The Plea Jury

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This Article argues that it is time to reform the much-criticized plea-bargaining process by restoring the Sixth Amendment jury trial right back to criminal adjudication. My proposal would incorporate the local community into the guilty-plea procedure through the use of a plea jury, thus solving a multitude of problems within the criminal justice system. In a plea jury, a lay panel of citizens would listen to the defendant's allocution and determine the acceptability of the plea and sentence, reinvigorating the community's right to determine punishment for offenders. My goal is to return the Sixth Amendment community-jury right to its proper place by envisioning its integration into the guilty plea, based on recent Supreme Court decisions, punishment theory, criminal justice policy, and modern procedural concerns. In doing so, I will illustrate not only how a standard jury would be incorporated, but also why the critical norms embedded into jury participation will help improve the existing guilty-plea procedure.

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INTRODUCTION

It is time for revolution in the criminal justice system. The system as it now exists is in crisis.[1] For over thirty years, scholars, courts, defense attorneys, and prosecutors have been deeply troubled by the guilty-plea procedure, concerned about the sacrifice of rights and due process for cheap efficiency. Yet, with the exception of a few commentators,[2] the vast majority has been content to either merely critique the process or call for the guilty plea's abolishment—tactics that have resulted in little change. The guilty plea now disposes of approximately ninety-five percent of all criminal indictments[3]—a sign of its continuing popularity despite some considerable disquiet. Although many legal players seem to dislike the plea, few have taken on its reform.

With the advent of the Supreme Court's recent focus on the role of the jury, however, a way to break this impasse has finally arisen. In *Blakely v. Washington*,[4] the Supreme Court reaffirmed the Sixth Amendment criminal jury-trial right, relying on the jury's historical and constitutional origins as reasons why a criminal offender must have a jury determine all aspects of punishment.[5] The *Blakely* Court grounded its decision on the community's traditional role in determining an offender's moral blameworthiness.[6] Ultimately, *Blakely* underlined the jury's function as the lay public's representative and as the primary provider of community-based punishment.

Although the Court has focused its analysis on jury decision making in criminal trials, there is nothing in the line of cases stretching from *Apprendi v. New Jersey*[7] through *Blakely* suggesting that this type of community participation in criminal adjudication should be so limited. Although a technically formalist reading of *Blakely* might restrict the opinion to jury trials, a functionalist view of *Blakely*, applying its focus on community participation to all criminal procedures, nicely serves the opinion's underlying values.

Indeed, looking through the *Blakely* lens highlights how constitutionally subversive the use of guilty pleas can be, since the plea process entirely eliminates the community's role in criminal adjudication. Thus, changing the guilty-plea procedure to make it more trial-like in form—by including the jury—would be a way of restoring full constitutional rights to the most frequently used form of criminal adjudication, as

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1. *See* Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 360 (2005).

2. *See* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009); Russell Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237 (2008); Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 874–78 (2003); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005).

3. *See* Wright, *supra* note 2, at 90–91 (discussing the trends for federal guilty pleas).

4. 542 U.S. 296 (2004) (reaffirming a criminal offender's right to a jury's determination of facts which increase the maximum sentence).

5. *Id.*; *see also, e.g.*, United States v. Booker, 543 U.S. 220 (2005) (applying *Blakely* to the Federal Sentencing Guidelines, making the Guidelines advisory).

6. *Blakely*, 542 U.S. at 305–08.

7. 530 U.S. 466 (2000).

well as paying homage to the political theory implicit in the Sixth Amendment's jury trial guarantee.[8]

This issue is particularly salient because, in today's world, there are so few criminal trials and so many criminal guilty pleas. Logically, then, the next step would be to expand the Sixth Amendment community-jury function into the guilty-plea procedure. One way to do so would be through the use of a plea jury.

Incorporating the community into the guilty-plea process[9] through the use of a plea jury would serve a number of functions. First, the use of a plea jury would allow the community, as jury, to finally inject its voice back into the criminal procedure (the guilty plea) that disposes of the majority of criminal indictments. Using a plea jury would return the community to its longstanding, constitutional role as decider of guilt and imposer of punishment, while retaining the essential structure of the guilty plea.

Second, the introduction of a fresh, less-jaded element into the business of plea bargains, through the incorporation of the lay public, would provide renewed attention to the often-overlooked procedural rights of the defendant. Similarly, with the use of a plea jury, the factual basis of the plea would be likely to receive greater scrutiny, helping to more tightly link punishment with the actual crime committed. Additionally, involving the jury would transfer many aspects of the guilty plea away from its secretive, back-room status to the public light of day, reducing some of the disparity in prosecutorial power that currently exists in plea bargaining.

Additionally, the use of a plea jury in the standard guilty plea would apply the Court's recent reaffirmation of the jury's constitutional rights and powers to all forms of criminal adjudication. Considering that the primary tool of modern criminal justice has been the guilty plea, not the trial, the focus of the Court's new jury-centered jurisprudence on criminal trials only addresses a small amount of criminal adjudication.

The Court's recent concentration on the jury and the rights of the community applies to the guilty plea as well as to the criminal jury trial. The Court's reliance on the historical origins of the criminal's jury trial signifies a return to a more robust community right. But this community right has been almost completely excised from modern criminal process, the guilty-plea procedure being the most dramatic example.

It goes without saying that the function of the petit jury—to represent the community—is deeply entwined with our general understanding of legitimacy, democracy, and punishment. Unfortunately, however, the current configuration of the criminal guilty plea leaves no room for the community's voice. Guilty pleas, although indispensible to the smooth processing of criminal justice, have become hasty and rote, allowing little to no expression of the community's voice. Moreover, the chronic imbalance of prosecutorial power over the last thirty years has shrunk the roles of the

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8. 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 of the State and district wherein the crime shall have been committed . . . .").

9. Although the phrases "guilty plea," "plea agreement," and "plea bargain" may seem relatively interchangeable in this piece, they each have a specific meaning. "Guilty plea" means the entirety of the procedure, from the first meeting of defense counsel and prosecutor to and through the court proceeding. "Plea agreement" means the details of the bargain crafted by the two parties. And "plea bargain" means the specific discussions and deal making done by the prosecutor and defense counsel, before presentation to the trial court.

defendant, the defense attorney, and even the court to small ones that are easily pushed aside.[10]

Incorporating a plea jury into the guilty-plea process provides the solution to many of these problems. Although the Supreme Court has made clear that a defendant may waive her right to trial, this does not block community participation during a plea. The most difficult aspect of community participation is getting the lay public involved as the arbiters of punishment. To address this issue, I propose having the defendant allocute to a petit jury, instead of a trial court, during the plea process and allowing that same jury, with some limited judicial oversight, to accept or reject the plea.

With its enshrinement of the jury trial, the Sixth Amendment delineates perhaps the most important right in our criminal justice system—a right that has for too long been neglected. As a fundamental matter of democratic political theory, it is the people who should run the government, not the legal elite, and this extends to the criminal justice arena as well as the legislature and the executive. Although many scholars and academics focus on the roles of the judge and the prosecutor in the criminal law, the true constitutional role of the people has been sadly neglected.

My goal in this Article is to restore the community-jury right to the bulk of criminal adjudication by envisioning the community's integration into the guilty plea, theoretically as well as procedurally. In doing so, I will illustrate not only how a standard plea jury would be incorporated, but also why the critical norms embedded into jury participation could help improve existing guilty-plea procedure. In this way, I hope to build a bridge between standard punishment theory (based primarily on criminal trials) and everyday criminal practice, providing in the process a principled, theoretical account of guilty pleas.

Part I reviews the existing Supreme Court case law addressing the jury trial right and the guilty plea, and it explains why current criminal practice necessitates the expansion of the *Apprendi–Blakely* line to this aspect of criminal procedure. I also briefly discuss how a theory of expressive, restorative retribution best supports the original conception of the right to a jury trial and how this might translate into the philosophical underpinnings of a plea-jury procedure. As scholars have noted, the substantive values underlying many of our criminal procedures have been greatly undertheorized.[11] This Part will help provide the jurisprudence to support the plea-jury proposal.

Part II addresses the specific mechanics of integrating a jury into the guilty-plea process, including the proposed procedure, the size of the jury, the duration of service, the division of labor between judge and jury, and the somewhat changed roles of the prosecutor and the defense attorney. This Part also locates and differentiates this proposal within the wide array of guilty-plea scholarship, both pro and con.

Part III discusses the classical criminal-procedure values that are served by a plea jury, including voluntariness, real retributive values, articulation of the public interest, and the expressive power of allocution. By carefully exploring the values underlying the community's interaction with the justice system, I build the case for why the community, in the form of a jury, needs to be integrated into the guilty-plea procedure

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10. As Stephanos Bibas points out, "No government official in America has as much unreviewable power and discretion as the prosecutor." Bibas, *supra* note 2, at 960.

11. *See* Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 40 (2006).

and why a defendant's waiver of the trial right should not end the community's participation. Although the defendant may be able to waive his interest in having the community take part, this does not erase the community's role as a critical participant in the process. Finally, Part IV addresses some potential challenges in implementing a plea-jury system.

It is my hope that incorporating the community-jury right and its underlying jurisprudence into the practice of guilty pleas will not only reestablish the lost voice of the people, but actually create real change in our current criminal justice system. Restoring the community voice to its full volume, in the form of a plea jury, will not only permit us to follow the constitutional requirements of the Court, the Sixth Amendment, and Article III,[12] but also provide balance and new energy into the business of adjudicating criminal cases.

I. *BLAKELY*, PUNISHMENT & CONSTITUTIONAL COMMUNITY RIGHTS

A. Lessons of Blakely*, History, and Community*

In the *Apprendi-Blakely* line of cases, the Supreme Court reinvigorated the Sixth Amendment jury right, concentrating on the need for the community, as jury, to impose punishment. By focusing on this basic idea—that all aspects of a crime must be *determined by a jury* for a valid conviction—the Court "provided the basis for [its] . . . decisions interpreting modern criminal statutes and sentencing procedures."[13] The Court relied heavily on the historical role of the community as an arbiter of punishment to support its contention that only the jury could find facts that increased an offender's punishment.[14] Thus, the basis of the Court's new focus on the rights of the jury in criminal adjudication rested on the importance of the community's determination of punishment.

Over the past decade, the Court has continually stressed how critical the role of the community is to the fulfillment of the Sixth Amendment jury right. In *Jones v. United States*,[15] for example, the Court carefully explicated the rights of the jury as paramount to the proper functioning of our criminal justice system and based its reasoning, in part, on the history of the jury.[16] *Jones* framed the participation of the jury in criminal adjudication as one of constitutional importance,[17] thereby laying the groundwork for the Court's even stronger reliance on historical sources in its future criminal cases.

A year later, in *Apprendi v. New Jersey*,[18] the Court expanded on its vision of the jury's communitarian role. The "twelve of [the defendant's] equals and neighbours,"[19] part of the offender's local community, were described as "the great bulwark of [our]

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12. *See* U.S. CONST. art. III, § 2, para. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.").

13. United States v. Booker, 543 U.S. 220, 230 (2005).

14. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 476–85 (2000).

15. 526 U.S. 227 (1999).

16. *See id.* at 244, 248.

17. *Id.* at 240.

18. 530 U.S. 466 (2000).

19. *Id.* at 477 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)).

civil and political liberties."[20] In this way, the Court recognized the critical role of the local community's participation in criminal adjudication. If there were no community, the "great bulwark" could not exist. Justice Scalia's *Apprendi* concurrence further fleshed out this community-jury right, arguing that historically, the jury trial guarantee was a critical preservation of the community's rights.[21]

The Court's belief in the importance of the role of the community jury came to full fruition in *Blakely v. Washington*.[22] In holding that a court can sentence a defendant only on facts found by the jury beyond a reasonable doubt or admitted by the defendant,[23] the *Blakely* Court gave strong support to the idea that the community must have the final word on criminal punishment.[24]

In *Blakely*, the Court explained that the community's role in the jury trial was a key reservation of the community's power in the structuring of our government: "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, [a] jury trial is meant to ensure their control in the judiciary."[25] By relying on the jury's function as the public's representative and as the primary provider of community-based punishment, the *Blakely* Court endorsed a collective understanding of the jury trial right. Ultimately, *Blakely* contended that the liberal, democratic decision making vested in the jury's determination of blameworthiness relied on the community's role in linking punishment to the crime committed, so that the offender would feel more responsibility for her actions.[26]

The Court's focus on community participation in criminal adjudication was not limited to criminal trials, leaving open the possibility of integrating the community-jury right into guilty pleas. But to best find a way to apply the Court's concept of jury rights to the guilty plea, it is important to look at the theory supporting the *Apprendi–Blakely* line of cases. Accordingly, the next sub-Part briefly explores the jurisprudential currents animating this return to community power and how they might apply to the modern plea.

B. Finding a Theory to Fit: Expressive, Restorative Retribution

The community right to determine an offender's punishment, as championed by the Court, is closely intertwined with a philosophy of expressive, restorative retribution. I have argued elsewhere that a framework of expressive, restorative retribution encompasses both the historical antecedents of the Sixth Amendment jury right and modern ideals of punishment.[27] This is because community determination of

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20. *Id.* (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41(4th ed. 1873)).

21. *Id.* at 499 (Scalia, J., concurring).

22. 542 U.S. 296 (2004).

23. *See id.* at 313.

24. *Id.* at 305–08, 313.

25. *Id.* at 306.

26. *See id.* at 309.

27. *See* Laura I Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307 (2007).

punishment is one major way that the lay public's voice can be incorporated into our current criminal justice system.[28]

From the beginning of the American colonial experiment, the community right to a public trial was deeply intertwined with a combined retributive and restorative understanding of punishment.[29] This was a philosophy closely tied to the sovereign will of the people, the community's traditional role in determining moral blameworthiness, the importance of popular authority, the public right to trial, and the community's willingness to forgive wrongdoers and eventually restore their rights.[30] The use of expressive, restorative retribution was inexorably tied to the community's right to determine punishment for wrongdoers.

But how do we translate that community-jury-trial right, and its underlying philosophy of expressive, restorative retribution, into the current criminal justice system? Unquestionably, we now live in a world of guilty pleas. And this world of guilty pleas is an unregulated one, devoid of much due process and lacking a credible theory of punishment. Although various guilty-plea theories have been offered—a contractual view, a motive theory, a crime-control theory, a social cohesion theory—none has truly worked on both a practical and a philosophical level.[31] As Ron Wright contends, "We need an alternate theory of guilty pleas, one that transcends the hidden intentions and grudgingly spoken words of defendants and the contradictory incentives at work on prosecutors in particular cases."[32]

The consistent use of a plea jury, supported by an underlying framework of expressive, restorative retribution, would meet this need for an alternate theory of guilty pleas. Thus my vision of the plea-jury process would operate on two levels: one theoretical and one practical.

