but arguing that honesty in our current system would cause terrible injustice); Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 197 (2021) (developing the lack of adequate transparency in plea bargaining and arguing for change); Michael P. Donnelly, *Truth or Consequences: Making the Case for Transparency and Reform in the Plea Negotiation Process*, 17 OHIO ST. J. CRIM. L. 423 (2020) (arguing similarly for much greater transparency in the plea bargaining process); Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731 (2010) (arguing that plea juries could cure many ills of plea bargaining).
 21. Framing is always subject to debate, and this is certainly no exception. My goal is to see whether good work can be done by pushing past topics upon which basic agreement is easy, but which have a “black-hole nature.” While rich debate about them can do good work (just as, we are told, life works rather well *within* a black hole), the mere invitation to debate them tends to doom any thought experiment to never move beyond them (just as no light can escape that black hole, everything bending to its inexorable gravity). Hence, I hope to quickly articulate assumptions and see where they can take us.

THE JURY VETO

The assumptions are these:

1. We'd like to meaningfully inject "the people" back into criminal adjudication;²²
2. We must avoid overwhelming an already overburdened system;²³

-
22. For me, this follows from the principle of *role reversibility*: in a democracy, this is the people's appropriate role. *See generally* Brennan-Marquez & Henderson, *AI and Role-Reversible Judgment*, *supra* note 8. But the assumption can of course be argued from different places, whether as a matter of American historic framing or from a different philosophic construct. *See, e.g.*, Epps & Ortman, *supra* note 7, at 860 ("Adopting [a system of sentence-informed juries] would, we argue, counteract one of the most pathological features of twenty-first century criminal justice—the penchant of legislature to enact and prosecutors to exploit statutes with draconian sentencing provisions . . . [and would permit juries] . . . to perform their core political function of authorizing state punishment."); Daniel S. McConkie, Jr., *Plea Bargaining for the People*, 104 MARQ. L. REV. 1031, 1035–36 (2020) ("[I]nfusing 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 to participate directly in some aspects of the criminal justice system and to deliberate in some of its workings." (internal quotation marks omitted)) ; Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413, 1420 (2017) ("Ultimately, restoring the public voice to the vast bulk of criminal adjudication can be achieved by envisioning the community's integration into all aspects of criminal adjudication, theoretically as well as procedurally. This includes inserting the community voice into criminal procedures for bail, jail, sentencing, probation, parole, post-release supervision, and criminal justice debt, among others."); Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1693 (2017) (declaring that "the path toward a more just, effective, and reasonable criminal system in the United States is to *democratize* American criminal justice" and proposing thirty proposals to do just that). *But see* Rappaport, *supra* note 18, at 717 (arguing that "the pertinent empirical facts do not favor the democratizers' designs").
 23. Some significant portion of that overburdening is caused by things many of us don't like, such as criminalizing issues that we think ought to be solely civil in nature and criminalizing other things far too harshly. But, again . . . if we can accept that our systems of criminal justice are overburdened—meaning too burdened to function as we think justice should—and that this is very unlikely to soon change, we can move forward for purposes of this Article. Criminal justice *is* inherently expensive, and it seems likely that there are significant limits to the process we could ever afford, and very significant limits to the process we could ever practically, politically achieve.

3. Assumption One takes precedence, if really necessary, over Assumption Two;²⁴ and

4. Jury—meaning group, layperson decision-making—is inherently expensive.²⁵

What we require, then, is an ever-ready, practical-when-invoked “voice of the people” injection that will not be invoked too often in any basically-healthy system, but that *will* be invoked when invocation is important. The latter criterion (“will be invoked”) is emphasized as the principle of first order given Assumption Three; if it means even regular invocation, pressing against Assumption Two for reasons of Assumption One, so be it. And it indicates an aspirational sense of availability: if, say, the process is not invoked because we have too many incompetent/overworked attorneys (and we do), that’s a critical but independent problem. In other words, it is not a problem with this (novel, proposed) system component; it’s a larger, systemic problem.

It follows, I believe, that invocation of our novel solution (1) must have potential costs to an invoking party in most instances, but (2) should not have such cost in some category of cases in which societal values necessitate that “the people” always speak. And hence my proposal, which is that we give criminal defendants the right to retain or convene a jury to review—and to potentially override—any judicial sentence.²⁶ (And, while it will not be the focus of this Article, if we decide to also permit State invocation, then I propose that we give prosecutors the right to convene a jury to review—

24. I believe this is normatively justified: the principle (One) ought not be entirely sacrificed to the practical (Two). Only if an Assumption One system were *impossible* in this world would it seem otherwise. So, perhaps that could be listed as another assumption, but it’s probably just a restatement of this one.

25. By “expensive,” I mean not only in the outlay of dollars and cents, of course, but in terms of time—both layperson and professional—and the imputed costs (opportunity costs) of what else could be done with it. And by “layperson,” I merely mean not trained in the *legal* art. Jurors can of course be from most any profession unless prohibited by a jurisdiction-specific exemption.

26. In most of the country, we have judicial sentencing. In a handful of states, we have jury sentencing, and if such sentencing is open-ended (i.e., not strictly circumscribed by narrow statutory range), then it would seem entirely inappropriate to grant the right to convene a second jury to disagree with the first. In any event, it is enough in a first try to tackle the norm. *See infra* Section III.D.

THE JURY VETO

and to potentially condemn (here I'm less sanguine about override)—any judicial sentence.²⁷)

Since criminal sentence is the ultimate “brass tacks” issue, the proposal gives “the people” very meaningful say (Assumption One).²⁸ At the same time, by not altering the merits adjudication, the proposal leaves modern plea bargaining largely intact (Assumption Two).²⁹ Defendants can continue to plead guilty and thereby move things along, and *some measure* of guilty pleas makes theoretically great sense in a world (1) increasingly awash in information regarding “what happened when,”³⁰ (2) rather awash in State employees charged with gathering the same (police and prosecutors among them),³¹ and (3) theoretically guaranteeing every defendant an advocate to ensure her story is known and told.³² And if the judge follows with a lawful

27. *See infra* Section III.A.

28. To the extent that modern collateral consequences of conviction can be significant-to-severe (e.g., the deportation consequence that famously led the Supreme Court to expand constitutionally ineffective assistance of counsel in *Padilla v. Kentucky*, 559 U.S. 356 (2010), the jury could veto them as well. This is important, but a detail of ‘secondary order’ that I’ll initially set aside in trying to formulate the core.

To the extent that jury sentencing seems ahistorical (since colonial sentencing was judicial and fixed) and therefore potentially afoul of the spirit of Assumption One, I think I’d push back that, given changed circumstances, either such tension mostly disappears or even the objection is nonsensical. At the founding, there were no police nor professional prosecutions/defenses as we today conceive of them, and the juries decided both law and fact. *See Sparf v. United States*, 156 U.S. 51 (1895) (considering rather extensively—and in presentation exhaustingly—the law/fact divide).

29. “[P]lea bargaining . . . is not some adjunct to the criminal justice system; it is the criminal justice system.” *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992)).

30. *See, e.g.*, Paul Ohm, *Don’t Build a Database of Ruin*, *HARV. BUS. REV.*, Aug. 23, 2012, <https://hbr.org/2012/08/dont-build-a-database-of-ruin> [<https://perma.cc/CE86-5G8Y>] (stressing the dangers of “perfect digital dossiers”).

31. *See, e.g.*, LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870-1910*, at 194 (1981) (recognizing the roles of professionalized police and prosecutors in changing the nature of criminal adjudication).

32. *See, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (guaranteeing defense counsel in felony prosecutions of indigents); *Argersinger v. Hamlin*,

sentence reasonable to the matters at hand, then that's the end of the matter.³³ But if not, the defendant can plead her cause (and perhaps the prosecutor can plead the State's cause) to the people.

Of course, there is no interest like self-interest, and so were jury review a one-way downward ratchet, most every defendant would rationally invoke review of most every sentence, in derogation of Assumption Two. So, review cannot *be* a one-way downward ratchet. Yet it also seems unrealistic to ask any group of persons to come to agreement on just *any* sentence—"Pick anything, from zero to life"—and also undesirable. While some measure of nullification is necessarily incorporated into Assumption One,³⁴ I think we'd want to focus a veto jury's discretion so that it can be most rationally and appropriately exercised, including some serious respect for the process that has already taken place, from legislation to already-completed adjudication. How, then, might we best focus—yet not hamstring—such a veto jury?

Here I'd look to the wisdom of classical Athens, in which the prosecution and the defense each independently formulated a penalty, and then suggested them to the jury.³⁵ The jury could select either, but nothing else.

407 U.S. 25, 25 (1972) (drawing an "actual imprisonment" line for lesser crimes). I stress the theory because I do not discount the severe practical problems of, among others, inadequate defense and therefore unequal bargaining.

33. Even if, alas, it's a bunch of lies. *See generally* Johnson, *supra* note 15 (documenting the lying upon which our plea bargaining often depends). As Johnson cogently explains, this is not good for our system but it is good for individual defendants. My proposal essentially sidesteps this crucial point, but—importantly—it should not make things any worse (defendants can still benefit from even false pleas) and of course it is intended to systemically make some things better (over time discourage draconian prosecutorial threats and statutes).
34. By which I mean the people—the jury—must be able to disagree in at least *some* measure with a judge. And the people must be able to disagree in at least *some* measure with a legislature, especially if that legislature has specified everything "to a t"—punishing a particular crime at, say, twenty-three days in jail. Absent that ability, the people have no *meaningful* role in any criminal adjudication; they are merely the abacus or rudimentary computer, performing a sort of criminal math of fact-bound elemental analysis. Anyone desiring that world does *not* desire the voice of the people *in the criminal adjudication*, and therefore rejects Assumption One.
35. DOUGLAS M. MACDOWELL, *THE LAW IN CLASSICAL ATHENS* 253 (1978) ("[I]n any trial in which assessment . . . of a penalty or compensation was required . . . the

THE JURY VETO

And I'd make the presentations simultaneous, in the sense that each must be formulated without knowledge of the other. Such a binary-choice system (or a trinary-choice system, as I'll ultimately propose) forces the State (prosecutor) to be reasonable, for any unreasonable ask will push the jury toward the defendant's ask, however low it might otherwise seem. Yet of course what is good for the goose is same for the gander—any unreasonable defense ask pushes the jury towards the State's proposal. Thus, the two actors with the best information about (1) what happened, (2) who *is* the defendant, and (3) what the law demands are pressed to make reasonable asks, focusing the jury's discretion.