On the theoretical side, the incorporation of the community into the primary organ of criminal adjudication and sentencing permits all three aspects of expressive, restorative retribution to function. First, although the full expressive aspects of a trial do not occur with the plea jury, there is still the offender's expiation of his crimes to a segment of the public. With use of the plea jury, the plea is no longer enacted only before a limited audience of the judge, the prosecutor, and the defendant. Second, requiring a plea jury to decide whether the offender's allocution is truthful and whether the sentence is appropriate satisfies the basic requirements of retributive justice, as it permits the injured community to impose punishment on its offenders. Finally, restorative justice also plays its part in the plea-jury process, since the participation of the lay public not only allows the community to impose punishment, but also allows the demonstration of mercy and forgiveness. If the community sees that the offender is truly remorseful for his actions, then it is more likely to accept a shorter sentence, as well as be more supportive of the offender's reintegration into the community after release from incarceration.

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28. *See id.* at 1337–38.

29. *See generally* Laura I Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397 (2009).

30. *See id.*

31. Wright, *supra* note 2, at 96–98.

32. *Id.* at 96. Wright argues for a mid-level theory of plea bargaining that evaluates plea bargaining as an artifact of a particular criminal justice system, with different features depending on different practices. *Id.* at 99–100.

Each value of expressive, restorative retribution can be found in the workings of the plea jury. Below, I trace the contours of each theoretical aspect as it would operate in a guilty plea.

1. Expressive Values and Social Norms

The power of expressive values in the criminal law cannot be understated. Scholars have argued that criminal law, as a whole, should track social norms to be effective.[33] The theory of expressive law goes further, contending that law and legal process have a strong effect on individual behavior through their power to affect the social, normative meaning of that behavior.[34] According to expressive theory, "the expression of social values is an important function of the courts or, possibly, the most important function of the courts."[35]

The nexus between law, norms, and social meaning is also important to expressive law.[36] This is particularly true when considering the impact that law and its procedures may have on mediating or influencing the social meaning of an activity,[37] such as belonging to a community.

If law and legal procedures do not merely dictate what people and institutions are permitted to do, and if they are also a part of the culture that helps form prevailing values and understandings,[38] then the participation of the community in criminal punishment and sentencing helps express the people's beliefs and values about the wrongdoer, the crime, and the injury to society. The expressive aspect of the community's decision is particularly apparent in the guilt phase of the jury trial, since the guilt phase itself is also both public and communal.

Following *Blakely*, the Court's interest in and dedication to the community's right to determine punishment can be seen as an expressive approach to the rights and needs of the community. The Court has relied upon the "citizenry's moral representative"[39]—the jury—to generally express the community's condemnation of the criminal act and reestablish the victim's unfairly reduced value. The decisions of the jury help publicize consensus about desirable behavior for the community.[40] Moreover, jury decisions provide an instrument for the changing social norms within a community by

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33. *See generally* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995) (suggesting tension between the legal code in America and folk intuitions concerning criminal culpability and the proportionality of punishment).

34. *See* Alex Geisinger & Michael Ashley Stein, *A Theory of Expressive International Law*, 60 VAND. L. REV. 77, 81 (2007).

35. Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 586 (1998).

36. *See* Geisinger & Stein, *supra* note 34, at 84.

37. *See id.*

38. *See* David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After* Kelo, 101 NW. U. L. REV. 365, 378 (2007).

39. Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1694 (1992).

40. *See* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 400–01 (1997) (explaining how legal decisions clearly convey social norms to the public).

extrinsically expressing commitment to socially positive behavior and beliefs about what is punishment worthy.[41]

Now that the jury trial has almost been eliminated from criminal adjudication, much of the expressive value of community punishment has been lost. To truly invest the community in criminal adjudication, to truly reinvigorate one of the primary reasons for punishing wrongdoers, the community must be integrated back into the process through the plea jury. Otherwise, by ignoring the expressive dimension of punishment—as guilty pleas currently do—we risk bypassing community beliefs about crime and punishment. Doing so threatens the democratic legitimacy and political salience of the regime.[42] To work properly, legal expression, such as criminal punishment, must enlist and utilize the natural sense of justice among citizens.[43] In criminal adjudication, this means directly involving the community.

2. Retributive Justice

Historically, the community always determined the blameworthiness of the offender.[44] The Court's recent line of cases endorsing the right to jury decision making is equally an endorsement of the community's determination of blameworthiness. Thus, retributive justice principles can be found in the Court's rediscovery and reaffirmation of the right of the jury to set out all criminal punishment, in all of its forms.

As a community, when we punish an offender who knows or should have known her actions were illegal, we are letting the offender know that her deeds matter—that she has affected not just the victim, but the network of shared laws that makes a community of us all. Accordingly, when the jury determines punishment, the wrongdoer has more difficulty avoiding the burden of criminal responsibility because her fellow citizens, her community, and her peers have judged her blameworthiness. Because criminal laws in liberal democracies reflect a democratic pedigree, crimes can be seen as expressions of superiority to the state and the community. By involving the will of the people through the incorporation of a jury, the plea-jury procedure helps offset the unfairness the offender created in the community.

A framework of retributive justice cannot function without some involvement from the public. Its very legitimacy is threatened without the actual imposition of punishment from the community. Markus Dubber observed, "The diminution of lay participation in the United States . . . and elsewhere reflects the gradual but continuous disappearance of concern for the legitimacy of state punishment."[45] This understanding of retributive justice ties neatly into the Court's repeated arguments, in its recent decisions, that the jury must make the decisions on almost all facts that affect punishment. Only a decision made by a fair cross section of the community imposes onto the offender the responsibility of accepting moral blame.

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41. *See, e.g.*, Cooter, *supra* note 35, at 607 (concluding that by expressing commitments to certain principles, laws provide instruments through which social norms may change).

42. *See* William DeFord, *The Dilemma of Expressive Punishment*, 76 U. COLO. L. REV. 843, 845 (2006).

43. *See* Cooter, *supra* note 35, at 596.

44. *See generally* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2003).

45. Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 602 (1997).

3. Restoring the Offender

Restorative justice also has a strong role to play when the community is involved with crime and punishment. Formally, restorative justice emphasizes restitution and rehabilitation, requiring that everyone affected by the crime (the victim, the defendant, and the relevant community) participate in determining the offender's punishment.[46] Most supporters of restorative justice understand it to include a set of moral and substantive principles, including responsibility, remorse, atonement, making amends, moral learning, forgiveness, and reconciliation.[47] These principles, however, also include restoring the offender to the community, by reintegrating the offender after her punishment, and providing compensation to victims through financial restitution, apologies, and other various types of reparations, both symbolic and real.[48]

Restoring the offender to the community is an important theoretical foundation of the plea jury, because when an offender commits wrongdoing, he or she injures the community. By passing judgment on the offender—by determining both the offender's crime and deciding on the punishment—the community can return itself to where it was before the crime was committed.[49] Thus, the community's role in the plea-jury process helps even the imbalance created by the offender's crime.

Reestablishing fairness and equalizing the community are both important components of restorative justice, and both principles also play a part in the community's role as the arbiter of punishment. Restorative justice defines crime as "a violation of people and relationships that creates obligations to make things right."[50] The restorative theory of punishment conceptualizes justice as a process that incorporates both the community and the offender in an attempt to repair and reconcile the harm done.[51]

When a lay jury, whether a petit jury or a plea jury, helps determine the crime and punishment, the wrongdoer has more difficulty avoiding the burden of criminal responsibility, because his fellow citizens, his community, and his peers have judged his blameworthiness. It thus makes sense that the plea jury should have some hand in imposing sanctions and moral blame upon the wrongdoer. At its most basic level, the plea jury injects an egalitarian cross section of that very same cultural and actual community into the guilty-plea process—a process that has thus far entirely lacked community input.

The plea jury, however, works for more practical and procedural reasons as well. In the next Part, I describe how such a procedure would work, along with the functional benefits that would accrue with its use.

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46. *See* Lanni, *supra* note 1, at 375.

47. *See id.* at 376.

48. *See id*. In the United States, restorative justice has been primarily used by drug courts. *Id.*

49. *See* Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1694 (1992).

50. David Dolinko, *The Theory and Jurisprudence of Restorative Justice*, 2003 UTAH L. REV. 319, 319 (2003) (internal quotation marks omitted).

51. *See id.* at 319−20.

II. THEORY INTO PRACTICE: IMPLEMENTING THE JURY INTO THE GUILTY PLEA

Incorporating the community into the criminal justice system, using a framework of expressive, restorative retribution, is easy to discuss in theory but much more challenging in practice. Courts and scholars alike have devoted much time and many pages to the constitutional procedures inherent in trials. With our heavy use of guilty pleas, however, it is important that substantive, theoretical values are integrated into the actual processes of the criminal system. As Nancy King notes, these nontrial rights have assumed much greater importance as "trial substitutes."[52]

Additionally, following the political theory inherent in the animating principles of both the Sixth Amendment and *Blakely* requires that the community have its voice heard during criminal adjudication. Therefore, including the community's imprint, both substantively and procedurally, into any widespread criminal process is critical to ensure that the criminal justice system remains balanced and fair.

If integrated into the procedure of the guilty plea, the jury's position as the community representative functions in a number of roles, both theoretical and practical. Although the idea of a plea jury or a plea panel has been briefly discussed by other scholars,[53] it has never been fully explored, either procedurally or substantively. Below I take a serious look at the possibility of implementing a plea jury into modern criminal procedure and review the benefits and drawbacks.

A. The Guilty Plea in the Courts of Opinion

Guilty pleas have colonized the criminal justice system. With ninety to ninety-five percent of all convictions resolved by a guilty plea,[54] what was once an infrequent disposition has become the norm.[55] As scholars have exhaustively discussed, however, the change from criminal trial to criminal plea has not been accompanied by an equal

52. Nancy J. King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 116 (1999).

53. *See, e.g.*, Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 141, 144 (2004) (suggesting that plea and sentencing juries could assess defendants' remorse and apologies); Mazzone, *supra* note 2, at 874–78 (briefly proposing the inclusion of citizen panels in guilty pleas to help to protect the public values underlying criminal constitutional rights).

54. *See* Wright, *supra* note 2, at 90–91.

55. *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 30 (2002).

shift in either constitutional protections[56] or punishment theory.[57] As Bill Stuntz has astutely noted, "criminal settlements do not efficiently internalize the law."[58]

In short, guilty pleas have become largely unregulated and have been implemented with a focus on efficiency and disparity rather than any particular theory of criminal punishment. Among other problems, this has given short shrift to the Sixth Amendment jury trial right.[59] In John Langbein's terminology, we have come to rely on a system of "condemnation without adjudication."[60] The practical landscape of the current criminal justice system, engrossed as it is in pleas, leaves no room for the recently reinvigorated theoretical importance of the jury trial right. Currently, the Court's *Blakely* jurisprudence has found only a limited toehold in the practical workings of the justice system. My plea-jury proposal, however, expands that space.

Legal response to the current realm of guilty pleas has been varied. On the whole, prosecutors, defense attorneys, and courts have been relatively accepting of this dramatic procedural shift.[61] Plea bargaining is supported by the belief that "any harm to the public or to third parties from the enforcement of plea bargains is outweighed by the benefits of enforcement."[62]

Scholars have been more varied in their reaction. Some have argued for either resigned or cheerful acceptance,[63] contending both that such a process is inevitable and that plea bargaining has triumphed.[64] Another set of scholars has demanded that the

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56. As John Langbein trenchantly notes, our shift from criminal trials to guilty pleas means that there is an "astonishing discrepancy between what the constitutional texts promise and what the criminal justice system delivers," making "our guarantee of routine criminal jury trial . . . a fraud." John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119, 120 (1992).

57. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2468 (2004) (describing how plea bargains and guilty pleas rely on sentencing factors such as wealth, sex, age, education, and intelligence rather than any traditional theories of criminal punishment).

58. William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2548 (2004) (emphasis omitted).

59. For further arguments on how the guilty plea undercuts the Sixth Amendment, see Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 932 (1983); Langbein, *supra* note 56, at 120.

60. John Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 204 (1978).

61. *See* GEORGE FISCHER, PLEA BARGAINING'S TRIUMPH 16 (2003). Fischer particularly notes that for the prosecutor and judge, not only did the plea bargain alleviate crushing workloads, but it also spared them both the risk of loss and the potential humiliation of defeat. *See id.*

62. King, *supra* note 52, at 116.

63. *See, e.g.*, Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1123 (1998) (arguing for a "clear plea-bargaining theory" to be adopted in light of the guilty plea's overwhelming use).

64. *See* FISCHER, *supra* note 61, at 1. Fischer argues that "plea bargaining has so fast a grip on the mechanism of justice that antagonistic institutions cannot survive." *Id.* at 3. Fischer also convincingly contends that plea bargaining has insinuated itself into almost every aspect of the criminal justice system, resulting in a constant inducement of defendants to plead guilty. *Id.* at 162–64; *see also* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1120 (2008) (arguing that even for innocent defendants facing charges, plea bargaining may be the

guilty plea be abolished entirely, calling for more trials in its stead.[65] A third group has tried to set a middle course, calling for more supervision of guilty pleas in the form of judicial oversight, prosecutorial screening, rewards for good prosecutorial behavior,[66] better enforcement of the Federal Rules of Criminal Procedure,[67] and the like.[68]

As Michael O'Hear has argued, once we accept the middle ground on guilty pleas—that as imperfect as they are, they are here to stay—it is critical to develop "a more complicated normative framework that is capable of endorsing some plea deals while disapproving of others."[69] That normative framework must acknowledge what has been lost by the move from the trial to the guilty plea, despite the gains in efficiency and cost.[70] Although there have been a few "middle course" proposals that recognize this truth, many do not. My plea-jury proposal meets such a challenge head-on.

None of the middle-course, guilty-plea modification proposals have proposed the incorporation of the jury into the plea process. The reason seems obvious: how can there be a jury if the defendant has waived that right? But looking at the inclusion of the jury as solely the right of the defendant is a mistake. The jury has long been the primary way that the community plays its part in criminal decision making, something clearly marked out for the people in both Article III and the Sixth Amendment.[71] Because the sanctions applied in the criminal justice system can be so severe, the Framers expected the community, in the role of the jury, to prevent abuses of state power.[72]

"manifestly least-bad option"); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 289 (1983) (describing plea bargaining as part of a "well-functioning market system" of criminal procedure); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992) (using contract theory to argue for increased regulation, rather than abolition, of the plea bargain).

65. *See generally* Alschuler, *supra* note 59; Langbein, *supra* note 56; Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984); Steven J. Shulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1979 (1992) [hereinafter Schulhofer, *Plea Bargaining as Disaster*].

66. *See* Tracy L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995).

67. *See* Dubber, *supra* note 45, at 599 (arguing that improving judicial supervision of plea bargaining lies in the use of the Federal Rules of Criminal Procedure, among other things).

68. *See, e.g.*, King, *supra* note 52, at 136 (supporting trial judge's ability to reject pleas and dismissals and calling for greater exercise of that power); Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 200 (2006) (making the case for increased judicial involvement in guilty pleas to improve accuracy); Wright & Miller, *supra* note 55 (pointing to structured prosecutorial screening as the principal alternative to plea bargains).

69. Michael M. O'Hear, *What's Good About Trials?*, 156 U. PA. L. REV. PENNUMBRA 209, 209 (2007), http://www.pennumbra.com/responses/11-2007/OHear.pdf. O'Hear explains that such a normative framework must discuss not only the innocent but also the guilty defendants, including their sentencing reductions, the role of victims, and which procedural rights they are allowed to surrender. *Id.* at 211.

70. *See id.* at 210.

71. I have previously argued that the right to a criminal jury trial originally belonged to the community; the defendant's right to a jury trial only came much later. *See* Appleman, *supra* note 27.

72. *See* Langbein, *supra* note 56, at 123–24.

As I discussed in Part I, this understanding of community involvement in criminal adjudication has been recently underlined by the Supreme Court, which has placed great emphasis on the Sixth Amendment's jury right to determine punishment. The Court's focus, however, has been almost entirely on the mechanics of the jury trial, despite the trial's declining use determining the nation's criminal punishment.

So this raises an interesting question. If the collective right of the community to determine punishment rises to a constitutional level—or even if it doesn't—does the defendant's waiver of "his" jury trial right in favor of a guilty plea eliminate the role of the jury? Logically, the answer seems to be "no." If, as the Supreme Court seems to imply, the community has a right to determine an offender's punishment, then it follows that the *community's* right cannot be waived by the defendant. In other words, the defendant does not have the ability to waive the collective right, only his own.[73] Accordingly, if the collective jury right is distinguished from the defendant's, then we must address how to integrate the community-jury right into all forms of criminal adjudication.

B. Community Rights and the Guilty Plea

Although twentieth-century courts, until quite recently, have assigned the jury trial right almost exclusively to defendants,[74] there is no reason why the rights of the people could not have more of a role in modern criminal procedure. In fact, in another facet of the right to a jury trial we do that very thing. I am referring, of course, to *Batson v. Kentucky*[75] and its progeny, which holds that a juror has a right not to be excluded from a petit jury based on race, ethnicity, or gender.

Recent peremptory-challenge law has focused on the juror's right to serve on a jury, and this right was recently reaffirmed by the Supreme Court in both *Johnson v. California*[76] and *Miller-El v. Dretke*.[77] Likewise, much of the scholarly literature on peremptory challenges has argued for a greater role for the people in selecting a jury, while still balancing the right of the defendant to eliminate jurors.[78] So why not use this balancing model for the jury trial right itself?

Dividing the right to a criminal jury trial between the community and the accused would serve a variety of purposes. First, restoring some measure of the jury trial right to the local community would comport with the original understanding of the procedure, both as practiced in the eighteenth century and as formalized in the Bill of Rights. If the Supreme Court is now basing some of its criminal jurisprudence on the historical practices of the jury trial, focusing on the rights of the community, then the original meaning of the jury trial right has renewed import.

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73. As Nancy King points out, the procedural rights remaining in the guilty-plea process "may serve a variety of social or public goals that will not always coincide with the preferences of defense and prosecution." King, *supra* note 52, at 132.

74. *See* United States v. Patton, 281 U.S. 276 (1930) (assigning jury trial right to defendant).

75. 476 U.S. 79 (1986).

76. 543 U.S. 499 (2005).

77. 545 U.S. 231 (2005).

78. The right to a peremptory challenge is not a constitutional right, however. *See, e.g.*, Ross v. Oklahoma, 487 U.S. 81, 88 (1988).

The best example for how to share such a right comes from another aspect of criminal procedure: the peremptory challenge. The body of case law surrounding peremptory challenges initially addressed the prosecution's illegal dismissal of jurors due to race or ethnicity, but it gradually grew to include the illegal dismissal of jurors by either the defense or the prosecution, based on the right of the juror herself to serve. It is this kind of division of jury rights, based on the rights of the community itself, that I propose to apply to the guilty plea.

In 1986, the Supreme Court abandoned its previous requirement, as promulgated in *Swain v. Alabama*,[79] that to prove juror discrimination, there must be broad historical evidence of racial discrimination in the exercise of peremptory challenges.[80] The Court in *Batson v. Kentucky* held both that a defendant could overcome the presumption that peremptory challenges were made legitimately through a three-step process and that the Equal Protection Clause prohibited peremptory strikes based solely on race.[81]

Over the following decades, as the Court developed its case law on peremptory challenges, its original holding expanded significantly. The discrimination initially forbidden by *Batson*—instructing prosecutors they could no longer strike jurors of the same race as the defendant—was extended to include peremptory challenges of jurors of a different race than the defendant.[82] In *Powers v. Ohio*,[83] the Court eliminated the requirement that the excluded juror be of the same cognizable racial group as the complaining criminal defendant.[84] That same year, in *Edmonson v. Leesville Concrete Co*.,[85] the Court extended *Batson* to include the discriminatory exercise of peremptory challenges in civil actions between private litigants.[86] A year later, in *Georgia v. McCollum*,[87] third-party standing to raise improper exclusion of potential jurors based on race was extended to the prosecution.[88] Additionally, the Court held in *J.E.B. v. Alabama*[89] that the Equal Protection Clause bars discrimination in jury selection on the basis of gender.[90]

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79. 380 U.S. 202 (1965).

80. *See id.* at 227.

81. Batson v. Kentucky, 476 U.S. 79, 96–98 (1986).

82. Elaine E. Carlson, Batson, J.E.B., *and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 958–59 (1994).

83. 499 U.S. 400 (1991).

84. *Id.* at 409–10. A defendant may make a *Batson* complaint for the discriminatory striking of members of any cognizable racial group, including whites. *Id*. *Powers* held that the criminal defendant has third-party standing to raise an equal protection claim chiefly on behalf of an excluded juror. *Id*. at 415.

85. 500 U.S. 614 (1991). Although the Equal Protection Clause requires state action for it to apply, the Court found that state action occurs in the jury-selection process because the peremptory challenges by the private litigant are facilitated by the court's "overt, significant assistance." *Id.* at 622–24.

86. *Id.* at 616.

87. 505 U.S. 42 (1992).

88. *Id.* at 55–56. In reaching this holding, the Court concluded that the discriminatory use of the peremptory challenge by the defendant constituted state action because the state is the "logical and proper party" to protect the constitutional rights of jurors. *Id*. at 56.

89. 511 U.S. 127 (1994).

90. *Id.* at 129.

The Court recently heard two more *Batson* cases, illustrating its continued interest in the procedure and in its division of rights between the defendant and the community.[91] In *Miller-El v. Dretke*,[92] the Court found, in a 6–3 decision, that Miller-El was entitled to a new trial due to discriminatory strikes by the prosecutor during jury selection.[93]

The same day it issued *Miller-El*, the Court also issued *Johnson v. California*,[94] which gave a ringing endorsement to the community's jury trial right:

> The constitutional interests *Batson* sought to vindicate are not limited to the rights possessed by the defendant on trial, nor to those citizens who desire to participate "in the administration of the law, as jurors." . . . [T]he "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror *to touch the entire community*."[95]

In *Johnson*, as in its previous *Batson* cases such as *J.E.B.*, the Supreme Court held that discrimination in jury selection impacts not only the litigants and the individual jurors who have been subject to peremptory challenges, but communities as well.[96] As the lower courts have understood it, "[j]ury service—a privilege and duty of citizenship—is . . . a fundamental means of participating in government."[97]

For one facet of criminal adjudication, then, the Court has held that the public has a right to serve on the jury. As the Court noted in *Powers*: "Although '[a]n individual juror does not have a right to sit on any particular petit jury . . . he or she does possess the right not to be excluded from one on account of race.'" [98]

By ensuring that no juror is struck for constitutionally impermissible reasons, the *Batson* procedure allows the community's interests to manifest in criminal jury selection. As the Court concluded, when a juror is illegally stricken under *Batson*, harm is done not only to the defendant, but also to the individual juror and the community at large.[99] These two competing visions of the jury right underlie the entire body of law regarding peremptory challenges.[100]

Of course, the community's right to serve on a jury must be weighed against the defendant's right to an impartial jury. The *Batson* procedure manages to simultaneously balance both rights. Similarly, the guilty-plea process can emulate this

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91. The Supreme Court continues to evince interest in the constitutional aspects of jury selection; *Berghuis v. Smith*, 130 S. Ct. 48 (2009), which was granted certiorari on September 30, 2009, will clarify the test on whether a jury selected to try a criminal case must actually be drawn from a fair cross section of the community, a constitutional requirement.

92. 545 U.S. 231 (2005) (holding that voir dire where prosecutors used discriminatory practices and "jury shuffle" to strike 91% of black jurors violated Fourteenth Amendment).

93. *Id.* at 266.

94. Johnson v. California, 545 U.S. 162 (2005).

95. *Id.* at 171–72 (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1880); Batson v. Kentucky, 476 U.S. 79, 87 (1986)) (citations omitted) (emphasis added).

96. *Id.*

97. New York v. Allen, 653 N.E.2d 1173, 1177 (N.Y. 1995) (citations omitted).

98. *Id*.

99. *Batson*, 476 U.S. at 87.

100. *See* Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1046 (1995).

balancing act by utilizing a plea jury. Like the *Batson* procedure, the procedure of the plea jury strikes a middle ground between two competing interests: the efficiency of the guilty plea versus community involvement in criminal adjudication.

There are a couple of ways in which the local community, through the use of the plea jury, could be directly involved in the guilty plea. These procedures, which I will describe in the next sub-Part, are supported both practically and through the use of expressive, restorative retributive theory. Expressive, restorative retribution, as filtered through twenty-first-century mores, not only permits the community a true opportunity to exercise their jury trial right, it also forces offenders to take more responsibility for their wrongdoings, since the community is involved in the imposition of punishment and restoring the balance disturbed by the offender's bad acts. This type of community involvement restores a much-needed step, one that has long been missing from our criminal adjudication.

C. The Plea Jury: Process and Policy

At first glance, applying a collective-jury right to the procedure of a guilty plea seems counterintuitive. After all, the whole point of a guilty plea is to *eliminate* the jury aspect of the trial. But upon further inspection, incorporating the jury into the mechanics of the guilty plea is a positive for both the community and the substantive values underlying our criminal justice system. Before we explore the *why* of the plea jury, however, we should first look at *how* the plea jury would perform.

The modern guilty plea consists of several stages. First is the charging decision, a decision that is generally left almost entirely to the prosecutor's control and discretion.[101] Sometimes even before the grand jury returns the indictment, the prosecutor and defense counsel have a preliminary meeting to discuss possible plea deals for the charged or potentially charged crimes.[102]

Usually, defense counsel will then meet with her client and advise him of a variety of matters, including his right to accept or reject a proposed plea bargain, the merits or demerits of the facts and the law, any plea offers made by the prosecutor, the consequences of accepting these offers, the range of the sentence if found guilty after trial, the necessary allocutions to be made to the court, and what, if any, fundamental rights will need to be waived.[103] Upon discussion with the client, defense counsel returns to the prosecutor[104] and either a deal is struck or bargaining continues until an agreement has been negotiated.[105]

Plea deals, however, are not merely simple negotiations of guilt, acceptance, and sentence length. Today's guilty pleas often involve haggling over such provisions as: dismissing or reducing a charge against a third person; limiting the factual proffer or

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101. G. NICHOLAS HERMAN, PLEA BARGAINING 26 (2d ed. 2004). At the screening phase, prosecutors tend to "err on the side of charging." Bowers, *supra* note 64, at 1126.

102. HERMAN, *supra* note 101, at 62, 78.

103. *Id.* at 62–63. Granted, some plea deals are struck without defense counsel ever truly consulting the client, but I am charting how guilty pleas should be made, without reference to the shortcuts sometimes made in the heat of the moment.

104. Contrary to many *Law & Order* plotlines, a client is rarely present for the plea negotiations between the prosecutor and defense counsel. *Id.* at 79.

105. *See id.* at 77–96.

fact-stipulation; a defendant's cooperation or testimony against another party; a defendant's agreement to leave the jurisdiction; stipulating to testimony in another case; waiver of civil liability; and charge-bargaining.[106] All of this complex bargaining, along with the resolution of matters normally decided within a more public and formal legal sphere, is now determined in the private meetings of the prosecutor and defense counsel. Thus, the plea jury's participation is all the more important in the next step.

Once the plea bargain has been struck, it must be brought before the court to be finalized and approved.[107] In most plea agreements, the court has the ultimate power to accept or reject the plea agreement, which includes the imposition of sentence.[108] Thus, for a guilty plea to be accepted by the court, all three players must come before the court so the defendant can "take" his plea in front of the judge. Before the defendant can plead guilty, the court must advise him of all of his rights,[109] and it must also explore the factual basis for the plea during the defendant's allocution. This is where the plea jury would come into play.

In the standard guilty plea, a defendant allocutes to the particulars of his crime(s) before the court.[110] Formally, this is the time when the court determines whether the defendant's conduct was intentional and actually constituted the charged offense, as well as whether the plea is knowing and voluntary.[111] This is where the plea jury would come in. My plea-jury proposal is relatively straightforward. The defendant would directly give his plea to a special guilty-plea jury, under the supervision of the court. The guilty-plea jury would then make a three-part determination: (1) whether the facts stated fit the alleged crimes; (2) whether the plea was knowing and voluntary; (3) and whether the proposed sentence was appropriate.

To incorporate this plea jury more smoothly into the vast, bureaucratic machinery of guilty pleas, the jury would function as a cross between a grand jury and a petit jury.[112] Like a grand jury, it would serve more than once, for at least a month at a time. Like a petit jury, it would probably consist of twelve or fewer people. Like a grand jury, it would be comprised of people randomly selected from the community, with no peremptory or for-cause challenges to shape its ranks. Like the petit jury, it would focus primarily on the facts of the charged offenses, although in this case, the plea jury would also help determine whether the suggested punishment—both charge and sentence—was acceptable.

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106. *See id.* at 93–94.

107. *See* Div. for Pub. Educ., Am. Bar Ass'n, Steps in a Trial: Plea Bargaining, http://www.abanet.org/publiced/courts/pleabargaining.html.