So, on a defendant's challenge, we might permit a unanimous veto jury to give any sentence of the choices—even an increased sentence—up to the lesser of the State "ask" and some formulaic maximum. No greater than life in prison, of course,³⁶ and also upper-bounded by, say, one-and-a-half times the statutory maximum for the offense(s) of conviction. That last bit might seem substantively unfair, but (1) it exists to provide some meaningful disincentive lest defendants over-invoke the process, and (2) it is importantly discouraged.³⁷ First, it requires jury unanimity. Second, by

successful prosecutor proposed a penalty, the unsuccessful defendant proposed another (naturally a lighter) penalty, and the jurors voted for one or the other; no compromise between the proposals was possible." See also ADRIAAN LANNI, *LAW AND JUSTICE IN THE COURTS OF CLASSICAL ATHENS* 39–40 (2008) (hereinafter LANNI, *LAW AND JUSTICE*). This penalty structure existed only for some crimes in the Athenian popular courts. See *id.* at 55. I leverage this historic practice as persuasive in its effect, not persuasive on account of historic pedigree. Nonetheless, it is worth noting that Athenian courts were remarkably democratic by modern standards. See *id.* at 13 ("Athenian justice was no less purposefully democratic than its politics. That it can seem amateurish or alien to us is a measure of the degree to which modern 'democracies' have abandoned popular decision-making with hardly a look back.").

36. Death is different, so there we already have—in significant part—jury sentencing: a judge can constitutionally select the sentence, but the jury must determine aggravators. *McKinney v. Arizona*, 140 S. Ct. 702, 707–08 (2020). Given its specialized (and disappearing?) nature, we'll set aside capital punishment for purposes of this Article.
37. Another alternative would be to permit the jury only some fractional "penalty" upon the judicially imposed sentence, or even to impose some such penalty if the jury approves the judicial sentence. But that seems to further detract from the principle of "justice." We *do* need to maintain sufficient deterrents to invocation in order to maintain adjudicative efficiency. We *do not* wish to

asking for so much, a prosecutor certainly risks the jury will instead pick the defendant's request. And third, I'd propose the jury ought to be instructed in a manner that explicitly discourages adoption of such an "above-market" sentence, as I will demonstrate below. So, while a prosecutor *can* ask for as much as one-and-a-half times the statutory maximum for the crime(s) of commission, thereby guaranteeing a potential deterrent to over-invocation even when a maximum or near-maximum sentence is given, such a request should occur only very rarely.³⁸

Nor would a prosecutor be solely upper-bound capped in what she can request of the veto jury. She would also be lower-bound capped according to her charging decisions. In particular, any plea offer ought to place an important limit on what the prosecutor can ultimately request. To see why

"punish" any defendant for seeking what she might well consider a more just and fair outcome.

Yet another alternative deterrent might be waiver of substantive or sentencing appeals. But the former strikes me as uncalled for (we must acquit a defendant if, say, no reasonable juror could find guilt beyond a reasonable doubt), and the latter would only deter in certain cases (namely those in which the defendant had a reasonably strong mistake-in-sentencing argument). So, again, I'll focus on deterring over-invocation through a maximum penalty of one-and-a-half of the statutory maximum.

38. Even as a rare ask, this element is cause for thoughtful concern, and I will return to it below. *See infra* notes 57–60 and accompanying text. More generally, imagine a "good prosecutor," meaning one who currently prosecutes just as we'd wish her to. (That nobody can know quite what that means, of course, is one of the reasons we need the jury veto—but put that aside for a moment.) This "good prosecutor" would not wish to deviate from her normal course in a system having jury veto; she'd like to keep doing justice precisely as she has always done. But does introduction of the veto push *against* this, encouraging her to be *more* game-theoretic in her decisions? Encouraging, in the words of one thoughtful reader, the "casino-like atmosphere" of criminal court? Would she for the first time consider seeking *more* punishment than this defendant deserves, in order to systemically deter costly over-invocation of the procedure? I think that specific instance unlikely, both because prosecutors are necessarily creatures of our current, typically harsh systems of criminal justice, and because prosecutors have of course always considered utilitarian concepts such as general deterrence. Still, these general questions—might a jury veto cause a "good prosecutor" to be *less* "good," and could this outweigh any other good the system might do—deserve serious consideration.

THE JURY VETO

requires a few steps.³⁹ To begin, no prosecutor should ever threaten nor offer a punishment she considers unjust; if, say, a mandatory minimum is unjust, prosecutorial discretion does not require the prosecution.⁴⁰ So, by definition, a plea offer ought to reflect some measure of justice, and indeed it ought to reflect a slightly *reduced* measure of justice since that is the defendant's benefit in agreeing to plead guilty and thereby waiving fundamental rights. Thus, the State ought to be precluded from later requesting anything less from a veto jury. As explained in the Introduction, such a limitation ought to have very significant benefit: since a prosecutor knows that anything she offers or threatens at the plea stage will constrain her options (setting a lower boundary) at a later-convened veto jury, and since a prosecutor knows that requesting too much from a later-convened veto jury may well push it to pick the defendant's ask, a prosecutor has *ex ante* reason not to over-threaten. And this beneficial motivator occurs without per-case cost, since no veto jury will necessarily be convened in any particular case.

There is just one caveat—a prosecutor's charge or threat should have that lower-bound effect *most of the time*. While we certainly want prosecutors to have their ducks in a row by the plea-bargaining stage—how else could we hope to achieve just results in any bargain?—there will be instances in which a prosecutor legitimately later learns important mitigating (or even partially- or wholly-exculpating) information. And we of course want prosecutors to do the right thing by responding to that later-learned information as soon as it becomes known. So, a prosecutor's offer or threat ought to presumptively set the State's lower-bound ask in any later veto-jury proceeding, meaning it sets that boundary absent judicially-accepted explanation of such later-learned, mitigating information.

As for jury veto *downward* departures from the judicial sentence, the system can be more flexible. Here we might permit a supermajority—say 80%, or 10-2, assuming a 12-person jury—to give any decrease the defendant requests, down to probation or even nothing at all. (And that could also be a supermajority decrease to a lower *prosecutorial* request, as will be demonstrated in the examples of the next Part.) In the end, mercy

39. And it requires one to accept that a legislature could constitutionally hold a prosecutor to such a choice. As implemented herein, I believe it could, but there is admittedly a separation of powers consideration here.

40. Whether and to what extent, say, the federal Take Care Clause would in its sphere prohibit *blanket* non-prosecutions is a fascinating, largely undecided secondary consideration. See *generally* TODD GARVEY, CONG. RSCH. SERV., R43708, THE TAKE CARE CLAUSE AND EXECUTIVE DISCRETION IN THE ENFORCEMENT OF LAW (2014).

seems as indefinable as it is human, and this permits the citizen jury to function as the intended “circuitbreaker in the State’s machinery of [criminal] justice.”⁴¹ An unbounded ability to decrease a sentence down to a prosecutorial or defense ask merely gives that purpose actual effect, an effect founding-era juries almost surely enjoyed given the absence of police investigation and jury determination of both law and fact.⁴²

In summary, upon defendant invocation of the right—and it must be an *unwaivable* right to serve its purpose,⁴³ and a right invocable after any judicial sentence (whether following guilty plea, bench trial, or jury trial)—three categories of outcome would be possible. First, a unanimous jury could select any of the three options: the judicially-imposed sentence, the prosecutorial ask, or the defense ask. Importantly, this means only a unanimous jury could *increase* a sentence, up to a cap and requiring, of course, such a prosecutorial ask. Second, a supermajority could decrease the sentence down to the defendant (or prosecutorial) ask, potentially all the way down to nothing. Third, an otherwise “hung” jury would leave intact the judicial sentence.

So, a veto jury might be instructed somewhat like the following, assuming the prosecution has put an above-maximum sentence into play by its specific ask. (As always, the jury ought to be instructed with specifics, not generalities irrelevant to its particular situation.)

As you know, you have been convened to decide whether the sentence imposed on Mr. Hayes following his conviction for the crime of forgery is just, meaning whether that sentence is right and fair, or at least as right and fair as we can hope to achieve in our imperfect world.⁴⁴ Ultimately, as the voice of the people in this matter, your decision will control.

41. *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

42. *See Sparf v. United States*, 156 U.S. 51, 64–107 (1895) (recognizing, but ultimately rejecting, arguments asserting that common-law jury function).

43. Otherwise, prosecutors with unequal bargaining power will be able to effectively coerce waiver as part of plea bargaining, eliminating the defendant’s opportunity to invoke the procedure.

44. Here I could imagine some jury instruction on the various justifications for punishment; they could hopefully look to how juries are instructed in those states currently having jury sentencing. *See infra* Section III.D. I playfully introduce them to my 1L students with an imagined parent-child colloquy:

THE JURY VETO

While our aim is thus justice, we also aim to be a nation of laws; in this country and in this state, everyone is equal before, and bound by, our democratically enacted law. That includes me. That includes Mr. Hayes. And that includes each of you. And in order to respect that law, it is critical that you arrive at your decision in the following manner.

First, you must each begin with the sentence enacted by Judge X⁴⁵ following Mr. Hayes' conviction: 9 years in prison.⁴⁶ That sentence

Parent: You took your sister's camera without asking and then broke it.

Child: Yeah, well, it wasn't a very good camera anyway.

Parent: That's entirely beside the point. You chose wrong, and, when you do wrong, it's my moral responsibility to punish you. (*Retributivism*)

Child: That should be god's job; you're hardly up to that task, dad. "First remove the beam" and all that. And remember when you broke mom's cellphone?

Parent: Yes, well . . . yes I do. Regardless, if there aren't painful consequences for your bad behavior, you'll just do it again. (*Specific deterrence by intimidation*)

Child: Not necessarily. You could just keep me out of her stuff; put a lock on her door or something.

Parent: Before I'd do that, I might as well put a lock on your door, keeping you in. (*Specific deterrence by incapacitation*)

Child: I'm not a monkey in the zoo, dad. Besides, you're the one raising me; maybe you just aren't a very good moral teacher.