108. HERMAN, *supra* note 101, at 96. "Under . . . the Federal Rules of Criminal Procedure and rules of some state jurisdictions, a judge is expressly prohibited from participating in plea discussions." *Id.* Although some states, like Vermont, allow participation after counsel have reached an agreement. *Id.* at 96 n.31.

109. *Id.* at 11–12. These rights include the right to a jury trial, to assistance of counsel at trial, to confront and cross-examine witnesses, and the right against self-incrimination. *Id.*

110. *See, e.g.*, U.S. ATTORNEYS' MANUAL, TITLE 9: CRIMINAL RESOURCE MANUAL § 623, *available* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00623.htm.

111. *See, e.g.*, *id.*

112. For a detailed look on how the grand jury functions as a populist, community body, and a defense of its discretion, see Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703 (2008).

There would, however, be two important procedural differences between the plea jury and the petit jury and grand jury functions. First, with the plea jury, the watchful eye of the court would always be a buffer between any irrational or patently unfair jury decisions rejecting a proffered plea, on either charging or sentencing grounds. In other words, the trial court could, with proper discretion, reject or overturn a plea jury's decision on a plea deal if the court determined the decision was unreasonable. Although I envision this discretionary oversight being used infrequently, the possibility of a safety valve in the process would protect against common concerns about the jury, such as bias or ignorance, and it would be similar to the court's discretion over a criminal jury's "irrational" guilty verdict. Second, with the plea jury, unlike with most criminal petit juries, there would be no requirement for unanimity. Instead, a majority vote would suffice.[113]

A crucial part of the plea jury's role would be its part in listening to the defendant's allocution. Instead of pleading guilty and explaining his offenses solely to the judge, the defendant would direct his plea and allocution to the plea jury. The jury would then determine whether the facts admitted by the defendant match the original charges; whether the plea was knowing, willing, and voluntary; and whether the proffered sentence was appropriate. Although the court would still need to first advise the defendant about the nature of his offense, the range of statutory penalties, and the like, the defendant's actual allocution would be addressed to the plea jury.

If the plea jury were to reject one or more aspects of the defendant's proposed plea, whether for reasons of involuntariness, lack of knowledge, lack of belief in the factual proffer, or unhappiness over the proposed punishment, then the defendant would have several options. First, the defendant could back out of the plea deal entirely and take his chances with a trial. Alternatively, the judge could grant a continuance, and during that time the prosecutor and defense counsel could fashion a different plea deal, responding to the concerns of the plea jury. Finally, if the problem was a matter of sentencing, the plea jury could recommend an appropriate sentence for the crime committed, the final sentence to be refined and imposed by the court.[114]

In cases where the prosecution and defense counsel object that the plea jury's rejection of the proposed plea or sentence was unfair or biased, the presiding judge or magistrate could make a ruling determining the propriety of the plea jury's decision. If the decision violated any legal or ethical standard, the plea jury's conclusion could be overruled. Because the jury's conclusion would not be a formal verdict, the court's override would not violate any constitutional roles. Normally, however, the plea jury's decision would stand, whether favorable or unfavorable to the fate of the proposed plea agreement.

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113. Both Oregon and Louisiana permit nonunanimous jury decisions in criminal trials. Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972). A request to reconsider Oregon's nonunanimous jury decision rule, however, was filed with the Supreme Court in September 2009. Bowen v. Oregon, No. 08-1117, 2009 WL 602020 (U.S. Oct. 5, 2009).

114. In the federal system, the defendant's guilty plea and the court's imposition of sentence are usually two separate procedures. Therefore, it would be important to have the same plea jury convened for both the guilty plea and the sentencing hearing. This might mean that federal plea juries are called for a longer period, possibly two or three months, similar to the service of grand juries.

Although the inclusion of a lay jury into a traditionally bureaucratic, administrative-like proceeding such as a guilty plea may seem, at first glance, surprising or quixotic, incorporating a panel of community members into this important criminal adjudication has many benefits. In Part III, I explain the substantive legal and theoretical values that are strengthened and improved by this integration of the public into the private workings of the criminal justice system.

III. THE JURY PLEA AND CLASSIC CRIMINAL PROCEDURE VALUES

It is no secret that our system of guilty pleas shortcuts many classic substantive and procedural values, ones taken for granted in criminal justice. The principles that justify our imposition of punishment in public jury trials rapidly disintegrate in the informal, private realm of plea agreements. This difference between "promise and performance, between text and reality,"[115] is particularly acute with guilty pleas because of the vast distance between the rights elaborated in the Sixth Amendment and the workings of the guilty-plea process.

Meaningful lay participation, in the form of a plea jury, would shrink the current distance between the criminal law's "legitimizing promise and [the] systemic reality"[116] of guilty pleas. Moreover, the plea jury would inject some genuine adjudication into our system of plea bargains, something that is badly needed,[117] as I have illustrated in Part II.

A. Voluntariness

One important way in which the plea jury would help bridge this gap is in helping determine the voluntariness of the defendant's guilty plea. Although courts technically supervise the voluntariness of guilty pleas,[118] the reality is quite different. First, as scholars have argued, a prosecutor's immense power as both charging instrument and adjudicator of the guilty plea can compromise the defendant's ability to make a knowing and voluntary decision to relinquish constitutional rights.[119] The prosecutor's vast charging discretion includes her ability to manipulate the offenses on which the accused is charged,[120] both by charging offenses that may not be provable beyond a reasonable doubt at trial and by charging offenses higher than necessary to induce a plea on a lower charge.[121] These potential abuses of discretion affect the ability of the accused to plead guilty in a knowing and voluntary fashion, because they affect the offender's ability to accurately assess the risks and benefits of going to trial.[122]

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115. Dubber, *supra* note 45, at 548.

116. *Id.* at 551 (arguing that our modern system of punishment has failed to live up to its legitimizing promise because of the hypocrisy pervading state punishment).

117. *See* Langbein, *supra* note 56, at 126.

118. *See* Abraham S. Goldstein, *Converging Criminal Justice Systems: The Guilty Plea and the Public Interest*, 49 S.M.U. L. REV. 567, 569 (1996) ("Judges have an affirmative obligation to police the guilty plea and with it the bargaining process.").

119. *See* Meares, *supra* note 66, at 852.

120. *Id.* at 863.

121. *Id.* at 864.

122. *See id.* at 867.

This potential for abuse in plea bargaining is not necessarily balanced out by the role of defense counsel. Often, defense counsel believe that it is in the client's best interests—and their own—to "go along with a prosecutorially orchestrated plea."[123] Although, under *Brady v. United States*,[124] such induced pleas might technically meet the minimum legal definition of voluntariness, they do not fit our normative sense of the concept.

When the prosecutor unilaterally decides innocence or guilt along with the charged offense and sentence, plea proffers tend to become coercive.[125] Because the criminal defendant often does not have the same access to information as the prosecutor—discovery rules do not require the prosecution to give a defendant free access to her information[126]—the prosecutor often acts as the sole judge and jury of the case.[127]

To compound this problem, the quick colloquy that the judge has with the defendant regarding the voluntariness of her plea is usually rote and perfunctory for both participants. If the defendant parrots the correct phrases, the judge is unlikely to scrutinize the plea any further. This lack of scrutiny hinders the defendant's ability to fully recognize her due process rights.[128] The inquiry into voluntariness should be made with full appreciation that "the plea occurs in a suspect context and structure," but it rarely is.[129]

Although judges could certainly take a more active role in reviewing plea bargains, they are in a weak position to do so because of their institutional capacity.[130] Due to separation of powers concerns, courts are poorly situated to oversee prosecutorial charging decisions or factual bases for these charges.[131] Judges rarely interfere with "discretionary decisions about which charge to select or whether and how to plea bargain."[132] "With crowded dockets and little personal or institutional investment in the resolution of particular cases," judges lack incentives to scrutinize plea deals.[133]

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123. *Id.* at 869. This is often due to defense counsel's heavy caseload and the hope of continuing the relationship with the prosecutor in the future. *Id.*

124. 397 U.S. 742, 745 (1970) (holding that a guilty plea encouraged by the fear of a possible death sentence was legal because it was both voluntary and intelligent). However, the meaning of "voluntary" differs in different criminal contexts. Meares, *supra* note 66, at 872. For example, the voluntariness standard for confessions is much more stringent than the voluntariness standard for guilty pleas. *Id.* at 872.

125. *See* Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 224 (2006).

126. *See* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 695 (1987).

127. *See* Langer, *supra* note 125, at 224.

128. *See, e.g.*, Dubber, *supra* note 45, at 598 (contending that "[s]ince courts do not seriously scrutinize the voluntariness of guilty pleas, the Due Process clause effectively does not apply to the vast majority of criminal proceedings in the United States").

129. *See id.*

130. *See* Covey, *supra* note 2, at 1266.

131. *Id.* at 1266–67; *see also* Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining*, 76 COLUM. L. REV. 1059, 1075 n.59 (1976).

132. Bibas, *supra* note 2, at 29.

133. Covey, *supra* note 2, at 1267.

Additionally, judges are major beneficiaries of the guilty plea's efficiency, resulting in even smaller motivation to carefully question a defendant's allocution. Finally, claiming involuntariness on appeal to later overturn the plea is not often successful, leaving the voluntariness of defendants' pleas virtually without scrutiny.

In sum, there is rarely, if ever, any deep investigation by the court into government practices that may have helped induce the plea. As Markus Dubber has dryly noted, "American courts have fallen into the comfortable habit of regarding defendants who complain about involuntary pleas as smooth operators who copped a deal with the assistance of a savvy defense lawyers."[134]

Allowing a plea jury to determine voluntariness, however, helps break this troubling pattern. Placing a representative section of the lay public into the guilty-plea process injects a fresher, less-jaded audience to listen to and determine whether the plea is actually voluntary. Insiders, like trial courts, which hear hundreds of guilty pleas a year, generally do not pay much attention to a plea's voluntariness unless the level of involuntariness or coercion is extreme.[135] In contrast, an outsider body[136] like the plea jury, by virtue of its lack of cynicism and more open views about the process, would likely scrutinize each defendant's level of voluntariness with much more care. Moreover, this reinvigorated scrutiny by the plea jury may well include an inquiry into the defendant's knowledge of the alleged facts.

As a general rule, a guilty plea cannot be considered voluntary unless the defendant is aware of the relevant circumstances and likely consequences of the guilty plea.[137] But the judge's cursory assessment of the defendant's voluntariness might differ from an assessment by the plea jury, because the judge is often inured to the routine and rote articulations of the defendant's colloquy. As George Fischer pointed out, judges definitely have a stake in plea bargains; they are invested in the procedure and try to facilitate it.[138] This investment can dull courts to the sometimes questionable voluntariness of the pleading defendant. Ron Wright has similarly argued that "courts have walked away" from the voluntariness part of the inquiry, satisfying themselves with a pro forma statement from the defendant that his guilty plea was not coerced.[139]

A plea jury, on the other hand, can be more sensitive to whether the defendant is pleading guilty under any undue coercion or influence, by virtue of its multiple eyes

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134. *See* Dubber, *supra* note 45, at 598.

135. *Id.* at 599 (contending that "plea hearings today are too perfunctory to ensure that even minimum voluntariness requirements for pleas have been met"); *see also* WILLIAM F. MCDONALD, U.S. DEP'T OF JUSTICE, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES 135 (1985) (explaining that courts deny a mere 2% of guilty pleas).

136. For the concept of inside and outside players in the plea bargaining process, I am indebted to Stephanos Bibas. *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006).

137. Brady v. United States, 397 U.S. 742, 748 (1970) (holding that standard as to voluntariness of guilty plea is that "a plea of guilty must be entered into by a person fully aware of the direct consequences" of plea).

138. FISCHER, *supra* note 61, at 175–80.

139. Wright, *supra* note 2, at 93. Wright goes on to explain how the very environment of the guilty plea can be coercive, making voluntariness questionable, as the "size of the differential between the post-trial sentence and the post-plea sentence can become enormous." *Id.*

and ears. When combined with the plea jury's less cursory and jaded view of the guilty-plea process, the voluntariness inquiry would be substantially invigorated.

First, the basic level of explanation required by a plea jury to understand the workings of an individual plea would necessarily uncover much more of the prosecutor's charging decisions. A plea jury would likely require some minimal presentation of the evidence as well as all indictments made by the prosecutor's office. Such a presentation would not only clarify matters for the plea jury, but also allow the defendant to potentially reconsider her plea based on the evidence offered, permitting her to make a more meaningful decision on whether to plead guilty.

Additionally, due to its outsider status, the plea jury can better understand and empathize with the defendant, who is thrown into the complex rules of the criminal justice system. A court's decision that a defendant understands the "direct consequences"[140] of a guilty plea may contain a very different calculus than that of laypeople. Even the most sophisticated defendant usually does not possess the understanding and general wherewithal belonging to the prosecution, defense counsel, and trial court.

Moreover, in cases involving chemical impairment, a plea jury might be equally, if not better, suited to determine the voluntariness of the guilty plea. Legally, when a defendant informs the court of recent use of alcohol or drugs, "a court must inquire further into the defendant's mental state."[141] This brief colloquy usually satisfies the requirement of a "meaningful engagement" to further examine the defendant's state of mind.[142] Courts, however, are not per se any more qualified than lay people to make a determination whether the defendant's plea, at his time of allocution, is voluntary or knowing despite the potential use of any mind-altering substances.

Instead, having the lay public listen to the colloquy, and potentially ask its own queries in addition to the court's questions, could only improve the quality of the voluntariness inquiry. Cass Sunstein, among others, has argued that heterogeneous decision making, in a group, is often superior to other types of decision making.[143] There is an undeniable advantage of having a group, instead of a single actor, determine an important question such as voluntariness, since the breadth of a group's experience is necessarily much wider than just one, regardless of expertise.

Another related benefit of having the plea jury, not the trial court, determine voluntariness is the potential for greater diversity. Although strides certainly have been made to diversify the bar and the bench, the fact remains that judges are primarily white[144] and defendants are often minorities.[145] The lack of diversity on the bench is

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140. *Brady*, 397 U.S. at 748.

141. *See Case Law Developments*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 145, 204 (2007).

142. *See id.*

143. *See* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 109 (2000) (explaining that eliminating homogeneity in groups improves the deliberative process, because heterogeneous groups build identification "through focus on a common task rather than through other social ties, [and] tend to produce the best outcomes").

144. *See* Am. Judicature Soc'y, *Judicial Selection in the States—Diversity of the Bench*, http://www.judicialselection.us/judicial_selection/bench_diversity/index.cfm?state=.

145. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl.6.28.2007 (2007).

true not only for race and national origin, but for gender, sexuality, and class as well.[146] Although there is no guarantee than any randomly selected plea jury would contain a perfect cross section of the community, statistically, it is far more likely that ten to twelve lay jurors would embody more racial, ethnic, gender, and class diversity than any one judge.

In sum, the combined experience, diversity, observation powers, and outsider status of a plea jury would provide a better voluntariness review in a defendant's guilty plea. As the Supreme Court has noted, "[A] plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality."[147] If courts are too busy or too enmeshed within the system to properly examine the voluntary nature of a defendant's guilty plea, then the plea jury is nicely designed to fill in the gaps.

B. Retributive Values, or Punishment Fitting the Actual Crime

The plea jury also helps solve a number of more theoretical problems with the current guilty-plea process. As Bill Stuntz has pointed out, one of the defining characteristics of plea bargaining is that it "so often fails to internalize the laws that purport to govern it."[148] In other words, although scholars and courts have spent much time and effort defining the criminal law's rules and theoretical boundaries, it is all blithely cast aside when it comes to our most common criminal procedure.

This is particularly true when it comes to Article III and the Sixth Amendment, both of which dictate lay participation as a critical element of punishment. As I discussed above, the Supreme Court's latest sentencing decisions seem to articulate a philosophy of expressive restorative retribution. Yet, this entire philosophy—as well as Sixth Amendment jurisprudence generally—hinges on the inclusion of a jury as a representative of the community, something the current guilty-plea procedure simply neglects. Such a disconnect between trial-based theory and the reality of our criminal justice system exposes the absence of principled accounts of punishment imposition for guilty pleas.[149]

The use of a plea jury helps bridge this gap. Most obviously, it reintroduces the community back into the most common form of criminal adjudication, thereby satisfying the constitutional and theoretical dictates of both Article III and the Sixth Amendment. More subtly, however, the use of the plea jury also provides a way to extend the Court's recent punishment philosophy to plea agreements. Only with the incorporation of the community can we extend the theoretical underpinnings of our system of punishment to the guilty plea.

These theoretical, retributive underpinnings of our criminal justice system would be more fully realized with the use of an independent body such as the plea jury to ensure that the factual basis of the plea matches the offenses allegedly committed. There is too

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146. *See* Am. Judicature Soc'y, *supra* note 144.

147. Boykin v. Alabama, 395 U.S. 238, 242–43 (1969).

148. Stuntz, *supra* note 58, at 2568.

149. *See* Dubber, *supra* note 45, at 602 ("[A]ll too little thought has been expended on the question of how to choose among the multitude of possible systems of punishment imposition that would satisfy the vague and modest requirements of the Constitution.").

often a discrepancy that occurs between the observed and stated facts of the offense and the defendant's ultimate recital of facts.[150] This makes the guilty plea an unreliable measure of fair and accurate punishment. This disconnect is due to a number of factors, including prosecutorial overcharging and the resultant charge-bargaining, deal-making between the prosecution and defense counsel, and judicial disinterest.

Despite all these problems, it is extremely rare to have a plea agreement rejected because of discrepancies between the crime charged and the crime committed. This remains true even when the gulf between the two is so dramatic that nonjudicial court officials have found cause for concern. In a recent study, forty percent of federal probation officers believed that the majority of cases were not supported by offense facts that accurately and completely reflected all aspects of the case.[151] But the disconnect frequently found between the crime committed and the crime charged has not yet forced a change in guilty-plea procedure.

This issue is not merely a concern for court officials; it has larger ramifications. When the crime for which the defendant is convicted has little or no relation to the crime that was committed, there is a distorting effect on the criminal justice system.[152] Too much distance between the actual offense and the punished offense collapses the retributive framework of punishment because the link between the actual crime and the appropriate punishment is severed.

Having an offender allocute and recite the facts of her crime to a plea jury, however, links the crime back to the proposed punishment. A plea jury is much less likely to accept a plea of guilty to a vastly different crime than the reported offense and would likely be less tolerant of puzzling disconnects between the two.[153] If the plea jury is briefed before the allocution with a short summary of the facts, most likely from the presentence report (which often contains witness statements, police reports, confessions, and the like), then it is more likely to spot any substantial divergence between the actual offense and the charged offense, as well as any differences among potential punishments. If the plea jury is comfortable with the lesser punishment given, then it may approve the plea agreement. If it is not, it can reject the agreement and direct the parties to find a closer fit between the crime committed and the crime charged.

Additionally, the role of the plea jury as a listening body for the defendant's factual allocution provides a safety valve for defendants who have been pressured by prosecutors, and sometimes defense counsel, to accept convictions for crimes they did not commit.[154] A defendant's literal discomfort with or obvious lack of knowledge about the crime to which she is supposedly pleading guilty is often overlooked by the court as long as the defendant can stumble through the facts.[155] With the use of the plea

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150. *See* David Yellen, *Probation Officers Look at Plea Bargaining, and Do Not Like What They See*, 8 FED. SENT'G REP. 339, 339 (1996).

151. *See id.*

152. *See* Goldstein, *supra* note 118, at 574.

153. This is because a plea jury, as members of the local community, would want to see some sort of retributive justice occur, and thus presumably would desire some correlation between the reported offense and the convicted offense.

154. *See* Wright, *supra* note 2, at 81 (discussing problems with plea bargains, including the pressure on defendants to take pleas for crimes not committed).

155. I mean to distinguish this from *Alford* pleas, where the defendant can retain his claims

jury, however, the formal processes of presenting the lay jury with the facts of the offense directly before the defendant's allocution will make the jury more focused on the actual particulars of the committed crime. This knowledge will help warn the plea jury when a defendant is entirely unfamiliar with the specifics.

Allowing the plea jury to hear and weigh the factual basis of the plea agreement thus helps to reestablish the theoretical link between the imposed punishment and the committed offense. The importance of retaining such a link—particularly in a world where more and more acts are criminalized—helps tether the apparatus of the guilty plea to both punishment theory and to retributive practice itself, two keystones of our criminal justice system.

C. Articulating the Public Interest

Restoring the community's voice to the imposition of punishment within the guilty-plea process serves both theoretical and practical interests. These positive aspects include the public's increased understanding of the criminal justice system, a restoration of criminal adjudication's educative function, a better fit between imposed punishment and the constitutional theory of the Sixth Amendment, and greater moral consensus among the community.

First, and most basically, the current guilty-plea process functions out of sight from the average citizen. Contemporary plea procedure "block[s] the public from learning the full story of the defendant's crime."[156] The guilty plea hides the criminal justice process from the community in two ways: (1) it excludes citizens from deciding on the proper punishment for community wrongdoers; and (2) it hides any misconduct done by the offenders from the community. This creates not only transparency concerns but also ethical problems,[157] because either the prosecutor or the defense might negotiate a plea agreement to cover up other matters, including police misconduct, wide-scale fraud, or undiscovered crimes.

The public has a meaningful interest in uncovering these issues. Requiring plea agreements to pass before the eyes of a plea jury would at least partially illuminate back-door dealings, because any major discrepancies between the original charges and offense descriptions and the details of the agreement would be scrutinized by members of the community. Additionally, enhancing local, popular participation within an existing criminal justice institution,[158] such as the guilty plea, combines the positive attributes of community involvement without requiring new courts or immense change in the existing system.

Granted, the prosecutor is both technically and legally the public's representative. As the Supreme Court noted over seventy years ago, the prosecution's interest "is not that it shall win a case, but that justice shall be done."[159] This role as the people's representative, however, frequently gets subsumed by a gradual inclination to

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of innocence while still garnering the benefits of a plea agreement. *See* North Carolina v. Alford, 400 U.S. 25 (1970).

156. Wright, *supra* note 2, at 81.

157. *See* Zacharias, *supra* note 63, at 1178 (focusing on the ethical duties that prosecutors may have to defendants in fashioning plea bargains, and arguing for adoption of a coherent theory by prosecutors' offices).

158. *See* Lanni, *supra* note 1, at 363.

159. Berger v. United States, 295 U.S. 78, 88 (1935).

sympathize with the prosecuting ethos and desire to achieve a positive win-loss record. As Abraham Goldstein noted, prosecutors have "their own agendas, both personal and administrative."[160] For prosecutors, the concepts of "public interest" or "justice" are often too diffuse and elastic to constrain them.[161] A prosecutor's simultaneous representation of both the state and the people can get subsumed in the everyday details of doing her job.

Moreover, many prosecutors, in an effort to strengthen their plea-bargaining position, regularly charge offenses that either do not fit the crime or that they have no plan to take to trial.[162] As a result, prosecutors often turn a blind eye to practices such as pressuring defendants to take unfavorable pleas or offering pleas that do not properly consider societal interests.[163] Thus, the goals of the individual prosecutor are often incongruent with those of the public.[164]

Defendants, on the other hand, are (understandably) primarily focused on their own functional realities, and are rarely concerned with principles of legality or public interest.[165] And, as I discussed above, courts are concerned with proportionality and neutrality, not with vindicating the people's concerns. The three major players in the guilty-plea process, then, fail to represent the public interest in any meaningful way. As a result, the public often "lose[s] faith in a system where the primary goal is processing and the secondary goal is justice."[166]

Scholars rightly argue that "an external evaluation of guilty pleas is necessary because none of the negotiating parties will reliably protect the public interest."[167] Although opinions differ as how to best achieve this goal, one way of achieving such public scrutiny and accountability is through the use of the plea jury. Like a trial, a plea proceeding is normally open to the public, which permits any member of the community to attend and watch the procedure.[168] Unlike trials, however, normal plea proceedings are rarely publicized or scheduled in an open manner, making it highly unlikely that even interested community members will attend. The plea jury, in contrast, indelibly inserts the public into the process.

By seeing how the plea jury weighs a defendant's guilty plea and proposed sentence, and by participating themselves in the process, the community will come to

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160. Goldstein, *supra* note 118, at 569.

161. *See* Bibas, *supra* note 2, at 961.

162. *See* Langer, *supra* note 125, at 246.

163. *See* Zacharias, *supra* note 63, at 1149.

164. *See* Schulhofer, *Plea Bargaining as Disaster*, *supra* note 65, at 1987. Schulhofer goes on to explain how a District Attorney's goals (such as a high conviction rate, a good relationship with other influential private attorneys, an absence of high-profile losses) can differ from the goals of a front-line prosecutor (such as career advancement, job satisfaction, manageability of cases), further complicating the matter. *Id.* at 1987–88.

165. *See* Goldstein, *supra* note 118, at 569.

166. Wright & Miller, *supra* note 55, at 33.

167. Wright, *supra* note 2, at 96. Wright is not the only scholar to hold this view. *See* Schulhofer, *Plea Bargaining as Disaster*, *supra* note 65, at 1985–90 (contending that prosecutors and defense counsel both ignore issues of the public interest in plea agreements).

168. *See* Presley v. Georgia, 130 S. Ct. 721 (2010) (holding that it is a violation of Sixth Amendment to exclude member of public from voir dire); Waller v. Georgia , 467 U.S. 39 (1984) (holding that right to a public trial extends beyond the actual proof at trial to all aspects of trial).

understand that criminal justice is an open, accessible proceeding. Through repeated participation in plea juries, the community will better understand how the system adjudicates and punishes crime, which will provide, among other things, an educative function. Through citizen involvement, the "cynicism and contempt" for the criminal justice system that is invariably created by secretive proceedings will be minimized.[169]

Equally important, the current machinations of guilty pleas can create "disappointment and a sense of helplessness"[170] in the public mind. Where the initial charges and the ultimate charge and punishment are incongruent, and this discrepancy is never explained to the public, there can be disappointed expectations and, often, community demoralization.[171] Relatedly, the prosecutor sometimes authorizes pleas to nonexistent, inapplicable, or time-barred crimes,[172] or sentences that the public has not legally authorized through statute.[173] These prosecutorial actions further frustrate the public. Finally, some plea agreements include the closure of court proceedings and sealing of court records,[174] eliminating the opportunity for public scrutiny. Allowing the lay public into the courtroom to weigh these choices will, at minimum, shed light onto the process for the community.

The public may also have concerns that innocent defendants are pleading guilty or that the criminal justice system allows defendants to barter away constitutional rights for a lesser punishment.[175] Thus, the public's integration into the guilty-plea process through participation in the plea jury can either stop some of these practices (pleas to nonexistent crimes or nonstatutory sentences), solve some other concerns (inclusion of the community, through the plea jury, in closed or sealed proceedings), and eliminates concern over much of the rest of the problems inherent in guilty-plea practice (by personally scrutinizing allocution for innocence or coercion).

As Kalven and Zeizel noted over forty years ago, "the jury, in the guise of resolving doubts about the issues of fact, gives reign to its sense of values."[176] The jury's ability to import community values into adjudication helps it fulfill one of its primary duties under the Constitution, resisting the governmental abuse of power against the public, as well as counteracting any judicial bias or corruption.[177] The fact that the jury has been completely stripped from the current guilty-plea process means that the experiences of average members of society have also been eliminated from the criminal justice system.

Finally, criminal law plays a critical part in helping sustain the moral consensus needed to maintain social norms in our diverse society.[178] The jury, as representative of

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169. Kenneth Kipnis, *Plea Bargaining, A Critic's Rejoinder*, 13 LAW & SOC'Y REV. 555, 557 (1979).

170. Wright & Miller, *supra* note 55, at 96.

171. *See id.*

172. *See* Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 740 (2001).

173. Punishments such as banishment or shaming. *See id.* at 725, 735.

174. *See id.* at 729.

175. *See* Wright & Miller, *supra* note 55, at 97.

176. HARRY KALVEN, JR. & HANS ZEIZEL, THE AMERICAN JURY 495 (1966).

177. *See* Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 473–74 (1997).

178. *See* Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L.J. 145, 154 (2008).

the community, needs to participate in all forms of criminal punishment, because this community determination of social norms "may be the only society-wide mechanism that transcends cultural and ethnic differences."[179] By eliminating the role of the jury, our current guilty-plea procedure robs us of an important norm-creating opportunity in the realm of criminal justice. Restoring jury participation to this most common of criminal procedures likewise restores the community's role in creating meaningful social norms.

D. The Power of Allocution

The plea jury's role in hearing the defendant's allocution gives it much of its power. This feature of the guilty-plea process is central to the plea jury's ability to change aspects of the procedure for the better, in practical, theoretical, and normative ways.

1. Insiders, Outsiders, and Transparency

One key aspect of the plea jury is its status as an outsider. Stephanos Bibas has observed that a vast gulf divides insiders and outsiders in the criminal justice system. Insiders, such as prosecutors, defense counsel, and judges, possess power and knowledge, while outsiders, such as crime victims, bystanders, and the general public, frequently feel excluded and confused.[180] This divide creates a tension between the two groups, "impair[ing] outsiders' faith in the law's legitimacy and trustworthiness . . . and imped[ing] the criminal law's moral and expressive goals, as well as its instrumental ones."[181] With the guilty plea rate as high as it is, outsiders undergo considerable frustration when they are excluded from the workings of the criminal justice system.