Parent: So I should sentence you to watching church services on YouTube? (*Specific deterrence by rehabilitation*) Maybe that's not such a bad idea . . . still, you have a younger brother. He's not going to learn anything by that—he needs to see you punished so he won't get any ideas about making his own grab for whatever pleases him. (*General deterrence by intimidation*)

STEPHEN E. HENDERSON, *THE CRIMINAL LAW* 13–14 (2021). The whimsical colloquy continues, but the point is hopefully made: these principles—as critical as they are—are intuitive, and so they ought to be readily, quickly teachable.

45. Ideally, a different judge would run the veto process.
46. This seeks to advantage that sentence given anchoring bias. *See generally* Fritz Strack & Thomas Mussweiler, *Explaining the Enigmatic Anchoring Effect: Mechanisms of Selective Accessibility*, 73 J. PERSONALITY & SOC. PSYCH. 437 (1997) (reporting on several fascinating studies demonstrating anchoring bias,

is a lawful one, within the bounds of 2 to 10 years set by our legislature for the crime, and arrived at following consideration of the facts and circumstances of this case and how they are similar to—and different from—other instances of this crime. So, that is where you must begin, both in your own mind and in your collective deliberations: at 9 years.

As the representatives of the people considering this case, however, you are entitled to deviate from that position if you feel that justice so demands.

You heard the prosecutor, Ms. Y, who represents the State in this matter, request and argue for a sentence of 12 years in prison. In considering whether justice demands that you deviate upward from the judicial sentence to 12 years, remember that you are here as representatives of the people to mete out the just sentence. And, because the State's request of 12 years exceeds the statutory range of punishment for this forgery offense—which has a maximum of 10 years—you must give especial care and thought to whether that upward deviation is just. That 10-year maximum has been determined by our legislature and should be given the strongest weight; punishments for the crime of forgery ordinarily cannot—and should not—exceed it. Nevertheless, if you unanimously agree it is right in this case, just like you are not bounded by any statutory minimum in considering a defendant's request, you may give that 12-year sentence if you believe it the most just outcome.⁴⁷

You heard Mr. Hayes' attorney, Ms. Z, request and argue for a sentence of 2 years in prison. In considering whether justice demands that you deviate downward from the judicial sentence of

perhaps most famously that concerning guesses at the age of death for Mahatma Gandhi). If such anchoring is not desired, an alternative would be to merely stress the deserved sentence. Still, since the human mind seems sure to anchor *somewhere*, we probably ought to select one of the three options as that anchor.

47. There is a tension here. On the one hand, the prosecutorial option to exceed a statutory maximum is included for reasons of deterring system over-invocation. On the other hand, I am proposing the jury be told to select the 'just' sentence, not one explicitly designed to have that systemic impact. I think this tension is acceptable and appropriate—we have multiple, different goals to fulfill. Someone else could disagree, however, and then the jury could be instructed to include consideration of that deterrent rationale.

THE JURY VETO

9 years to that 2-year sentence, remember once again that you are here as representatives of the people to mete out the just sentence. And if ten or more of you think—after fully and carefully discussing the matter together and considering each of your fellow jurors' views—that 2 years in prison is the proper sentence, then that is the verdict you will return, and that is the sentence Mr. Hayes will receive. While it is certainly ideal if you can all agree on your verdict—and that should be your goal—again, a supermajority of ten or more of you are empowered to select Mr. Hayes' request as the most just.

So, in summary, you are here to give Mr. Hayes the sentence that he deserves and that society requires for his having been convicted of his crime of forgery. You are to begin by considering the judicially imposed, lawful sentence of 9 years in prison. You are entitled, if you unanimously so decide, to depart upward to the prosecutor's requested sentence of 12 years. And you are entitled, if ten or more of you so decide, to depart downward to the defendant's requested sentence of 2 years. You will now be escorted back to the deliberation room, where you may begin your discussions. If you have questions for me at any time, you may reach out to Ms. Q, our bailiff, and she will let me know. Any questions now, before you begin?

Then, Ms. Q, would you please escort the jury back to the deliberation room, where they may begin their deliberations.

...

Before developing several examples that will put meat on these bones, let me quickly address a few preliminary concerns.

On what authority? I claim constitutional *inspiration* for the jury veto: I think it consistent with founding desires for our systems of jury adjudication given the very different circumstances of our day. But it would require legislative enactment. I am *not* arguing a system of jury veto would be constitutionally required,⁴⁸ nor do I see any credible argument that a

48. That is not to say such argument would be impossible; I simply have not attempted it. *See, e.g.,* William Ortman, *Confrontation in the Age of Plea Bargaining*, 121 COLUM. L. REV. 451 (2021) (arguing the Sixth Amendment

legislatively enacted jury veto would be *unconstitutional*. In particular, the Supreme Court's suggestion that there is no federal constitutional right to jury nullification⁴⁹ says little to nothing about the legislative wisdom of a veto. Moreover, the veto is not merely nullification by another name. While at times a veto jury might indeed "nullify" in the sense of disagreeing with and therefore disregarding a legislative enactment—and I've certainly stressed the importance of such rebuke when it occurs—much more often it would disagree only with a particular application of prosecutorial discretion or judicial sentencing, selecting a different sentence within a legislatively-proscribed range.

Should it "go to zero?" I have proposed that a veto supermajority ought to be able to select a defendant's ask—down to and therefore including the "magic" of no punishment. For me, this best instantiates a jury's intended "circuit-breaking" role. It is possible, however, that human psychology would make this prohibitively expensive, in the sense that the veto procedure might be widely—and even illogically, meaning defense-counter-productively—over-invoked.

This might be best demonstrated by a thought experiment. Consider a far simpler, and far more arbitrary, veto procedure: in place of the jury veto, defendants are given the choice of rolling a four-sided die containing the numbers zero, one, two, and three. If a defendant chooses to roll, her sentence will be the result of multiplying the judicially-imposed sentence by that die roll. It is possible that many defendants might roll, not based upon any sense of sentence injustice, but rather solely on account of being "blinded by" that chance at zero, and a bit pacified by the presence of the one. Such an arbitrary addition to already unfair systems of criminal justice would hardly be a welcome improvement. And while this thought experiment is easily differentiated from a jury veto—it is entirely different to ask a group of flawed-but-conscientious human beings to evaluate the justice of a situation than to roll a die—we must account for human decision-making, illogic and all.

Confrontation Clause right ought to apply to plea bargaining and proposing the "Sixth Amendment deposition" to permit the same); Jane Bambauer & Andrea Roth, *From Damage Caps to Decarceration: Extending Tort Law Safeguards to Criminal Sentencing*, BOSTON UNIV. L. REV. (forthcoming) (arguing due process ought to prevent criminal sentences too disproportionate to the harm the crime caused); Hoffman, *supra* note 12, at 968–85 (arguing that the Sixth Amendment can be interpreted to require jury sentencing).

49. See *Sparf v. United States*, 156 U.S. 51, 106–07 (1895).

THE JURY VETO

So, perhaps a more realistic system would (1) cap the defendant's immediate gain by veto, such as by permitting only a halving of any judicial sentence, but also (2) send to the executive for possible pardon or commutation any such minimal outcome, streamlining and guaranteeing an executive "second look." Like many questions of implementation, careful psychological study could provide far more certain answers.

Must it be so complicated? As will quickly become evident—if it is not already—the jury veto has ample complication; it is a simple idea in theory that is hardly so simple in practice. It would be delightful if it could be otherwise. To the extent this is a criticism *of the jury veto*, however, as opposed to merely a comment upon the reality of our earthly situation, its bite might be limited. Consider current federal sentencing. The United States Sentencing Commission's 2021 Guidelines Manual weighs in at six hundred and eight pages.⁵⁰ *Six hundred and eight*. And that is without an appendix (Appendix B, Selected Sentencing Statutes), which adds another one hundred and seventeen. And if one wants to include all its modifications over the years (Appendix C), that adds fifteen hundred pages more.⁵¹ It is of course apples and oranges to compare the description of a sentencing *procedure* to a description not only of a calculation procedure but also of all the criminal laws and punishments that factor into it and to improvements that have proved necessary over decades. I do not mean to represent otherwise. The point is merely that these things are hard, and that the addition of a jury veto would hardly be mucking up currently simple systems. So, when I herein lay aside very significant questions, such as how we would bring veto juries sufficiently "up to speed" after plea verdicts or bench trials, it is not because I fail to appreciate any such complexity. It is merely because this Article is a first, and we have ample theoretical complication already on our plate.

Did you miss the 1860s . . . and so many juries since? For every founding-era jury early Americans might have celebrated, there are far more juries that not only did grave injustice, but that collectively bury us in almost

50. *Guidelines Manual*, U.S. SENT'G COMM'N (Nov. 2021) <https://www.ussc.gov/guidelines/2021-guidelines-manual-annotated> [<https://perma.cc/WU7D-8YQW>].

51. More particularly, 550 pages for C-1, 408 pages for C-2, 422 pages for C-3, and 200 for C-Supplement. *See id.*

unimaginable shame.⁵² I certainly do not mean to ignore this, even as I have committed to not herein attempting argument in favor of lay adjudication (as opposed to, say, representative systems where elected prosecutors and judges attempt that role).⁵³ But it is worth stressing that I do not mean to duck the issue. I merely beg it as an argument for elsewhere, and recognize that if one does *not* desire strongly democratic adjudication, a jury veto is

-
52. As for the existence of such juries, one could look to many sources but could certainly do worse than starting with those convicting members of the Groveland Four. See *Groveland Four*, WIKIPEDIA, https://en.wikipedia.org/wiki/Groveland_Four [<https://perma.cc/LU3R-KJ2P>]; GILBERT KING, *DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA* (2013). As for the guilt of persons for racial injustices that they did not individually perpetrate, one of my favorite sources is a Robert Penn Warren interview of Malcolm X.

RPW: Let's take a question like this. Can a person, an American of white blood, be guiltless? . . .

MX: Well, you can only answer it this way, by turning it around. Can the Negro who is the victim of the system escape the collective stigma that is placed upon all Negroes in this country? And the answer is "no." Because Ralph Bunch, who is an internationally recognized and respected diplomat, can't stay in a hotel in Georgia, which means that no matter what the accomplishment, the intellectual, the academic or professional level of a Negro is, collectively he stands condemned. Well, the white race in America is the same way. As individuals it is impossible for them to escape the collective crime committed against the Negroes in this country collectively.