As a partial solution to this crisis, Bibas suggests efforts in both transparency and participation.[182] On the transparency side, Bibas proposes summarizing and publishing accurate charging, conviction, and sentencing statistics.[183] On the participatory side, he recommends sentencing circles and other restorative justice techniques to give the public a say.[184] Bibas admits these are partial solutions, as insiders will always have more power, information, and practical concerns, but he argues that these reforms will at least shrink the gap.[185]

The plea jury fits in nicely as the next step in the kind of innovation and reforms supported by Bibas. In regard to transparency, the plea jury provides a window into the workings of the criminal justice system, highlighting hidden processes such as the work of the probation officer, the presentence report, and the function of postrelease supervision, as well as better illuminating the sentencing statutes and guidelines, state or federal, that constrain and shape punishment. Because part of the role of the plea jury is to study the presentence report and the descriptions of the crime before hearing the plea, the public gains a much wider understanding about the complex mechanisms of substantive criminal law and criminal procedure.

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179. *Id.*
180. *See* Bibas, *supra* note 136, at 912–13.
181. *Id.* at 916.
182. *See id.* at 917.
183. *See id.*
184. *See id.*
185. *See id.* at 918.

Since most hearings, including plea hearings, are obscure and not well-publicized,[186] having a formal mechanism to incorporate the lay public into these procedures will unquestionably shed light on the process. This transparency has important trickle-down benefits, as Bibas points out. With better access and comprehension of how guilty pleas work, the public will have a more realistic understanding of criminal penalties and sentence proportionality, and it will no longer be forced to primarily rely on stereotypes, news stories, and media hysteria.[187]

The participatory benefits of the plea jury similarly accrue. There are few roles for the public in the modern criminal justice system. Grand juries are controlled by prosecutors;[188] jury trials are few and far between; victims have minimal roles at sentencing hearings; and both incarceration and postrelease supervision often occur far away from the community.[189] At most, the public can affect the practice of criminal law by electing district attorneys and judges or through referendums, and even this is relatively hands-off and controlled by imperfect information.[190] Thus, the plea jury supplies a way for many different citizens to partake in the practice and imposition of criminal justice, one that is frequent, inclusive, thoughtful, and meaningful—an exercise that has become increasingly rare in the modern era.

The plea jury also helps mend the substantive gulf between criminal procedure and criminal values. By better fostering the lay public's understanding of criminal process and by clarifying the link between crimes and specific penalties, the plea jury both educates the community as a whole and reinforces retributive justice, the latter of which requires that offenders must know the punishment for crimes before they are committed.

The plea jury's scrutiny of the defendant's allocution and proposed plea agreement requires it to ponder whether the committed crime matches up with the admitted crime, as well as whether the crime is properly punished by the proposed penalty. Such a review of the defendant's enumerated crimes and potential punishments, along with the act of actually helping impose punishments, will assist in bringing home the lessons of retributive justice in a concrete way. "[T]he criminal law's most important real-world effect may be its ability to assist in the building, shaping, and maintaining of these norms and moral principles."[191]

Moreover, citizens are more likely to think that the criminal justice system is fair if they have had a direct part to play in its workings, helping impose punishment on offenders who have, more likely than not, committed crimes in the community. If

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186. *See id.* at 924.

187. *See id.* at 927. Importantly, Bibas explains how constant "misperceptions about average sentences fuel spiraling sentences and discontent with criminal justice. Because voters are badly misinformed, they clamor for tougher sentences, three-strikes laws, and mandatory minima across the board." *Id.* at 929.

188. *See id.*

189. *See id.*

190. *See id.* at 935. As Bibas points out, due to their lack of participation and knowledge, resentful outsiders can force through new and rigid rules in an attempt to bind insiders, often resulting in unfortunate outcomes or work by insiders to evade the new rules, resulting in the same impasse. *Id.* at 940–43.

191. Robinson, *supra* note 178, at 148.

"[s]ecrecy and opacity weaken citizens' trust in the law," [192] then the plea jury, by participating in the sentencing of the community's wrongdoers, permits the public to see how guilty pleas work both procedurally and substantively. This, in turn, allows some lost trust in the system to be rebuilt. Reassuring outsiders that guilty pleas are not exercises in self-serving or random lenience for the insiders, but rather a principled and fairly conducted practice, provides an unmistakable value.[193]

The plea jury also assists in inculcating public preference directly into the criminal law. There are few, if any, majoritarian ways in which the citizenry may straightforwardly affect change in any administrative-type body, let alone one as critical as the criminal justice system. Having the community partake in an active process like the plea jury cannot replace the power and consequence of the jury trial, but it is a decent compromise: the lay public still gets to decide whether a defendant's punishment is acceptable, but there is no tremendous sacrifice in efficiency or procedural change. Combined, potentially, with proposed restraints on charge bargaining and sentence bargaining,[194] the plea-jury procedure could bridge the worst aspects of the insider/outsider gulf while improving the system's fairness, transparency, and legitimacy.

Finally, there is undeniably an important civic interest in having some inquiry and adjudication occur in front of the community, particularly for a serious crime.[195] Allowing the public to learn, through the utilization of the plea jury, the circumstances of the crime and the proposed punishment provides a positive externality. Although there is not the public expiation of a trial, the plea jury provides at least some measure of how our institutions have responded to current events.

2. Balancing Efficiency with Fairness

The plea jury strikes a balanced medium between the need for fairness and probity and efficiency requirements. The reality of the modern criminal justice system prevents any increase in jury trials, due to time, money, and processing costs.[196] But as I have explored in Part I, the guilty-plea system has become increasingly problematic. We have moved primarily to a de facto administrative regime "where prosecutors interpret the law and adjudicate cases without written standards or hearings,"[197] and the usual constitutional rights surrounding criminal procedure are largely irrelevant or ignored. The adversarial system inherent in the jury trial has been replaced with a balancing of faulty bargains on one end against faulty bargains on the other, attempting to

192. *See* Bibas, *supra* note 136, at 950.

193. *See* O'Hear, *supra* note 69, at 216.

194. *See* Wright & Miller, *supra* note 55, at 60–61, 113–16.

195. *See* Langbein, *supra* note 56, at 124.

196. The judicial system is experiencing, among other things, an acute financial crisis and an enormous caseload burden. *See* Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 303 (2005).

197. Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentencing Bargaining*, 84 TEX. L. REV. 2023, 2027 (2006).

approximate justice.[198] As Wright has rather plaintively asked, "[C]an true justice happen in the absence of trials?"[199]

The plea jury is the middle ground between full-blown jury trials and unregulated plea agreements. The guilty-plea process as a whole is relatively untouched; the prosecutor and defense counsel may still bargain as they will to dispose of cases, retaining the efficiency gained when the formal adversarial process is bypassed. And integrating the selection of the plea jury into the already-existing apparatus for calling and selecting both petit and grand jurors is as simple as accessing the data rolls and choosing a body of jurors randomly selected from the community.[200] Thus, the plea jury can efficiently be called and chosen from the extant jury rolls and sent to whichever courtroom and judge has need of them for the day.

Because the plea jury would serve for at least two weeks, their required training would not need to be excessive. We expect petit juries to absorb an immense amount of complex legal information in a short period of time during the jury-instruction phase. Therefore, it does not seem unrealistic to expect a panel of citizens to be able to understand its role in examining the voluntariness, knowingness, and factual basis of the defendant's plea, along with the appropriate level of punishment within a sentence structure.

Granted, the plea jury's rejection of a defendant's plea agreement, whether for issues of coercion, incapacity, false factual basis, or improper sentence, would slow down the process somewhat. However, this would not happen during each and every guilty plea.[201] The nonunanimous nature of the plea jury's decision would also help increase the efficiency of the plea jury assisted guilty pleas without returning to the wilds of prosecutorial power. Additionally, the presence of the court along with the plea jury would allow it to ask any questions on a timely basis.

The crucial task of the plea jury, to weigh the defendant's allocution, is the crux of the compromise between the current state of the jury trial and the guilty plea. The lay public participates in the guilty-plea process, but only in a traditional, jury-like capacity: determining the truthfulness of the defendant, the voluntary nature of the testimony, and the crimes for which the defendant should be held liable. The plea jury's responsibility in helping assess the appropriateness of the agreed-upon punishment is paralleled in the work of sentencing juries, an aspect of jury trial now common in many states.[202]

Equally important, however, the function of the plea jury—listening to and weighing the defendant's allocution and proposed punishment—is limited in nature. It does not interfere with the prosecutor's or defense counsel's normal roles in shaping the initial agreement. It does not require the lay public to have any extra knowledge of

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198. *See* Zacharias, *supra* note 63, at 1141.

199. Wright, *supra* note 2, at 91.

200. For a more in-depth discussion of simplifying the use and administration of petit juries, see Akhil R. Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1189 (1995).

201. For a discussion of inefficiency concerns rising from the use of plea juries, see *infra* Part IV.A.

202. For more on non-capital-sentencing juries, see Nancy J. King & Roosevelt L. Noble, *Jury Sentencing in Non-Capital Cases: Comparing Severity and Variance with Judicial Sentences in Two States*, 2 J. EMPIRICAL LEGAL STUD. 331 (2005).

criminal law or sentencing. And it does not usurp the traditional role of the judge in managing and supervising all legal functions that come before her court. There is a need for predictability in our current plea-heavy criminal justice system. Having a plea jury would continue that predictability, as the procedure would inject a familiar element into the plea process while roughly maintaining the plea's current structure.

The presence of both the plea jury and the court in the guilty plea allows these two bodies to function as "legitimate counterweights to prosecutors,"[203] injecting more procedural and substantive fairness into the process. There is widespread agreement that "the active involvement of an impartial third party in the plea negotiations makes its own contribution to the fairness of the process."[204] By balancing the enormous discretion of prosecutors with the scrutinizing power of the plea jury and the oversight of the court, we could reach a middle ground, admittedly imperfect, but definitely serviceable. Guilty pleas could become, as Ron Wright has desired for federal sentencing generally, "more a servant of truth and less a slave to efficient case disposition."[205]

3. Expressing Social Norms

One of the most powerful aspects of the plea jury's part in evaluating the defendant's allocution is its expressive role. Traditional jury trials have a strong expressive element to them, as any crimes for which the offender is accused are publicly aired out and determined in a community arena. Within a contested public trial's "detail and drama . . . [it] becomes a morality play which impresses upon the public that the law is being enforced and that justice is being fairly administered."[206] This expressive element is completely absent in the current guilty-plea process, where the defendant's rote allocution to the court is simply an empty rehearsal of the deal made in private by the prosecutor and defense counsel. Although technically held in public, guilty pleas are poorly publicized.[207] Even victims of the crimes frequently do not receive notice of or attend guilty pleas.[208]

Because publicity is still an important part of our modern criminal justice system,[209] we should increase the legitimacy of the guilty plea itself by making these private machinations both public and meaningful. As Abraham Goldstein observed:

> Much of the effectiveness of law enforcement depends upon the symbolic role played on the public stage by the . . . case selected for prosecution. That case sends a strong message to potential violators, reinforcing both the legal norm and the habits of obedience that form a law-abiding population.[210]

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203. Wright, *supra* note 2, at 139.
204. Turner, *supra* note 68, at 254.
205. Wright, *supra* note 2, at 86.
206. Goldstein, *supra* note 118, at 569.
207. *See* Bibas, *supra* note 2, at 991.
208. *See id.* at 991–92.
209. *See* Dubber, *supra* note 45, at 601.
210. Goldstein, *supra* note 118, at 569.

The offender's allocution to the plea jury works its expressive power in a variety of ways. First, the involvement of a more impartial body such as the plea jury helps give the impression of fairness both to the defendant and to the general public. The public understandably feels that justice is best left in the hands of more neutral decision makers, such as the plea jury and the judge.[211] This is particularly true because the procedures surrounding the guilty plea are relatively untouched by constitutional regulation.[212]

The combination of the judge and the plea jury in the allocution process means that the community is better able to trust the conviction and sentence resulting from a guilty plea. This trust forms a direct link between public participation and public confidence in the administration of justice.[213] By allowing the community to participate in the open allocution, the public gets "clearer and more accurate signals about how the system adjudicates and punishes crimes."[214]

Moreover, the role of the plea jury functions expressively in determining the defendant's truthfulness, measuring the appropriateness of the agreement, and accepting or rejecting the proposed sentence.[215] If, as expressive theory holds, "the expression of social values is an important function of the courts,"[216] then the public's ability to see the community impose its social values, through the work of the plea jury, is particularly valuable. By requiring the criminal justice system to incorporate the lay public into the guilty-plea process, the plea jury helps signal to everyone that fairness and procedural due process is an intrinsic part of the criminal justice system, one that cannot be eliminated by the defendant's waiver of his jury trial right.

The plea-jury allocution also has expressive value for the defendant. By openly admitting her guilt and articulating her offenses to the plea jury, the defendant is able to publicly accept her blameworthiness and show remorse to the community. In so doing, she is able to fulfill a key aspect long part of jury trials—the outward expression of guilt. Because the defendant is willingly admitting her wrongdoing and asking for a reduced sentence, she not only shows the community her acceptance of responsibility, but she also publicly reinforces the link between offense and societal punishment.

Additionally, the acknowledgment of wrongdoing to a plea jury well may have a positive effect on the defendant. By allocuting only to a court, the defendant may very well attribute her punishment to the state and shrug off the desired feelings of

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211. *See* Turner, *supra* note 68, at 244 (quoting a defense attorney who noted that "it is reasonable for the public to expect [impartial bodies such as] judges to be involved, rather than to defer to the judgment of rather inexperienced prosecutors and defenders").

212. *See* Klein, *supra* note 197, at 2028.

213. *See* Goldstein, *supra* note 118, at 569.

214. Wright & Miller, *supra* note 55, at 34.

215. Granted, the plea jury's role in reviewing plea agreements is substantially different than the community's much broader role at trial, where it can freely assign responsibility and blame to wrongdoers. The plea jury, by virtue of its limited participation, can only accept or reject the conviction and sentence proffered by the prosecution and defense. However, the plea jury's role in listening to the offender's allocution, and judging whether the alleged facts of the crime meet up with the proposed punishment, provides some measure of involvement, and, if accepting of the plea agreement, a type of condemnation as well. Thanks to Nita Farahany for highlighting this issue.

216. Cooter, *supra* note 35.

responsibility or awareness of her wrongdoing. In contrast, when there is a subsection of the community listening to her admission of guilt, the wrongdoer has more difficulty avoiding the burden of criminal responsibility, because her fellow citizens, her community, and her peers have both literally and figuratively become part of the expiation process. The plea jury's seal of approval on the proposed sentence impresses upon the defendant that the public has had at least some say in the punishment, even if the actual bargaining was done between the prosecutor and defense counsel.

If the public tends to "lose faith in a system where the primary goal is processing and the secondary goal is justice,"[217] then a visible guilty-plea process and public allocution facilitates renewed belief in the workings of criminal procedure. The plea jury's role provides a public resolution of the offense without requiring a full jury trial, and the requirement that the defendant allocute directly to the panel fosters more responsibility and acceptance of wrongdoing.

4. Restorative Justice

The defendant's allocution to the plea jury is a significant feature in the context of restorative justice. Restorative justice, an aspect of criminal justice that has recently become popular again, focuses on the community's role in not only judging and punishing the offender, but also returning her to the fold after the sentence has been served.[218] The restorative theory of punishment conceptualizes justice as a process that incorporates both the community and the offender in an attempt to repair and reconcile the harm done. In other words, part of restorative justice is the community's willingness to forgive wrongdoers and eventually restore their rights. This is an aspect of modern punishment that we have almost entirely ignored, and it has been to our detriment.

To ensure our system of criminal sentencing and punishment is equally humane and powerful, we must focus on both the punishment and the restoration. The first part of this, discussed above, should ensure that the offender feels the moral approbation of the community, something achieved by pleading guilty to a panel of community representatives. But after punishment is imposed, the critical next step is to help restore the offender back into her place within the community. Otherwise, we end up with a perpetual underclass of felons who are blocked from participating in most aspects of society.[219]

The plea jury's role in allocution helps fulfill the need for restorative justice as well. By admitting her crimes to a subsection of the community, the offender literally *pleads* to them, the community itself, not only for the reduced sentence or punishment that she hopes will be approved In accepting culpability for her bad acts, the defendant acknowledges her communal breach and asks for mercy and reconciliation. This is particularly true if the victim is also in the courtroom listening to the allocution.

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217. Wright & Miller, *supra* note 55, at 33.

218. *See generally* Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251 (2005).

219. *See, e.g.*, Posting of Scott H. Greenfield to Simple Justice: A New York Criminal Defense Blog, http://blog.simplejustice.us/2008/03/24/beware-the-permanent-underclass.aspx (Mar. 24, 2008, 06:18 EST).

Restorative justice removes the offender, victim, and community from their usual passive roles, encouraging all three to become actively involved in resolving the conflict.[220] The plea jury's removal of the guilty plea from the back rooms of the criminal justice system, while also creating a role for the community, plays an integral role in facilitating restorative justice.

The community as a whole is also more likely to allow the offender to be eventually restored to its good graces if it has heard her acknowledgement of wrongdoing. When it is time for the offender to be released from whatever punishment has been imposed, the community, having literally seen and heard the offender's plea of guilt, will arguably be more willing to forgive the offense and move on. Having been empowered by hearing the defendant's allocution, the local public will hopefully be more willing to allow the offender back into the neighborhood and local polity, whether by restoring felon voting rights, allowing halfway houses in the community, assisting with job training, or other important reintegrative procedures.[221]

The transformative potential inherent in the plea jury's restorative-justice aspect is one that has been little explored since the decline of rehabilitation forty-odd years ago.[222] "Restorative justice regimes reconstruct the identity of the victim and the accused to invite collaboration and permit dialogue,"[223] and the plea-jury allocution helps bridge the gap between the accused, the victim, and the community. As Anthony Alfieri has argued about drug courts, the plea-jury allocution reunites compassion and punishment, re-envisioning justice as a community mandate.[224]

Integrating restorative justice into the guilty-plea procedure has positive benefits for the offender, the victim, and the larger community. Through the vehicle of allocuting to the plea jury, the guilty plea can help involve and empower the community, restore victims, reintegrate offenders, and provide opportunities for dialogue—all classic values of restorative justice.[225]

E. Deliberative Democracy

The jury is generally acknowledged as a critical part of democratic government.[226] The creation of jury-like systems in new democracies illustrates how important the incorporation of citizens into legal decision making can be to polities seeking democratic legitimacy.[227] This is because of a sound belief that citizen participation in lawmaking promotes democracy.[228] In particular, "[d]irect involvement of citizens is

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220. *See* Umbreit et al., *supra* note 218, at 255.

221. For a brief explanation of how community-based retributive justice could shape re-integrative procedures for released felons, see Appleman, *supra* note 27, at 1339–41.

222. *See* MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973); Appleman, *supra* note 27, at 1347–48.

223. Anthony V. Alfieri, *Community Prosecutors*, 90 CAL. L. REV. 1465, 1479 (2002).

224. *Id.* at 1495.

225. *See* Umbreit et al., *supra* note 218, at 258.

226. *See* Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 726 (1992).

227. *See* Valerie P. Hans, *Introduction: Citizens as Legal Decision Makers: An International Perspective*, 40 CORNELL INT'L L.J. 303, 306 (2007).

228. *See id.*

said to enhance the legitimacy of the legal system, making it more responsive to community values."[229] This popular participation in legal deliberation, via the plea jury, provides a way for citizens to resolve moral disagreements in a quasi-public sphere, using collective, reasoned discussion.[230]

The diversity of the plea jurors helps encourage arguments that ultimately move the group toward mutually acceptable outcomes.[231] Indeed, the more reflective the jury is of diversity in society, the better it will democratically embody the beliefs of the community it represents.[232] Only a representative jury, one drawn randomly from a representative cross section of the population, can truly make legitimate decisions for its community.[233] A representative jury not only provides democratic decision making, but it also exposes each juror to the diversity within his or her very community.[234]

The democratically deliberating jury is also a local jury. Pluralist scholars have argued that "the deepest justification for holding trial locally is that only jurors from the community affected by the crime are in a position to render a verdict that democratically reflects that community's legal and moral judgment about what the facts show."[235] This is so because only the local citizen can truly bring the values of the community into the courtroom, whether for a trial or a plea bargain. Although "strangers" can equally hand down the law,[236] they would not bring the peculiar standards and morals that only those living in the actual community would truly know.

Jury service is the primary way that this country incorporates its citizens into the legal process, whether in grand juries or petit juries. Although surface complaints about the inconvenience of jury service are common, posttrial surveys of jurors who have actually served[237] have shown that jury service seems to produce more public support for both the courts and the legal system.[238] As the Jury and Democracy Project has shown through its research, jury service has strongly positive effects on civic participation and engagement.[239] Indeed, some scholars have found that "[t]aken as a whole, the jury may serve a more powerful role in promoting democracy and citizenship than any voluntary association."[240]

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229. *Id.*

230. *See* Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 125 (1998). Thanks to Alice Ristroph for helping me tease out this argument.

231. *See id.* at 129.

232. *See id.*

233. *See id.* at 130, 133.

234. *See id.* at 134.

235. *Id.* at 136.

236. *See id.*

237. It is important to distinguish between attitudes of those jurors who actually serve on a jury and those who simply spend a day or two at the courthouse, waiting around, before they are ultimately dismissed. The latter set of potential jurors often have valid complaints about the time spent sitting aimlessly in the courthouse. Although this is a real problem, it is tangential to the issues set out here.

238. *See* Hans, *supra* note 227, at 306.

239. *See* JOHN GASTIL, PERRY DRESS, PHIL WEISER & CINDY SIMMONS, THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION (2010).

240. *Id.*

Although jury service through the petit jury has been drastically reduced over the past thirty years, this elimination of civic participation may come with hidden costs for both democratic principles and political participation. For one, eliminating or sharply reducing jury service directly affects the ability of citizens to interact, not only with each other but also with the polity. Jury service permits political participation that can be, among other things, "inspiring, empowering, educational, and habit forming," mediating the divide between the state, political society, and civil society (which includes the individual and the community).[241]

In addition, recent studies have suggested that those who participate in jury duty are more likely to vote.[242] More specifically, the enhancement in voting occurs only with criminal, not civil, trials, and it happens with any jury body that deliberates.[243] This means that participation in a plea jury would also likely provide such a benefit.[244] Another benefit that results from criminal jury participation is, interestingly, increased activity in charitable groups by those jurors who decided on a guilty verdict,[245] perhaps inspired by a desire, conscious or not, to further improve their community.

Reviving jury service through the use of a plea jury, then, would provide all of these positive externalities, in addition to restoring classic criminal-procedure values such as voluntariness, retributive values, and articulating the public interest.

IV. Potential Problems with Plea Juries

Naturally, the incorporation of a lay jury into the guilty-plea procedure is not a perfect solution to the woes of modern criminal adjudication. As a middle ground between the costly full constitutional rights of a jury trial and the cheap and quick machinations of the plea bargain, it is inevitable that some aspects of this plea-jury proposal will fail to please various constituencies.

Furthermore, inserting the community into the plea process raises some specific concerns regarding costs to defendants and the state, how to define relevant communities, and penal populism. I address each of these areas below and try to show how the plea-jury process can either overcome or answer the specific problem.

A. Inefficiency, Inexperience, and Inconsistency

The most basic criticisms against incorporating a form of the jury into the guilty plea are process based, contending that this sort of change to the procedure would lead to inefficiency, inconsistent results, or judgments by inexperienced decision makers.

1. Inefficiency, Temporal and Fiscal

It is likely that the speed at which indictments transform into guilty pleas would slow down with the incorporation of a plea jury. This, in turn, might make for slower processing of defendants to jail, prison, or probation. But, in a system that often gives

241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*

indigent defendants only a brief time to meet with appointed counsel before quickly deciding on a plea, this procedural slow-down has its benefits.

For example, in 2005, Howard Finkelstein, the Public Defender in Broward County, Florida, forbade his attorneys from advising indigent criminal defendants to plead guilty at arraignment until they had had "meaningful contact" with their clients in advance.[246] This directive was to combat the practice where public defenders met their clients for the first time and immediately counseled them to plead guilty or no contest, thus violating the Sixth Amendment.[247] Although Broward County judges were allegedly upset at the initiative, worried that this directive might result in clogged dockets,[248] Finkelstein's rule helped carve out a critical Sixth Amendment right—the effective assistance of counsel—even if it did slow down the rapid-fire pace of the Florida criminal justice system.

Similarly, in November 2008, public defenders' offices from seven states either refused to take on new cases or sued to limit them, citing overwhelming workloads that prevented defendants from receiving adequate attention, time, and representation.[249] Because the majority of a public defender's workload has turned into the processing of guilty pleas, the public defenders argued that the hurried pace of their representation was less justice and more "McJustice," as their representation essentially formed plea bargain "assembly line[s]."[250]

Too often, an indigent client's interaction with her attorney is extremely limited. In many cases, public defenders must accept the police version of events and then, after short discussions, make life-altering deals, with no time for legal or factual research.[251] Thus, once again, the potentially slower pace for the resolution of guilty pleas could end up having positive effects for the defendant, rather than negative effects.

Integrating the community into the guilty-plea process may also lengthen the average time of a plea disposition, thus costing the states and federal government money. In a time of worldwide fiscal crisis,[252] this is no minor issue. There are legitimate practical concerns here. Increases in the complexity of guilty pleas will result in slower processing times and more money spent per defendant. But this point returns us to the essential debate between efficiency and substantive values, which often turns into a battle between quality over quantity. As Bill Stuntz observes, society should be wary of pleas because they are so absurdly cheap, which is unhealthy for everyone.[253] This is an issue not just for defendants, but for the community in general, given the current negative perceptions of criminal courts.

By forcing the criminal justice system to spend time, money, and effort to ensure that classic criminal-procedure values are observed in the guilty-plea process, the use

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246. *See* Dan Christensen, *No More Instant Plea Deals, Says Public Defender*, DAILY BUS. REV., June 6, 2005, *available at* http://www.law.com/jsp/article.jsp?id=1117789520360.

247. *See id.*

248. *See id.*

249. *See* Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1.

250. *See id.*

251. *See id.*

252. *See* Chris Isidore, *The Great Recession*, CNNMONEY.COM, Mar. 25, 2009, http://money.cnn.com/2009/03/25/news/economy/depression_comparisons/index.htm.

253. *See* William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1970, 2034–35 (2008).

of a plea jury helps signal to everyone that fairness and procedural due process are intrinsic parts of the criminal justice system that cannot be averted through back-room machinations and insider plays. Our current criminal justice system is unhealthy, and it is time for the pendulum to swing back toward quality and clarity.

2. Inexperience

Incorporating the public into a guilty plea raises some questions about how the plea jury will determine issues during the plea process. Obviously, the plea jury must pass on whether the proposed guilty plea is acceptable, but what does that mean? For example, would this result in plea juries, ignorant of typical police practices and charging decisions, questioning every decision made in prosecuting the defendant? Moreover, what might a randomly selected plea jury know about proper sentencing, or how best to treat, for example, a third-time minor offender? As the argument goes, having inexperienced lay people involved in sophisticated legal processes will result in great difficulties in determining complex issues, such as weighing offender status, understanding the machinations of prosecutor and defense-counsel bargaining, and determining the proper balance of sentence and postrelease supervision.

Although these are valid concerns, some of them may be alleviated by looking to the effect of modern sentencing laws on trials, which permit sentencing juries to determine the specific punishment imposed on the defendant. Since we assume that the average jury is capable of determining the correct sentence in sentencing hearings (within ranges, as in most states and federal guidelines), then surely the same can be granted to a plea jury.

Moreover, the objection that citizens are particularly unqualified to determine individual sentences seems weak, considering that many modern policies are driven by politics and public opinion, not expert criminology.[254] If sentencing policies are being determined by media, legislatures, public sentiment, and popular initiatives—and not by experts—then having a plea jury consider whether a sentence is correct for a particular defendant does not seem to deviate from the status quo. The average citizen is no more or less qualified to decide on sentencing than any decision maker in our current system.

3. Inconsistency

Likewise, there may be concerns that having plea juries scrutinize bargained offenses and sentences might lead to serious inconsistencies between similar defendants. As this argument goes, judges—with their experience and their great familiarity with different types of offenders—are simply more effective at equalizing sentences between and among defendants who plead guilty.

The reality of our criminal justice system and sentencing regime, however, makes this argument much less potent. First, most states have stringent sentencing guidelines which severely limit the sentence that any judge may grant or prosecutor may recommend, upwards or downwards. Similarly, the federal sentencing guidelines, although technically voluntary, are followed by federal judges the vast majority of the

254. *See* Lanni, *supra* note 1, at 388–89.

time. Additionally, the tough sentencing laws enacted by most states end up transferring power and discretion from the courts to the prosecutors, resulting in less transparency—but not necessarily less disparity—in outcomes for similar cases, both within and between districts.[255]

Moreover, as Bibas cogently argues, there is only so much any one trial court can do to equalize convictions and sentences among and between defendants: "Individual trial judges are limited by the confines of particular cases and controversies. They are not well-suited to take the synoptic, bird's-eye view needed to police systemic concerns about equality, arbitrariness, leniency, and overcharging."[256] Consequently, in the average court-run guilty plea, inconsistency and disparity of outcomes are simply better hidden than that which might occur with a plea jury. If nothing else, the use of the plea jury would illuminate the more secret machinations of prosecutors.