RPW: Let's take an extreme case like this, just the most extreme example I can think of. Let us say a white child of three or four, something like that, who is outside of conscious decisions or valuations, is facing accidental death, you see. Is the reaction to that child the same as the reaction to a Negro child facing the same situation?

MX: Well, just take the Negro child—take the white child. The white child, although he has not committed any of—as a person has not committed any of the deeds that have produced the plight that the Negro finds himself in, is he guiltless? The only way you can determine that is to take the Negro child who is only four years old—can he escape, though he's only four years old, can he escape the stigma of discrimination and segregation? He's only four years old.

Interview by Robert Penn Warren with Malcolm X (June 2, 1964), https://whospeaks.library.vanderbilt.edu/sites/default/files/RPW.Reel_2.MalcolmX.tape_1.pg_908-924.pdf [<https://perma.cc/QVT9-GAZE>].

53. See *supra* notes 21–22.

THE JURY VETO

likely a non-starter. It might help, however, to at least say this: in championing the jury veto, and thus, *a fortiori*, the jury, I invoke the “Winston Churchill principle,” which I often find relevant but which naturally has particular relevance in this democratic deliberative context.⁵⁴ I do not expect jury vetoes to deliver good justice. I expect them to deliver better justice than all other earthly systems because, to the extent they become truly representative and thus role-reversible,⁵⁵ they are, for me, deontologically superior on those grounds. Moreover, we already have—in name and alleged design—a system of jury adjudication that plea bargaining has parasitically consumed. Given that starting point, my argument should be a Pareto superior move, returning a meaningful measure of that intention, even though not achieving any sense of Pareto optimality. And, finally, it is ever hard for me to imagine that a single sentencing jurist is, on average, less biased than a genuinely fairly sampled group of laypersons. My elitism exists, but it has limits.

Wouldn't this be yet another criminal justice function requiring better defense counsel? Yes. Absolutely. Even as my sense is that a defendant's personal narration could have powerful impact before a veto jury, it would require well-trained, diligent, adequately compensated, and conscientious defense counsel to help defendants navigate this process. But we *already* need this in our current system—desperately so.⁵⁶ Thus, I do not think the jury veto is adding an *additional* burden in this sense, but the need is so critical that it merits this mention. A veto jury would be yet another criminal

54. The famous words of Churchill are these:

Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed it has been said that democracy is the worst form of Government except for all those other forms that have been tried from time to time.

The Worst Form of Government, INT'L CHURCHILL SOC'Y (Feb. 25, 2016) <https://winstonchurchill.org/resources/quotes/the-worst-form-of-government/> [<https://perma.cc/3XZS-X37V>].

55. See generally Brennan-Marquez & Henderson, *AI and Role-Reversible Judgment*, *supra* note 8.

56. For my own take on the matter, see Stephen E. Henderson & Jordan E. Thomas, *Seeing Those We've Rendered Invisible—A Clarion Call for Criminal Justice*, 18 OHIO ST. J. CRIM. L. 709, 716–20 (2021) (arguing for a system of universal public defense).

justice function that would never operate fairly until every person accused of crime receives competent and compassionate criminal defense.

Are you really serious about going beyond the otherwise-statutory max? If there is one thing that consistently causes discomfort when I share this proposal, it is the notion of a jury sentencing a defendant to *more*—perhaps one-and-a-half times more—than what is otherwise the statutory maximum for the crime. I too am troubled by this, but my thinking goes something like the following.

On the one hand, as I will develop at a later point for life sentences, I am tempted to think any sentence at or near a statutory maximum to be an edge case for which we would like to see jury review.⁵⁷ If that is the case, we have no desire to deter invocation of veto, and so we could eliminate this aspect of the system design. Only that's not necessarily the case, nor even ordinarily should be the case. Imagine for a moment a reasonable set of criminal laws that provide reasonable, fixed or nearly-fixed penalties for every offense. Defendants judicially sentenced under such a regime would often receive a "statutory maximum," and therefore some mechanism would be necessary lest the veto system be an over-invoked, downward-only ratchet in contradiction to its fundamental design parameters.

Still, a beyond-otherwise-maximum sentence feels . . . vindictive. Now, part of me wants to see any jury veto sentence—even a beyond-otherwise-maximum sentence—as *not* punishment *for* invoking the procedure, but rather possibly the best, non-path-dependent justice in a particular case. In other words, once a defendant makes the choice to take her sentence before the people, the people's designated representatives ought to have rather free rein in doing what they collectively believe justice demands on the particular facts, at least when the State's prosecutorial representative believes the just answer flows in this direction. That such rein also deters over-invocation, well, that's just bonus. Only even I, the proponent of this proposal, and the one who would require the jury be so instructed,⁵⁸ find that difficult to believe. Again, an above-otherwise-maximum sentence simply feels vindictive. And we of course know it is fundamentally unfair to

57. See *infra* Section III.B.

58. See *infra* note 47.

THE JURY VETO

punish a defendant for exercising a constitutional right⁵⁹ . . . even as we do it every day in plea bargaining and its trial penalty.⁶⁰

Still (one could argue), perhaps a veto jury is meaningfully different. Unlike a defendant who has not yet enjoyed the right to trial, here we deal with a defendant who has been convicted and sentenced *despite* the constitutional and statutory rights our systems provide. Might it not only be constitutional but also ethical to punish certain such defendants for lack of remorse?⁶¹ Perhaps, even as I am extremely skeptical given the realities of our systems of criminal justice.

Which brings me to this: if anyone has a better solution—a mechanism that provides the goods of a jury veto while adequately deterring over-invocation *and* while never permitting a sentence beyond the ordinary statutory maximum—I expect to be its biggest fan.

. . .

With those important preliminaries aside, we are equipped to consider some examples, through which we can further design veto-jury procedures.

II. RUNNING SOME NUMBERS

What follows are seven examples; the first three illustrate the basic design, and the latter four work through the situation of the Introduction (and therefore the facts of *Bordenkircher*). I present them to explain the system, and therefore favor information conveyance over the art of prose, especially as the examples progress—a pattern of facts and decisions quickly emerges. While I attempt to convey in the text everything essential

59. See *Blackledge v. Perry*, 417 U.S. 21 (1974) (developing that due process doctrine); *United States v. Goodwin*, 457 U.S. 368 (1982) (concerning when there ought to be a presumption of vindictiveness and therefore a due process violation); *Thigpen v. Roberts*, 468 U.S. 27 (1984) (same).

60. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[B]y tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor’s interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.”).

61. See, e.g., *Mitchell v. United States*, 526 U.S. 314, 330 (1999) (setting aside as a different question whether adverse inference from defendant silence can be used as evidence of lack of remorse, thereby justifying a higher sentence).

to understanding both the hypotheticals and the system design, I tend to resort to footnotes to make larger-picture concessions.

A. A Simple Start

Imagine a defendant faces from two to ten years' imprisonment.⁶²

The prosecutor offers, in return for a guilty plea, a sentence recommendation of five years.⁶³ As explained in the Introduction, this presumptively establishes the State's lower-bound ask in any later veto-jury proceeding, meaning it sets that boundary absent judicially-accepted explanation of later-learned, mitigating information.

Speaking of limits, one is tempted to similarly have plea offers presumptively establish *upper bounds* on later veto-jury asks. If five years is basically a just sentence—and the prosecutor's offer represents that it is—then surely seven-and-a-half years (one and a half of that plea-offered amount) should suffice, providing ample room for a “trial penalty” (or, if one prefers, a “plea discount”). In other words, establishing such an upper bound on later State asks would temper the trial penalty/plea discount. Unfortunately, such a bound would also make it extremely difficult to formulaically ensure a disincentive to over-invocation of the jury veto. That will be hard to see now, but the next example will be one in which the adjudication and sentencing seem potentially reasonable, but where most every defendant would “roll that die” if the prosecutorial plea offer established such an upper bound.

62. Every example will be structured in this unitary manner: one minimum and one maximum. If there were multiple charges, the minimum and maximum would naturally reflect those combinations. More generally, I will ignore all of what might be considered “secondary considerations,” where they are “secondary” not because they are unimportant or easy—sometimes far from it—but because if the system cannot be worked out ignoring them, there seems no hope of working it out considering them. In short, we take the easier intellectual exercise first and see how hard it proves to be. Thus, every example will also present the sentencing range as a genuinely available range; perhaps the jurisdiction's sentencing guidelines recommend, but do not dictate, how a judge might select within it.

63. Every example will be structured as a potential sentence-recommendation plea, and I will assume a system in which all plea offers or threats are known. While we ought to do much better in getting this information into the criminal justice record, to the extent some disagreement remains inevitable, I will consider that a set-aside secondary consideration.

THE JURY VETO

The defendant refuses, opting for trial, and she files notice that she might later invoke the jury veto.⁶⁴

The defendant is convicted at trial.

The prosecutor recommends a sentence of seven years, reflecting a two-year “trial penalty.” While the plea offer set a *presumptive* State lower-bound ask, this settles the matter: the prosecutor cannot request less than seven years before any future-convened veto jury, once again tempering any prosecutorial tendency to over-request. If seven years is justice, the State has no business strategically asking a veto jury for less.

The defendant is sentenced to three years in prison.

The defendant doesn’t invoke a veto jury, meaning our story is done. And while our first example thus perhaps ends in a whimper, it makes a critical point: the veto jury is hoped to be the exception, not the norm, albeit ever-tempering prosecutorial charging. Still, we are of course here to examine the veto jury and not our existing world of its absence, and so our defendant will invoke in the remaining examples.

B. The People’s Review

A defendant faces from two to ten years’ imprisonment.

The prosecutor offers, in return for a guilty plea, a sentence recommendation of five years. This establishes five years as a presumptive (unexplained) lower boundary for any later State veto-jury ask.

The defendant refuses, opting for trial.

The defendant is convicted at trial.

The prosecutor recommends a sentence of seven years, reflecting a two-year “trial penalty.” This establishes a new, seven-year lower bound for any later State veto-jury ask.

The defendant is sentenced to seven years in prison, the judge adopting the prosecutorial recommendation.

The defendant invokes a veto jury.

64. Such notice flags a secondary issue. (Thus, I’ll ignore it in future examples.) Defendant notice could permit the judge to frontload some sentencing matters such that sentencing could follow relatively soon after any conviction, which is valuable when the jury must remain available for the latter. Thus, failure to file notice could forfeit the right. Of course, if there were no downside to filing, it would merely become pro forma in every case, thereby doing no work . . . or at least only working to punish defendants having ineffective counsel, and that is certainly no useful goal. All of which is to say that, again, consistent with my declared norm, I shall ignore this secondary issue going forward, not because it is unimportant, but because we have enough on our plate.

According to the system design, the ask parameters are as follows. The defendant must of course make a specific request, but it can be anything from zero (no punishment) to the sentence judicially imposed, so from zero to seven years' imprisonment.⁶⁵ The prosecutor established a lower-bound of seven years by her sentencing recommendation, and thus the prosecutor can select her specific request from within the range of seven years' imprisonment to one-and-a-half times the statutory maximum (or one-and-a-half multiplied by ten), for a maximum of fifteen years' imprisonment.

So, the jury decision parameters are that the veto jury has a threefold choice between: (1) the punishment judicially imposed (seven years' imprisonment); (2) the State ask (something particular in the range of seven to fifteen years); and (3) the defendant ask (something particular in the range of zero to seven years). More particularly, a *unanimous* jury can select any of these three options, including that it can thus increase the judicially-imposed sentence up to a cap of the prosecution ask (where that maximum is often, as here, one-and-a-half times the statutory maximum); however, the jury instructions will discourage exceeding the legislated maximum. A *supermajority* (e.g., if eighty percent then ten-two but not nine-three) can depart downward from the judicially-imposed sentence to the defendant ask. Otherwise, the judicially-imposed sentence stands.

Naturally, what will happen from among those options depends upon the facts of the case and the resulting decisions of the defendant, prosecutor, and jury. Merely to give one example, perhaps the defendant feels that she has a rather sympathetic case, and she therefore requests a sentence of two years. The prosecutor independently—and not knowing what that defendant ask will be, but surely having a sense given sentencing arguments before the judge—decides it would be a risk to request more than the current, judicial sentence, and therefore asks for that seven years. Thus, the jury would select between: two years (defendant ask) and seven years (both the judicial sentence and the prosecutorial ask). If ten jurors desire, the defendant would receive a sentence of two years. Otherwise, the sentence would remain at seven.

While it is difficult to generalize the vast universe of cases—that infinite variety is, in a sense, the very reason for the veto jury system—my sense is that juries would rarely be asked to deviate above the statutory maximum, and that they would do so only in a rare subset of cases (“What a waste of

65. Again, I will consider matters other than imprisonment secondary considerations for another day. And of course the defendant would never request seven (the existing, judicial sentence), but there seems no need to include such expression of futility as a rule.

THE JURY VETO

time, and what a callous human being!”). My sense is similarly that juries would very rarely move to no punishment, making such an ask a “definite loser” outside of a small subset of cases in which we’d very much want “the people” to confront that ultimate fact-and-law question. In most instances of invocation, I’d imagine the defense and prosecution both jockeying for similar-magnitude departures from the existing, judicial sentence, with the result being that we would attain both more democratic justice in the individual case and, over time, learn much more about what “the people” actually desire in criminal punishments.

C. A Response to “Maximum Frank” (Judicial High Sentence)

It is of course judges that impose a criminal sentence, and sometimes they are given little choice in the matter on account of a narrow statutory range or a mandatory minimum. At other times, they may simply exercise discretion in a harsh manner.⁶⁶ Either way, there will thus be instances of veto invocation in which the defendant and prosecutor largely agree. For example, say . . .

A defendant faces 2 to 10.⁶⁷

The prosecutor offers, in return for a guilty plea, a sentence recommendation of 2. (Setting a presumptive State veto lower-bound ask of 2.)

The defendant accepts, pleading guilty.

The prosecutor recommends 2.⁶⁸ (Setting a State veto lower-bound ask of 2.)

The defendant is sentenced to 10.

The defendant invokes a veto jury.⁶⁹

66. Decades ago, a Frontline documentary entitled *The Plea* featured a judge allegedly (and infamously) of the nickname “Maximum Frank,” who used his discretion to sentence defendants extremely harshly. See Charles Gampero, Jr., *Frontline*, PBS (June 17, 2004), <https://www.pbs.org/wgbh/pages/frontline/shows/plea/four/gampero.html> [<https://perma.cc/KER8-MYMU>].

67. Having provided complete templates, in this and subsequent examples I will use Arabic numerals rather than words, and indeed use words sparingly in order to ease information acquisition and mental calculation.

68. As she must, given her plea-bargain promise. See *Santobello v. New York*, 404 U.S. 257, 262 (1971).

69. Here we have an aforementioned secondary consideration of considerable procedural importance: how to efficiently bring a new jury “up to speed.” The

According to the system design, the ask parameters are:

For the defendant: From 0 to the judicially-imposed 10.

For the State: From 2 to 15. (The maximum being 1.5 times the statutory maximum 10.)

So, the jury decision parameters are a threefold choice between (1) the judicially-imposed sentence (10); (2) the State ask (range 2-15); and (3) the defendant ask (range 0-10).

More particularly, a unanimous jury can select any of the three options, including to deviate upward from the judicial sentence if there is a prosecutor ask above ten years. As stressed earlier, while the potential for such a prosecutorial request seems generally important to deterring over-invocation, its likelihood seems especially rare in a case such as this. Indeed, one can imagine the prosecutor here recommending the much-lower sentence of two years, as she thought that a just sentence in obtaining the guilty plea. A supermajority can depart downward to the defendant (or prosecutorial) ask. Otherwise, the sentence remains at ten years.

All of which presents an interesting hypothetical. Imagine the prosecutor indeed sticks to her two years. The defendant must propose her sentence without yet knowing that prosecutorial choice. And given the much-larger judicial sentence of ten years, the defendant might fear that a request as low as two—even while just in her mind—is practically too dangerous to recommend. Thus, imagine the defendant decides to request four years. The veto jury would then be asked to decide between: (1) the judicial sentence of ten years; (2) the prosecutor ask of two years; and (3) the defendant ask of four years.⁷⁰ Once the “asks are in” and the defendant therefore realizes the situation, it might make for some interesting jury argument. But whatever that case—and I’m not sure the “brutal honesty” this might encourage would be a bad thing—a supermajority of that veto jury would be empowered, as it always is, to select any request *lower than* that judicially imposed. Thus, a supermajority could depart downward

same would occur when a veto jury is invoked following a bench-trial sentence. When the time comes to consider such things, Laura Appleman’s work in framing the logistics of a plea jury might be of significant help, *see* Appleman, *The Plea Jury*, *supra* note 20, at 747–50, as might be consideration of whether a veto jury could be convened to decide a number of cases, like the investigatory grand jury. Finally, we might again turn to Athens, where juries seemed able to much more quickly decide cases in part because the parties of interest would speak and evidentiary limitations were practically non-existent. *See* LANNI, *LAW AND JUSTICE*, *supra* note 35, at 41–74.

70. If, by contrast, the defendant also requested two years, then this veto jury would have only a binary choice.

THE JURY VETO

either to the defendant request of four years or further to the prosecutor request of two.

D. Bordenkircher

We are now equipped to see how a veto jury might operate on the infamous facts of *Bordenkircher v. Hayes*.⁷¹

A defendant faces 2 to 10.

The prosecutor offers a sentence recommendation of 5 but threatens with indictment as a habitual offender having mandatory life. The threat operates just like an offer, in that the prosecutor has thereby taken the position that a life sentence would be a just result. Thus, this establishes a presumptive State veto lower-bound ask of *life*.

The defendant refuses, is newly indicted, and goes to trial.

The defendant is convicted at trial.

The prosecutor recommends life (here mandatory by statute). (Setting a State veto lower-bound ask of life.)

The defendant is sentenced to life.

The defendant invokes a veto jury.

The ask parameters:

For the defendant: From 0 to the judicially-imposed life.

For the State: Life.

So, the jury decision parameters are a binary choice between (1) the judicially-imposed/State ask of life and (2) the defendant ask (range 0 to life). More particularly, change would occur only if a supermajority wishes to depart downward to the defendant's ask.

As intended, here the mere existence of the veto jury system ought to strongly caution the prosecutor against this string of events. The prosecutor knows from the beginning that if she threatens the life sentence in plea negotiations, she will be held to that threat before any empaneled veto jury. And she knows that the jury will have to decide, for a defendant who forged a single check to the tune of five hundred dollars, whether the proper sentence is either potentially *life* or something presumably much lesser. For example, if the defendant asks for two years' imprisonment, the jury will decide whether this check forger ought to receive either two years in prison or potentially life in prison.⁷² My hope and expectation is that the former

71. See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *supra* notes 4–7 and accompanying text.

72. I say potentially because there may be possibility of parole, as actually occurred in *Bordenkircher*. See *supra* note 5.

would be found the obviously right choice. However, and critically, if not—meaning if the representative voice of the people demands life in prison on the particular facts before it—then the system has worked as intended. The people have spoken, both through their representative legislature and through a representative system of adjudication.

E. Bordenkircher Alternative One (Defense Plea)

The *Bordenkircher* case could have worked out differently, and it is worth working through how a veto jury might function for those permutations. For example, the defendant might have caved to the prosecutorial threat and thereby pleaded guilty:

A defendant faces 2 to 10.

The prosecutor offers a sentence recommendation of 5 but threatens with indictment as a habitual offender having mandatory life. (Presumptive State veto lower-bound ask = life.)

The defendant accepts, pleading guilty.

The prosecutor recommends 5. Nonetheless, the State veto lower-bound ask *remains* at life (a post-conviction recommendation can raise, but never lower, this bound).

The defendant is sentenced to 10.

The defendant invokes a veto jury.

The ask parameters:

For the defendant: From 0 to the judicially-imposed 10.

For the State: Life. Of course, a life sentence is not available for this check-forging crime (recall that the defendant accepted the plea to avoid the prosecution threat, and thus was never indicted under the habitual offender provision). Thus, this must translate to the maximum that *is* allowable, which under the jury veto system is 1.5 times the statutory maximum. Here, that is 15 years.

Thus, I envision the veto jury would be informed that (1) the prosecution originally threatened a life sentence, but that (2) the maximum penalty available as prosecuted is 10 years, and therefore that (3) the prosecutorial ask is thereby lowered to one-and-a-half times that statutory maximum amount, or 15 years.