Additionally, prosecutors do not always keep to the promised sentence in a plea agreement. On January 14, 2009, the Supreme Court heard oral arguments in *Puckett v. United States*,[257] which addressed whether forfeited claims that the government breached a plea agreement were subject to "plain error" review. Although the issue at the Court primarily involved standards of appellate review, the facts of *Puckett* are not uncommon. In *Puckett*, a federal prosecutor changed the government's promised sentence after the acceptance of the guilty plea but before sentencing, opposing a sentence reduction for acceptance of responsibility.[258] These issues often arise in federal plea bargains, where there is usually a time lapse between the defendant's allocution and the actual sentencing.[259]

As Douglas Berman has pointed out, lower courts frequently struggle with various practical questions in the wake of prosecutorial failure at sentencing to comply with plea promises.[260] Therefore, prosecutors who continually make decisions in the guilty-plea procedure do not provide perfect consistency and reliability. There is no reason to think a lay plea jury would prove any less consistent or reliable in practice.

In fact, the lay public makes decisions with greater consistency than currently acknowledged. A variety of recent studies have illustrated that there is a significant degree of agreement among laymen in the ranking of crimes and punishment in terms

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255. *See id.* at 391.

256. Bibas, *supra* note 2, at 973 ("[Trial judges] lack statistical training and expertise, as well as detailed information from prosecutors' files. Their choices ex post are often crude and binary, requiring them either to find statistical disparities unconstitutional or to put their imprimatur on them.").

257. *See* Joe Tucci & Kaci White, Legal Info Inst., Puckett v. United States *(07-9712)*, LII BULL., http://topics.law.cornell.edu/supct/cert/07-9712.

258. *See* United States v. Puckett, 505 F.3d 377, 381–82 (5th Cir. 2007).

259. *See* United States v. Villa-Vazquez, 536 F.3d 1189, 1201 (10th Cir. 2008) (holding that the government breached a plea agreement by urging an upward departure from sentencing guidelines after acceptance of guilty plea but before sentencing); United States v. Griffin, 501 F.3d 354, 355 (2d Cir. 2007) (holding, by a divided panel, that the government breached a plea agreement by encouraging the court to deny a departure after the defendant pleaded guilty and the court held evidentiary hearing). Thanks to Doug Berman for bringing these cases to my attention.

260. *See* Posting of Douglas A. Berman to Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2009/01/interesting-scotus-discussion-of-plea-agreement-breaches-in-puckett.html (Jan. 15, 2009, 00:21 EST).

of the relative seriousness of crimes.[261] When based on a system of proportionality and expressive retribution—as has been encouraged by the Court—the community's understanding of justice is both wide-ranging and sensitive to subtle factors. "Virtually without exception, citizens seem able to assign highly specific sentences for highly specific events."[262] There is no reason to assume that modern lay plea juries could not achieve a strong level of consistency between and among guilty pleas, as the community usually has broadly shared intuitions about the relative blameworthiness of different cases.[263]

B. Greater Risk for Defendants

Defendants may not necessarily prosper with the incorporation of the community into the guilty-plea process. But, "[a]s judges of the nineteenth century understood, a procedural right may serve a variety of social or public goals that will not always coincide with the preferences of defense and prosecution."[264] This is particularly so with the community right to a jury trial, the realities of which—when integrated into the guilty-plea process—might undercut any special, insider deals that the defendant may have defense counsel make with the prosecutor.

Incorporating a plea jury makes sense as a means to protect public interest, because it protects the collective-jury right from obsolescence, provides the guilty plea with a theoretical framework, and removes the screen from the behind-the-scene machinations of plea agreements. But enforcing the public interest can potentially infringe upon the rights of the defendant, or result in competing definitions of rights.[265] Moreover, using a plea jury may result in more extreme charges and/or higher sentences for the offender in question, depending on how much back-room bargaining occurred before the plea was presented to the plea jury.

Again, introducing sunshine to the guilty-plea process, even if it does produce less desirable results for some defendants, is generally a good thing. In the long run, moreover, involving the public in criminal adjudication—as it used to be—demystifies both courts and the ways criminal offenders are judged and sentenced. A better public comprehension of the criminal justice system would presumably reduce the fear of crime and victimization, something that has been steadily decreasing for the past forty years.[266] Ultimately, this greater understanding of the criminal justice system will

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261. *See* Julian V. Roberts & Loretta J. Stalans, *Crime, Criminal Justice, and Public Opinion*, *in* THE HANDBOOK ON CRIME & PUNISHMENT 42–43 (Michael H. Tonry ed., 1998) (noting that many studies have replicated the relative ranking of crimes across a number of countries, including Canada, Denmark, Finland, Great Britain, Holland, Kuwait, Norway, Puerto Rico, and the United States).

262. Alexis M. Durham III, *Public Opinion Regarding Sentences for Crime: Does it Exist?*, 21 J. CRIM. JUST. 1, 2 (1993).

263. *See* Paul H. Robinson, *Empirical Desert*, *in* CRIMINAL LAW CONVERSATIONS 29, 30–31 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kressler Ferzan eds., 2009).

264. King, *supra* note 52, at 132.

265. *See* Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 372–73 (2001).

266. *See, e.g.*, New York Crime Rates 1960–2008, http://www.disastercenter.com/crime/nycrime.htm (showing steady and dramatic decrease in crime over past forty years).

hopefully lead to fewer demands for ever-more harsh and punitive sentencing laws by frightened, unknowing communities.

C. Defining "the Community"

Inherent in community decision making and community justice is a different approach to crime and punishment—advocacy of local initiatives promulgated through strong citizen participation.[267] At its best, community justice provides for strong local, popular participation within existing criminal justice institutions.[268] Generally, those who argue that the community has a right and a need to participate in all major criminal justice procedures presuppose that the community is a defined entity.

The phrase "the community," however, can mean a variety of things, often simultaneously. One version of "community," and the one most generally used when discussing jury rights, is usually a definable social entity "to which judicial procedures and behavioral norms can apply."[269] But community can also simply be a floating normative concept, signifying much but referring to nothing in particular.[270]

Scholars have questioned the legal power and implications of characterizing any living place as a "community," which raises issues of authority, responsibility, and the exercise of power.[271] Those who have argued for community self-determination and power have based their arguments on a strong belief of the neighborhood as a place that fosters individual freedoms, balances liberty and order, and is entitled to great moral respect.[272]

There has been much recent interest in local control over local environments,[273] a trend with which the plea jury harmonizes nicely. Various advocates of localism argue that "local governments are more responsive to the specific needs of unique communities and that local institutions can provide better and increased services."[274] These arguments parallel ones that can be made for the plea jury—that the local governments are critical in implementing our criminal justice system, for both constitutional and civic reasons.

Defining community is important but difficult.[275] The rhetoric of community often covers a variety of different meanings, some of which are contradictory.[276] My vision of community can be classified as a combination of a deep account and a dualist account, following Rich Schragger's classifications.[277] A deep account of community,

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267. *See* Lanni, *supra* note 1, at 359.

268. *See id.* at 362–63.

269. Robert Weisberg, *Restorative Justice & the Dangers of Community*, 2003 UTAH L. REV. 343, 347 (2003).

270. *See id.* at 343–44.

271. *See* Schragger, *supra* note 265, at 375.

272. *See* Tracey L. Meares & Dan M. Kahan, *Black, White and Gray: A Reply to Alschuler and Schulhofer*, 1998 U. CHI. LEGAL F. 245, 258–59 (1998).

273. *See* Schragger, *supra* note 265, at 380 (noting that this new localism has arisen as a response to urban disorder and the problems of urban governance).

274. *Id.* at 381.

275. *See id.* at 385–87.

276. *See id.* at 387.

277. *See id.* at 393.

or an "affective community,"[278] defines communities as possessing "the reciprocal consciousness of a shared culture"[279] based on the presence and quality of social connections, shared experience, mutuality, and common fate.[280] A dualist account of community is defined by deliberation—a participatory practice where shared values are crafted by dialogue and negotiation.[281] In other words, the dualist vision depends on the idea that civic engagement occurs only in forums where community members can meet in person, through participation in small-scale democratic governance.[282]

It is this blended account of dualist and deep community structuring that best fits the concept of the plea jury. The very body of the plea jury is comprised of citizens having face-to-face dialogue about governance—here, assisting with decision making on guilt and sentencing for local crime. The plea jury's work is helped by the common aspects it shares in its composition of community members.

Of course, for the strict purposes of the plea jury, the community is the juror pool—however it is defined by the local courts.[283] But a fuller comprehension of what is meant by "community" in this context is vital to understanding why such a body should have rights in the criminal justice process.

D. Community Fragmentation

Along with the problem of definition, another issue with relying on "community" in the plea-jury context is one of more recent vintage: belonging to multiple communities by virtue of differing work and home locations. Local governance based solely on residence ignores the complex realities of metropolitan life.[284] Individuals may work and live in completely different localities but have an equally strong interest in affecting criminal justice where they work and go to school as where they live. Currently, however, juror pools are only based on residence.

In addition, culling the plea jury only from citizens with fixed residences discriminates against the poor, the homeless, and the young—many of whom do not have permanent addresses from which they can be called to serve. The aforementioned all help comprise the community, but due to their temporary residential status, they are excluded from participation in the criminal justice system.

Moreover, criminal law evokes issues of both community and race,[285] as well as class. In a still racially divided society, the communities of the defendant and the victim may be either shared or separate.[286] If separate, the two communities may end up clashing in any legal procedure, no matter how much interplay the public is given.

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278. ROBERT P. WOLFF, THE POVERTY OF LIBERALISM 187–92 (1968).
279. *Id.* at 187.
280. *See* Schragger, *supra* note 265, at 394.
281. *See id.* at 398.
282. *See id.* at 402–03.
283. *See* Lanni, *supra* note 1, at 367–68 (pointing out that for community justice initiatives, definition of the relevant community usually is defined as a large neighborhood or subsection of a city).
284. *See* Schragger, *supra* note 265, at 421.
285. *See* Alfieri, *supra* note 223, at 1470.
286. *See id.* at 1468–71.

The healing balm of community does not necessarily soothe when there are different factions within a given district, whether that district is large or small.

One interesting counterpoint to the problem of community fragmentation has been illustrated in the recent empirical work by Paul Robinson and Robert Kurzban. Robinson and Kurzban found that there is a surprising amount of empirical consensus on ranking different offenders' punishments.[287] In other words, people tend to grade the seriousness of various crimes very similarly, despite many differences in their groups or culture.[288] This is important to anyone concerned about community differentiation, because these studies illustrate a bedrock conception of retributive justice—or just deserts—that reach across communities, no matter how different they might be.

E. Penal Populism

When the lay public is incorporated into the guilty-plea process, and is granted the ability to decide on both the proposed plea and sentence, the dangers of penal populism arise.[289] Penal populism, or punitive public attitudes that strongly influence the creation of criminal justice policy, is greatly unpopular in some quarters, and some would rely entirely on experts to determine punishment to avoid this problem.[290]

As other scholars have pointed out, however, "[p]olls consistently indicate that U.S. public opinion on criminal justice is fickle and highly malleable in the face of specific events and political manipulation."[291] This has been recently evidenced by the call—in both a variety of states as well as in the federal context—for lighter drug sentences and a partial lessening of the desire for capital punishment.[292]

If this is true even now, then how much more possible might a lessening of punitive public attitudes be after the incorporation of the plea jury into the guilty-plea process? With a plea jury, the lay public would learn more about contested issues such as strict sentencing guidelines for minor drug offenses or punitive three-strikes laws. The educational factors of the public's interaction with the workings of the criminal justice system would naturally be small at first but would presumably have compounding effects. Additionally, within a smaller or more tight-knit community, where the offenders might be known to varying degrees by the members of the plea jury, the risk for small-scale, overly harsh penal populism would likely be smaller.

Finally, Robinson and Darley have made the argument that making punishment conform to the community's desires implements the optimal social policy, instead of

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287. *See* Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1846–92 (2007) (finding that, based on empirical studies, there is strong agreement across groups and cultures on the relative seriousness of violent, property, and deception crimes, and lesser—but still important agreement—about drug and sex offenses).

288. *See id.*

289. Thanks to Alice Ristroph for raising this point.

290. *See, e.g.*, FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001) (studying California's experiment in populist penal reform).

291. Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1746 (2006).

292. *Id.*

clashing with it.[293] This occurs because criminal law is based on voluntary compliance, and the public will not follow the law unless it mirrors existing understandings of proper punishment.[294] Thus, penal populism can be seen as simply reflecting the community's desires, which is not, by itself, a negative thing. Although the plea jury does not tidily solve any of the problems of today's criminal justice system, it provides partial solutions to some of the glaring inequities of the guilty-plea process.

CONCLUSION

The problems with the guilty plea have not been solved by any previously proposed solutions, either practical or theoretical. What is needed, as scholars have observed, is an "alternative theory of guilty pleas, one that transcends the hidden intentions and grudgingly spoken words of defendants and the contradictory incentives at work on prosecutors in particular cases."[295] The plea jury, supported by a theory of expressive, restorative retribution, strikes a solid middle ground.

Even if my plea-jury proposal is only utilized as a thought experiment, the idea of involving the community into the plea bargain is a valuable one. First, the careful look into the inner workings of guilty pleas illustrates that there are real problems in the most common procedure of criminal justice, especially the grave imbalance of power between the prosecutor and the rest of the participants. Shining light into the ugly reality of guilty pleas, through the use of a lay jury, can only be a positive good.

Second, restoring interest, power, and accountability to the local community is a critical step in fixing some of the current problems with our criminal justice system. There is a tremendous need to restore a populist aspect to the punishing and sentencing of criminal offenders. When the public feels too distant from the workings of crime and punishment, and only sees the media representation of crimes and the occasional (in)famous trial, they often react by calling for ever harsher and lengthy sentences. In contrast, allowing the community to participate in a much larger slice of criminal procedure gives the lay public a more realistic—and more personalized—view of the criminal justice system, hopefully fostering a less punitive streak.

As both a practical measure and a fundamental matter of political theory, the people should be involved in the machinations of criminal punishment. Our current system of plea bargains and guilty pleas cuts the lay public entirely out of the picture. Although there is no one perfect solution to the complicated reality of the guilty-plea world, involving the community via the plea jury is one way to start, a way that reflects our constitutional history, our democratic structure of government, and our desire to ensure that criminal justice is both fair and proportional.

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293. *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 477–88 (1997).

294. *See id.*

295. Wright, *supra* note 2, at 96.