So, the jury decision parameters are a threefold choice between (1) the judicially-imposed 10; (2) the State ask of 15; and (3) the defendant ask (range 0 to 10). More particularly, a unanimous jury can increase the punishment to 15 years, a supermajority can decrease the punishment to whatever the defendant's specific ask, and otherwise the sentence remains at the judicially-imposed 10.

THE JURY VETO

Once again, knowing all of this from the beginning, the prudent prosecutor ought to be wary of threatening a life sentence in plea negotiations. Whereas she would have been able to present the ultimate veto jury with a perhaps-reasonable recommendation of 5 years' imprisonment (or something slightly more), her threat means she cannot recommend below an explicitly discouraged, above-statutory maximum 15. Such a request seems unreasonable, pushing the veto jury towards the defendant's request.

F. Bordenkircher Alternative Two (Vetoing a Deal)

Often, a defendant might invoke a veto jury when something unexpectedly harsh occurs during an adjudication, as with judge "Maximum Frank" above. It is worth emphasizing, however, that a defendant could invoke when she receives the "expected value" of a plea deal, because (1) a not-insignificant purpose is to permit "the people" to reject overly harsh statutory rules, (2) we certainly don't want to encourage needless trials (a defendant's other option to "contest"), and (3) we have already built in a mechanism to avoid over-invocation. Thus, . . .

A defendant faces 2 to 10.

The prosecutor offers a sentence recommendation of 5 but threatens indictment as a habitual offender having mandatory life. (Presumptive State veto lower-bound ask = life.)

The defendant accepts, pleading guilty.

The prosecutor recommends 5. (State veto lower-bound ask remains life.)

The defendant is sentenced to 5.

The defendant invokes a veto jury.

The ask parameters:

For the defendant: From 0 to the judicially-imposed 5.

For the State: Life, which translates to 15.

So, the jury decision parameters are a threefold choice between (1) the judicially-imposed 5; (2) the State ask of 15; and (3) the defendant ask (range 0 to 5). More particularly, a unanimous jury can increase the punishment to 15 years, a supermajority can decrease the punishment to whatever the defendant's specific ask, and otherwise the sentence remains at the judicially-imposed 5.

Once again, the existence of the veto jury system should do the desired work, discouraging the plea-stage prosecutorial draconian threat and, if not, allowing the people an opportunity to correct any lesser injustice that nonetheless occurs.

G. Bordenkircher Alternative Three (Charge Dismissal)

Finally, a veto jury can do the same work whether a prosecutor (1) charges low but threatens to increase, as in *Bordenkircher* or (2) charges high but then offers to dismiss:

A defendant faces, on account of a habitual offender charge, mandatory life in prison. A second forgery count threatens 2 to 10.

The prosecutor offers to dismiss the habitual offender count if the defendant will plead guilty to the forgery, in which case the prosecution will recommend a sentence of 5 years. Because the prosecution's charging has threatened a life sentence, the presumptive State veto lower-bound ask is life.

The defendant accepts, pleading guilty, and the habitual offender count is dismissed.

The prosecutor recommends 5. (State veto lower-bound ask remains life.)

The defendant is sentenced to 5.

The defendant invokes a veto jury.

The ask parameters:

For the defendant: From 0 to the judicially-imposed 5.

For the State: Life, which translates to 15.

So, as above, the jury decision parameters are a threefold choice between (1) the judicially-imposed 5; (2) the State ask of 15; and (3) the defendant ask (range 0 to 5).

III. FURTHER CONSIDERATIONS AND EMPIRICAL WORK

A jury veto could thus solve the "*Bordenkircher* problem." But I have argued it could do more, and while these seven examples illustrate the core function of a veto and how it could operate, they are only the tip of the iceberg. Here, then, I briefly address several additional issues worthy of thought and, perhaps, ultimate development, including the potential for empirical work to illuminate both potential gains and drawbacks.

A. Prosecutorial Invocation

A natural question is whether the State—through the prosecutor—ought to be able to invoke the veto jury. As a matter of system design, I do not believe such a "State option" necessary: the system is meant to return the jury to its intended "circuit-breaking" role despite the overwhelming contemporary dominance of plea bargaining, and circuit breakers are not

THE JURY VETO

designed to *increase*.⁷³ In our homes, for example, various breakers put a stop to electric current that runs too high, thus protecting against the risk of injury and fire, while remaining happy as clams when such current dips to zero.⁷⁴ So, a palatable option is to permit only defense invocation, and that is my preference.

Still, a jury is an appropriately role-reversible adjudicative system not merely when it acquits, of course, but also when it convicts.⁷⁵ And the Supreme Court has long recognized that it is not merely the defendant who has a potential interest in “the people” adjudicating her case, but also the people themselves who have an interest in meting out justice. Thus, held the Court in *Singer v. United States*, the federal Constitution permits conditioning a defendant’s waiver of the Sixth Amendment jury right upon prosecutorial and judicial agreement.⁷⁶ And a proposed veto system might have broader political support if it “went both ways,” not only permitting defendants to challenge judicially-imposed sentences they feel are unjustly high, but similarly permitting prosecutors to challenge judicially-imposed sentences they feel are unjustly low.

Thus, it is worth considering how a prosecutor-invoked veto jury might function and, for the most part, the considerations are the same as those

-
73. Lest there be confusion, *once defense-invoked*, it is crucial that the veto jury be entitled to increase a judicial sentence (as described in Part I, *supra*, and as demonstrated in Part II, *supra*) for the practical reason that, absent that potential, most every defendant would invoke and adjudicative systems would be swamped. Here the question is the different, preliminary one of whether prosecutorial invocation ought to be permitted; in other words, if a defendant is happy with her judicial sentence, can the prosecutor request that “the people” consider its increase?
74. For example, the ground-fault breakers in our kitchens and bathrooms are designed to protect against relatively low-level but still deadly currents, while the breakers in our homes’ main panels trip at significantly higher currents to avoid fire and to permit easy electrical maintenance and improvement. *See, e.g.*, Tom Harris, *How Circuit Breakers Work*, HOWSTUFFWORKS, <https://electronics.howstuffworks.com/circuit-breaker.htm> [<https://perma.cc/DGG3-53MW>].
75. *See generally* Brennan-Marquez & Henderson, *AI and Role-Reversible Judgment*, *supra* note 8.
76. 380 U.S. 24, 26 (1965) (“There is no indication that the colonists considered the ability to waive a jury trial to be of equal importance to the right to demand one.”). Similarly, the Court has permitted prosecutors to challenge defense peremptory strikes as racially motivated. *See Georgia v. McCollum*, 505 U.S. 42, 59 (1992).

developed in Part I. If the State were to invoke, we require the same basic outcomes: the State could win, but the State could also lose. Taking the latter first, we can permit the same, already-described supermajority decrease in punishment.⁷⁷ As for the former—a prosecutor-invoked, prosecution jury veto “win”—we can once again permit a unanimous jury to increase the judicially-imposed sentence. But this time we can establish any statutory maximum as a cap. The reason I argued to permit (albeit then discourage) a defense-invoked veto jury to *exceed* a statutory maximum was to discourage over-invocation in a readily administrable manner,⁷⁸ and the equivalent discouragement when prosecutor-invoked is in the opposite, decreasing direction. So, a unanimous veto jury could increase the judicially-imposed sentence up to any statutory maximum. Or, if one wanted to permit prosecutorial invocation but more modestly, such unanimous veto juries could be given only the bully pulpit, permitting them to “censure the system” by publicly declaring that a defendant’s sentence ought to have been greater, but not actually changing that sentence. Finally, as when defense-invoked, if there is no unanimity desiring increase and no supermajority wishing decrease, the judicially-imposed sentence would remain.

Whatever its specifics, permitting a prosecutor to invoke the veto jury would emphasize that the system is more than a “mercy-only” one-way ratchet. (Of course, even a defense-invoked veto jury is more than that given its ability to unanimously *increase* judicially-imposed punishment, but permitting prosecutorial invocation makes the statement even more forcefully.) And while they are not the systems most of us tend to see in American criminal justice, one could certainly imagine systems of under-criminalization and enforcement that might warrant such adoption.

B. Over-Invocation (Especially for Life Sentences)

For every defendant facing a judicially-imposed life sentence, there is no downside to invoking the veto jury: no greater punishment is risked, and a supermajority could decrease that punishment to whatever is the defendant ask. Thus, I would imagine most every life-sentenced criminal defendant would invoke the veto jury because here the system *is* something we generally avoided: a one-way downward ratchet.

The question is whether this is a feature or a bug. For me, it is a feature. First, this is a small fraction of criminal convictions. In the year 2016, for

77. See *supra* notes 41–42 and accompanying text.

78. See *supra* notes 36–38, 57–60 and accompanying text.

THE JURY VETO

example, only 5.2% of United States prisoners never expected to be released, whereas the mean expectation was to serve a time of 10.1 years.⁷⁹ Second, and even more importantly, the Third Assumption in designing the veto system was that—when necessary—the desire to meaningfully inject the people into criminal adjudication takes preference over administrability,⁸⁰ and I can scarcely imagine a more meaningful edge case than whether a person ought to potentially spend the rest of her life in prison.⁸¹ And while that is merely a personal sense, perhaps it receives some reinforcement from the decision in various countries to altogether prohibit such punishment,⁸² and calls in our own country to abolish it.⁸³ A life sentence is simply an exceptional thing. And when it costs several tens of thousands of dollars per year to incarcerate a person, it is an extremely expensive thing as well.⁸⁴

79. U.S. DEP'T JUST., BUREAU OF JUST. STAT., PROFILE OF PRISON INMATES, 2016, 15 (2021), <https://bjs.ojp.gov/content/pub/pdf/ppi16.pdf> [<https://perma.cc/7KEF-448F>]. *But see* SENT'G PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 4 (2021) (reporting a significantly higher fraction of one in seven—or 14 percent—are serving what is effectively a life sentence).

80. *See supra* note 24 and accompanying text.

81. I say “potentially” because a life sentence could have the possibility of parole. While a life sentence without such possibility is even *more* serious—just as capital punishment is even more serious—that doesn't diminish my considering any form of life sentence a critical, edge case, just as the decision whether to blow up any civilian-occupied building during war ought to be a critical case despite the potential for ‘greater’ questions of whether to blow up any combination of such buildings or even entire cities.

82. *See Life Imprisonment*, WIKIPEDIA, https://en.wikipedia.org/wiki/Life_imprisonment [<https://perma.cc/S6SL-HMD3>] (gathering data on countries that establish a maximum sentence of some term of years, perhaps 25 or perhaps as high as 45).

83. *See generally Campaign to End Life Imprisonment*, SENT'G PROJECT, https://endlifeimprisonment.org/learn_more/ [<https://perma.cc/5RJ8-8PE3>].

84. *See* VERA INSTITUTE, THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS, 2010–2015, at 7 (“Among the 45 states that provided data (representing 1.29 million of the 1.33 million total people incarcerated in all 50 state prison systems), the total cost per inmate averaged \$33,274 and ranged from a low of \$14,780 in Alabama to a high of \$69,355 in New York.”).

We can return for a moment to where we began, with the facts of *Bordenkircher*.⁸⁵ Before the State can sentence a person to potentially living the rest of her life incarcerated because she forged a check, under my system of jury veto, a representative body of “the people” must—if the defendant desires it—give some assent. That hardly seems too much to ask, and, for me, the particular crime of conviction (forgery) makes the case even more obvious but not fundamentally changed. Even where a defendant pleads guilty to a crime or crimes of criminal homicide, and even where a judge then decides a life sentence is the legally mandated outcome, a jury of the people ought to consent before our State implements that near-maximum punishment. I know of no better way to argue the proposition than to say it. But if one disagrees, of course, she will be less inclined to accept this feature of the jury veto and some other disincentive to invocation would presumably have to be imagined and implemented in order to gain her approval.

Much more generally, one might expect routine veto-jury invocation if a system typically metes out more draconian punishments than deliberative groups of people actually desire. In such case, the potential for explicitly discouraged, unanimous upward adjustments is very low, and the potential for supermajority downward adjustments is quite high. Once again, however, this strikes me as a feature rather than a bug: if through some failing of representative democracy our systems of criminal punishment are routinely over-harsh, then democratic principles triumph when they are brought back into line. Furthermore, while that process would require administrative costs in the near term (the costs of running these veto juries), one would expect prosecutors to rather quickly respond in their future charging decisions, and, ultimately, legislators to respond in their enactments. If it means we would ultimately have criminal penalties more closely in line with “the people’s” desire, the cost seems well spent. And if, by contrast, we already have such desired penalties, then general routine invocation should simply not occur.

Finally, if over-invocation is a primary concern, one might consider establishing the jury veto using a lottery system: some sentences would randomly be selected for veto jury, with the judicially-imposed sentence establishing an upper bound on punishment in order to protect individual defendants so selected.⁸⁶ Such a system would be a different, auditing one,

85. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

86. For an extensive defense of a system of substantive jury lottery, including why that would analogously be the upper bound, see Brennan-Marquez et al., *The Trial Lottery*, *supra* note 9.

THE JURY VETO

not protecting individual defendants in each case, and therefore not my system of choice. But it could potentially have the same longer-term, systemic benefits, as system actors responded to those veto verdicts.

C. Implied Threats

As I have proposed the veto system, prosecutors would be held to both explicit plea offers⁸⁷ and explicit plea threats.⁸⁸ If a prosecutor offers a plea sentence of five years, for example, she cannot later offer a lower sentence to a veto jury. Similarly, if a prosecutor threatens indictment for a crime with a particular penalty, she cannot later offer a lower sentence. I have already articulated the good this would do, for the first time holding prosecutors accountable for such actions.⁸⁹ One might inquire, however, why explicit threats ought to mean more than the ever-present, definitional—if implicit—threat of the statutory maximum sentence that could follow any trial conviction. Since prosecutors and defendants by definition bargain in this shadow, why not *always* hold prosecutors to requesting the maximum before any ultimate veto jury?

The reason is because prosecutors are important moral actors in our systems of adjudication, so we ought not deprive their decisions of that moral import, nor deprive veto juries of that relevant information. Consider the notorious 2021 Colorado prosecution of trucker Rogel Aguilera-Mederos.⁹⁰ Prosecuted for causing the deaths of four motorists when his tractor-trailer's brakes failed, he was convicted and the judge imposed a sentence of 110 years.⁹¹ The judge considered that sentence too high, but he thought himself bound by the state's sentencing law.⁹² Indeed, the prosecutor also thought that sentence too high, and she therefore requested resentencing where she meant to ask for a sentence of between twenty and

87. See, e.g., *supra* Section II.A.

88. See, e.g., *supra* Section II.D...

89. See *supra* text accompanying note 13.

90. See Talal Ansari, *Truck Driver's 110-Year Prison Term is Cut to 10 Years*, WALL ST. J. (Dec. 30, 2021, 8:35 PM ET), <https://www.wsj.com/articles/truck-drivers-110-year-prison-term-is-cut-to-10-years-11640911608> [<https://perma.cc/7234-54PK>].

91. *Id.*

92. *Id.* ("I will state that if I had the discretion, it would not be my sentence,' the judge said at the time of the sentencing earlier this month.")

thirty years.⁹³ While that resentencing never occurred because the governor intervened with a commutation to ten years—an interruption neither the prosecutor nor judge appreciated⁹⁴—it would be morally obtuse to require this prosecutor to argue for such a maximum sentence before any veto jury. If she never desired any such penalty, she ought to be—and the very reasons for a veto jury need her to be—free to offer what she believes justice demands.

Still, one might raise a related objection: by placing a down-the-line cost on explicit offers and threats, the veto system will encourage prosecutors towards mushy, ambiguous threats that do not have that cost. This might in part be deterred by much better recording of all plea negotiations, something that would independently serve the interests of justice.⁹⁵ Most importantly, while such a move to ambiguity might occur on some margin, it seems very unlikely in the mine run: prosecutors are as dependent as anyone on the predominance of guilty pleas,⁹⁶ and they shouldn't have success in getting most defendants to enter blind—or otherwise ambiguous—ones.⁹⁷

93. *Id.*; *Rogel Aguilera-Mederos: Colorado Truck Driver's Sentence Cut by 100 Years*, BBC NEWS (Dec. 31, 2021), <https://www.bbc.com/news/world-us-canada-59839723> [<https://perma.cc/M3E2-9U6X>].

94. Blair Miller, *Judge Criticizes Polis for Sentence Reduction for Rogel Aguilera-Mederos*, ABC NEWS 7 (Jan. 5, 2022, 5:46 PM), <https://www.thedenverchannel.com/news/local-news/judge-criticizes-polis-for-sentence-reduction-for-rogel-aguilera-mederos> [<https://perma.cc/A387-6834>] (“The Court respects the authority of the Governor to [reduce the sentence]. Based on the timing of the decision, however, it appears this respect is not mutual,’ [Judge] Jones wrote in his order. . . . King, the district attorney, said she was ‘disappointed in the Governor’s decision to act prematurely.’”).

95. See Louis Brandeis, *What Publicity Can Do*, HARPER’S WEEKLY, Dec. 20, 1913 (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”); see also Brandon L. Garrett, *Open Prosecution*, STAN. L. REV. (forthcoming), <https://ssrn.com/abstract=3946415> [<https://perma.cc/7EGW-WQJ5>] (describing a fascinating, encouraging program of working with prosecutors in certain offices to improve plea-bargain recordkeeping).

96. See Gershowitz & Killinger, *supra* note 10.

97. To the extent I am here relying upon competent defense counsel, see *supra* note 56 and accompanying text.

D. Jury Sentencing

Although judicial sentencing is the overwhelming norm in America outside of the capital context, a handful of states instead use jury sentencing, and scholarly literature develops its benefits and drawbacks.⁹⁸ One of those drawbacks is that juries lack the institutional wisdom necessary to even somewhat ensure fairness as consistency across like cases.⁹⁹ Perhaps there are clever ways our increasingly data-rich world might deal with this, such as future systems of artificial intelligence that could inform a sentencing jury of similar outcomes. Until that happens, the same like-case criticism can be made of the veto jury—albeit on a lesser scale, since it is only sometimes invoked and is only given two or three choices. Still, it is the same criticism, and I am personally very interested in ways we might better educate both judges *and* juries on what has come before. Strikingly, our systems of

-
98. See, e.g., Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 364 (2005) (arguing that “[t]he most important element in building a comprehensive community justice system is giving sentencing power to juries drawn from local communities”); Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 888 (2004) (empirically studying jury sentencing in Kentucky, Virginia, and Arkansas and finding that “[s]tate law in each of these three states deprives the jury of either full information or power, to varying degrees”); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 314 (2003) (arguing that “both historical precedent and insights from modern democratic theory suggest that criminal sentencing is a task to which the jury is well-suited,” but also gathering scholarship to the contrary); Hoffman, *supra* note 12 at 956 (similarly arguing that “[t]here are compelling historical, constitutional, empirical, and policy reasons to believe that trial judges’ sentencing discretion should not only be curbed, it should be eliminated entirely and transferred to juries”); Randall R. Jackson, *Missouri’s Jury Sentencing Law: A Relic the Legislature Should Lay to Rest*, J. MO. BAR, Jan.-Feb. 1999, at 14, 14 (arguing from his twenty-plus year experience as a trial judge that “Missouri stubbornly hangs on to th[e] anachronism [of jury sentencing] in the face of overwhelming evidence that . . . in non-capital criminal and quasi-criminal cases [it] is outdated and fails to serve the ends of any legitimate modern sentencing goal or philosophy”).
99. See Iontcheva, *supra* note 98, at 315 n.18 (gathering such criticisms); Hoffman, *supra* note 12, at 987–88 (reporting on three inconclusive studies). Fairness as consistency ought to be achievable in some significant measure, whereas humans are questionably capable of ever discovering a “platonic ideal” of “right” sentence for particular facts. Of course, even doomed to failure, we ought to ever try.

adjudication are often so poorly documented that even judges have no way of knowing such history.¹⁰⁰ Clearly, we can and must do better.

Regardless, one thing is clear: in the few jurisdictions that use jury sentencing, *when there is actually a trial employing such a jury*, there would be no jury veto. We ought not convene a second, later jury to potentially disagree with the first.¹⁰¹ And the same if the defendant can plead guilty on the merits but then convene a jury for her sentencing—we need no veto jury there. But where there is not that sentencing-only right, the jury veto might have its same utility. Just as the option of a jury trial is not an adequate solution to the problems of plea bargaining, the option of jury sentencing *after* a jury trial is not an adequate solution to the problems of contemporary sentencing.

100. See, e.g., Laura A. Bischoff, *Can a Spreadsheet Improve Fairness and Justice in Sentencing in Ohio Courts? Some Judges Say Yes*, COLUMBUS DISPATCH (June 28, 2021), <https://www.dispatch.com/story/news/2021/06/28/fairness-ohio-criminal-court-sentencing-depends-data-collection/7768981002/> [<https://perma.cc/N9RY-CGW8>]. In the words of Ohio Supreme Court Justice Michael Donnelly, the lack of information regarding what sentences are given on what facts in Ohio has

resulted in the perception, which I believe is true, that the public feels their sentencing outcomes in our courts have more to do with the proclivities of the judge you're assigned to, rather than the rule of law, which requires proportionality and fairness and that similarly situated defendants are treated with similar sentences. There is [currently] no tool or information available for the decision makers.

Id. Which perception he believes is true! Wow. See also *Ohio Sentencing Data Platform*, OHIO SENT'G COMM'N, <https://www.ohiosentencingdata.info/> [<https://perma.cc/AX3S-86GR>] (describing the problems and a project to improve them).

101. Of course, if a jurisdiction has “jury sentencing” in name only, or even just overly cramps what that jury can learn or do, that’s not so much jury sentencing as something neither fish nor fowl. See King & Noble, *supra* note 15, at 889 (“Jury sentencing in these [three] states is not a systematic check on sentencing policy set by prosecutors, judges, or sentencing commissioners. Rather, it serves at best as an occasional shield, and at worst as a smoke screen that helps to hide routine sentencing practice from public view. . . . In sum, jury sentencing may be appreciated for its democratic appearance, but its vitality may depend instead on its perceived utility in streamlining case disposition and in protecting judges and legislators from electoral accountability.”).

THE JURY VETO

In short, the veto jury is (of course) not judicial sentencing, but nor is it jury sentencing—it is some *tertium quid*. In any basically healthy system, the veto jury is not the manner of sentencing but rather a check invoked only on the margins. In a basically unhealthy system, as developed above, it would hopefully help get that system back on track.

E. Parole

One convinced of—or even merely intrigued by—the utility of the veto jury might ask whether it is extensible to other criminal decisions. For example, could it apply to the context of parole? Should a defendant denied parole be permitted to convene a veto jury?¹⁰² And if we are to generally permit State invocations, should a prosecutor be permitted to convene such a jury when parole is granted?

Starting once again with defense invocation as the most natural case, it seems a question worthy of consideration, but not as readily convincing. Most importantly, for these other criminal justice decisions, there is unlikely to be an analogous constitutional history of a jury speaking. And if we are to deter over-invocation, such veto boards must, in the typical instance, have both potential positive and negative consequences for the invoking defendant. It is not immediately obvious that such consequence (e.g., for a parole decision, perhaps an increase in the carceral sentence) would be desirable. On the other hand, given America's very high levels of extremely long-term incarceration, resulting in mass incarceration,¹⁰³ perhaps we ought to keep an open mind. Ultimately, however, the initial point seems the most important: while systems of "people veto" might often be considered in their own right, my argument for a jury veto is a special case precisely because of the historic purpose and role of the American criminal jury.

102. Another option would be to move from a system of professional, established parole boards to a system of parole juries. But rather than be analogous to the veto jury, that would be analogous to straight jury sentencing. *See supra* Section III.D.

103. *World Prison Populations*, BBC, <http://news.bbc.co.uk/2/shared/spl/hi/uk/06/prisons/html/nn2page1.stm> [https://perma.cc/FL6D-2JED]; *Incarceration Rates by Country 2022*, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/country-rankings/incarceration-rates-by-country> [https://perma.cc/FL6D-2JED].

F. Empirics

In a sense, the jury veto would simply “work.” After all, what could be wrong about gathering—and simultaneously implementing—information regarding what groups of citizens would actually like to see in our criminal systems?¹⁰⁴ But of course the reality is never quite so simple. For one, any implementation will have financial costs. Two, if not practically and uniformly accessible within an implementing jurisdiction, there are concerns about fairness as consistency. Three, if not carefully implemented, the system might generate results the jury would *not* have desired had it better understood its role, better understood the case or the charged crime, or better understood something else pertinent. And, four, any additional adjudicatory step on the backend could cause all sorts of participant gaming in earlier stages that mean either the ultimate veto jury simply won’t be called to perform, or will be presented options quite different than those we might have otherwise expected. In short, as in any meaningful change, much could go wrong.

So, it would be desirable to first experiment with the system in laboratory conditions, not only to see whether it “works,” but to tinker with how it might work even better. We might do so in at least two ways. First, I have coded the basic system in the Python programming language using Google’s Colaboratory environment,¹⁰⁵ and, if that code proves sufficiently robust, I will make it publicly available.¹⁰⁶ That could enable anyone to tinker with the concept, either singly or in groups playing various roles, whether it be as part of a serious clinical trial or merely for amusement or reflection.

Second, I hope to—with the assistance of experts—run a series of empirical assessments to determine how a jury veto might function. Ultimately, its existence might affect every major participant in the adjudicatory system: perhaps the prosecutor will offer more generous bargains to avoid it, perhaps the judge will award lesser sentences for the same purpose, and perhaps defendants will turn down more pleas given its backend potential. Or perhaps quite to the contrary. Perhaps prosecutors

104. Again, for this Article I take as a given that we generally desire jury adjudication. *See supra* notes 21–22.

105. *See What is Colaboratory?*, GOOGLE COLAB, <https://colab.research.google.com/> [<https://perma.cc/WJB7-E97S>].

106. As of this writing, it runs all the examples of Part II and many others, but coding for oneself is always a far cry from working out the kinks appropriate to public distribution.

THE JURY VETO

would no longer fear “weak sentencing” judges, judges will be less concerned about sentencing “as high as desert deserves” (now that everyone must concede a “people’s review”), and defendants will plead even more often (because a plea sentence can be challenged). And for each such effect, there is the question of good or ill. To give merely one example, if prosecutors offer more generous bargains to avoid potentially facing jury veto, is that better justice because they are diverging nearer to what persons in our society democratically desire, or is that worse justice because they are artificially deviating downward from that mark? Empirical studies should be able to work at least some of these questions, and I look forward to sharing those results in future work.

CONCLUSION

Given our plea-dominant criminal systems, no jury has any role in most punishments. This would have seemed strange to Thomas Jefferson, who declared that, “[w]ere I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative.”¹⁰⁷ While modern forensics, policing, and the professionalization of prosecution can sometimes, perhaps even often, obviate the need for an adversarial trial of fact—thus legitimizing *some* system incorporating some amount of plea bargaining—those things do nothing to even dull the founding desire for a group of citizen jurors “function[ing] as circuitbreaker in the State’s machinery of justice.”¹⁰⁸ Yet because the federal constitutional guarantee of a grand jury is not incorporated against the states,¹⁰⁹ and because even those grand juries that do operate tend to be dominated by the prosecution,¹¹⁰ the dearth of trial

107. Alschuler & Deiss, *supra* note 6, at 876–77 (quoting Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 283 (Julian P. Boyd, ed., 1958)).

108. *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

109. *Hurtado v. California*, 110 U.S. 516, 538 (1884) (“[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.”).

110. See Andrew E. Taslitz & Stephen E. Henderson, *Reforming the Grand Jury to Protect Privacy in Third Party Records*, 64 AM. U. L. REV. 195, 225–28 (2014)

juries means that citizens often have no role—and even more often have no meaningful role—in the prosecution of even the most serious of crimes.

What is more, even in the relatively rare instance in which a trial jury is invited to participate, things seem a bit backward. “The people” are thereby involved in the difficult historic decision of finding fact, and in the obviously legal skill of applying that fact to complicated law.¹¹¹ Yet when it comes to outcome—“Okay, take as given that defendant *Y* did *X*, what ought to happen now?”—a stage when the evidentiary rules relax such that most things come into play (e.g., defendant life experience),¹¹² and so a stage when the question is quintessentially *human*, we tend to entirely neglect the best representative of the people.¹¹³

A system of jury veto would allow a defendant the opportunity to meaningfully return “the people” to criminal justice.¹¹⁴ By offering the right to invoke such procedure—a procedure by which the invoking defendant could win or lose as that representative of the people sees fit, but subject to important system parameters—we could discipline prosecutorial threats and better democratize criminal sentencing. And we could do so without

(chronicling the incredible indictment success of federal prosecutors); Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319 (2012) (arguing for misdemeanor grand juries applying normative criteria given the lack of public participation in ordinary process).

111. See Josh Bowers, *Upside-Down Juries*, 111 NW. U. L. REV. 1655, 1657 (2017) (“I worry that we have lost track of which questions lay bodies are best equipped to consider and answer. Succinctly, they are particularly well suited to evaluate the moral (and even prudential) questions of when and whether it is equitably appropriate to arrest, charge, brand, and punish. They are comparatively worse at analyzing and applying formal legal tests.”).
112. See *Williams v. New York*, 337 U.S. 241, 246 (1949) (“[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.”).
113. Again, I set aside those few jurisdictions having jury sentencing. In the words of Morris Hoffman, “Apparently, jurors are necessary and trustworthy only at the two ends of the “importance” continuum—in civil cases where only money is at stake and in capital cases where a life is at stake. They are somehow unnecessary or untrustworthy in the vast middle, where only judges are trusted to impose prison sentences that can run from one day to a lifetime.” Hoffman, *supra* note 12, at 954.
114. And maybe a prosecutor as well. See *supra* Section III.A.

THE JURY VETO

having to invoke the procedure in the mine run of cases, without generally abandoning the increasingly “smart” sentencing of our data-enriched world, and without acting contrary to the ability of the legislature to generally set the parameters within which each criminal case will be decided. At least that’s how it would operate in any basically just system, meaning a system in which defendants are typically punished as the people would have them be. And in a basically-unjust system, well, we need a veto jury all the more.

While a jury veto is thus procedurally novel, it might be the best hope of returning the jury’s “circuit-breaking” ideal to our contemporary systems of criminal justice.